REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR HENRI ELZÉAR TASCHEREAU, Knight, C. J.

The Hon. ROBERT SEDGEWICK J.

" DÉSIRÉ GIROUARD J.

" SIR LOUIS HENRY DAVIES J., K. C. M. G.

" DAVID MILLS J.

" JOHN DOUGLAS ARMOUR J.

" WALLACE NESBITT J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Hon. CHARLES FITZPATRICK, K.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

THE HON. HENRY GEORGE CARROLL, K.C.

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 32 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Belcher v. *McDonald* (33 Can. S. C. R. 321). Leave to appeal to the Privy Council was granted in August, 1903.

Calgary and Edmonton Railway Co. v. *The King*; *Calgary and Edmonton Land Co.* v. *The King* (33 Can. S. C. R. 673.) Leave to appeal to the Privy Council was granted; 17th July, 1903. See Can. Gaz. vol. xli., p. 400.

Clergue v. *Murray* (32 Can. S. C. R. 450) Leave to appeal to the Privy Council was refused; 21st July, 1903. In refusing leave for this appeal their Lordships specially referred to *Prince* v. *Gagnon* (8 App. Cas. 103.)

The Consumers Cordage Co. v. *Connolly* (31 Can. S. C. R. 244). The appeal for which leave was granted in this case was allowed by the Privy Council on 3rd August, 1903, the judgment of the Supreme Court of Canada was discharged and a new trial granted on terms as to deposit and costs, otherwise the judgment of the Court of Review of 13th February, 1900, affirming the trial court judgment of 31st May, 1899, to stand and defendants to pay all costs in the trial court; each party to bear their own costs on the appeal to the Privy Council. (See Can. Gaz. vol. xli., p. 440.)

Hanson v. *The Village of Grand'Mère* (33 Can. S. C. R. 50.) Leave to appeal to the Privy Council was granted; 29th May, 1903.

The King v. *The Algoma Central Railway Co.* (32 Can. S. C. R. 277. On 17th July, 1903, the Privy Council dismissed the appeal with costs. ([1903] A. C. 478.)

The King v. *Chapelle*; *The King* v. *Carmack*; *The King* v. *Tweed* and *Woog*, (32 Can. S. C. R. 586.) Leave to appeal to the Privy Council was granted, 4th March, 1903, and at the same time leave was granted for a cross-appeal on the part of the Crown. See Can. Gaz. vol. xl., p. 569. On 2nd December, 1903, the appeal was dismissed.

In re Representation of Prince Edward Island in the House of Commons of Canada (33 Can. S. C. R. 594.) Leave to appeal to the Privy Council was granted; 11th November, 1903.

Wilson v. *The Canadian Development Co.* (33 Can. S. C. R. 432.) Leave for an appeal to the Privy Council was refused; July, 1903.

MEMORANDA.

On the 8th day of May, 1903, the Honourable David Mills, one of the Puisné Judges of the Supreme Court of Canada, died at the City of Ottawa, Canada.

On the 16th day of May, 1903, Wallace Nesbitt, of the City of Toronto, in the Province of Ontario, one of His Majesty's Counsel learned in the law, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable David Mills, deceased.

On the 11th day of July, 1903, the Honourable John Douglas Armour, one of the Puisné Judges of the Supreme Court of Canada, died at the City of London, in England.

On the 8th day of August, 1903, the Honourable Albert Clements Killam, Chief Justice of Manitoba, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable John Douglas Armour, deceased.

ERRATA AND ADDENDA.

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

Page 109, line 30, for "appellants" read "respondents."

Page 228, line 13, for "ot" read "the."

Page 341, line 3, add before the word "affirming" the reference "(1)," and foot-note as follows;—"(1) Q. R. 12 K. B. 445."

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Y.

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Z.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

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

JAMES DAVIDSON (DEFENDANT INTERVENING) ..... } APPELLANT;

AND

THE GEORGIAN BAY NAVIGATION COMPANY (PLAINTIFFS).... } RESPONDENTS.

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*Nov. 1,9,20.

*Dec. 9.

THE "SHENANDOAH" AND THE "CRETE."

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA TORONTO ADMIRALTY DISTRICT.

Admiralty law—Navigation—Narrow channels—"White law" R. 24—Right of way—Meeting ships.

Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

Held, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting ves-

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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sels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.

The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The "Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the "Carmona." The "Shenandoah" then gave the port signal and steered accordingly. The "Carmona," thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah" but on going ahead again collided with the vessel in tow.

Held, reversing the judgment of the local judge (8 Ex. C. R. 1) that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed.

APPEAL from a decision of the local judge for the Toronto Admiralty District of the Exchequer Court of Canada (1) in favour of the plaintiffs.

The facts of the case sufficiently appear from the above head-note and are fully stated in the judgment of Mr Justice Davies on this appeal.

Nesbitt K.C. and *Hough* for the appellant. The evidence of the hands on the "Shenandoah" and "Crete" shows they were not in fault and is of greater weight respecting what was done on those vessels than that of others. *The Havana* (2).

As to the right of defendant's vessel to follow the general custom, see *The Velocity* (3); *The Esk and The Niord* (4); *The Ranger and The Cologne* (5).

Mulvey K.C., (*M. J. O'Connor* with him) for the respondents. As to navigation in a fog see *The Sea*

(1) 8 Ex. C. R. 1.
(2) 54 Fed. Rep. 411.
(3) L. R. 3 P. C. 44.
(4) L. R. 3 P. C. 436.
(5) L. R. 4 P. C. 519.

Gull (1); *The Warrior* (2); *The Mary A. Bird* (3).

This court will not reverse on questions of fact. *The Picton* (4).

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—This is an appeal from a judgment of the Exchequer Court of Canada, Toronto Admiralty District. The action is one *in rem*, brought by the Georgian Bay Navigation Company, Limited, owners of the steamer "Carmona" against the ships "Shenandoah" and "Crete," owned by James Davidson, the defendant intervening, for damages arising out of a collision between the "Carmona" and the "Shenandoah" and "Crete" on June 25th, 1899. The action was tried on January 17th, 18th and 20th, 1902, before the local judge in admiralty, who delivered his judgment on June 2nd, 1902, awarding the plaintiffs $2183.25 damages and costs and dismissing the defendant's counterclaim for his damages arising out of the said collision with costs. The defendant, James Davidson, appeals from this judgment.

The facts, so far as they are material to be stated are thus summarised by the learned trial judge:

> The "Carmona" is a British paddle-wheel steamer, 183 feet long, and the "Shenandoah" is an American steam barge or propeller, 328 feet long, and the "Crete" is an American tow barge, 300 feet long. The "Shenandoah" and her tow were coming up the river on their way to Duluth, loaded with coal, the "Carmona" was descending the river with passengers upon her regular voyage from Sault Ste. Marie to Cleveland, intending to call at Sarnia on her way down the river. The time of the accident was about 1.30 a.m.; the weather had been clear and fine and there was no wind but a bank of fog covered the

(1) 23 Wall. 165.
(2) L. R. 3 Ad. & Ecc. 553.
(3) 102 Fed. Rep. 648.
(4) 4 Can. S. C. R. 648.

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river from about the Grand Trunk Railway docks for some distance down the river. When the "Carmona" entered the river it was clear and she had no difficulty in getting the range-lights, but when she reached the Grand Trunk docks she encountered the fog. The "Shenandoah" had had clear weather up the river until a little below the waterworks dock on the American side, or about five hundred yards below Botsford's elevator, when she too entered the fog. The collision took place opposite Botsford's elevator, which, as nearly as may be, is about four or five hundred yards down the river from the Grand Trunk Railway docks; in other words, the fog bank covered, approximately, a thousand yards of the river. The collision took place between the vessels about the centre of the fog.

The appellants contended that the "Shenandoah" with her tow, following a custom or practice which has prevailed for over forty years in this river, was slowly steaming past Port Huron, hugging the United States shore, and that, in doing so, she was not violating any rule or regulation governing the navigation of the river, nor was she guilty of any neglect of duty which contributed to the collision.

The respondents contended that the proper construction of the rules shewed the "Shenandoah" to have been on the wrong side of the channel, and that the "Carmona" having the right of way and not having been guilty of any negligence or violation of the rules, was entitled to recover for all damages she sustained.

The waters where the collision occurred are within the United States and the regulations governing the navigation of these waters are what are known as the "White Law." Rule 24, upon the proper construction of which so much depends, is as follows:

Rule 24. That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

The English rule which requires that

in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel,

has not been incorporated in the White Law Rules and is not in force in the waters where the collision occurred.

A large amount of the evidence was given to show what had been the custom and practice with respect to the side of the channel up-stream tugs with their tows should take, and I think it is clear that the learned judge was of the opinion that but for rule 24 the "Shenandoah" was not in fault in taking the side of the river she did. He says at one place:—

As between the two vessels, if the custom prevails *and be held to supersede the statutory rule*, the "Carmona" was on the wrong side and the "Shenandoah" on the right side.

And again.

I have already briefly adverted to the evidence offered in support of the alleged custom. More witnesses affirm the custom than negative it, but is the evidence so overwhelming as to justify the court in holding that *it supersedes the statutory rule* 24, which gives the descending vessel the right of way and choice of course?

Now if the statutory rule gave the "Carmona" the right to the side of the channel lying next the United States coast it is perfectly clear that no evidence of custom as to a contrary practice could operate to repeal the statutory rule. But with great deference we do not think rule 24 was designed to have or has any reference whatever to the side of the channel vessels going up or down the river must take. It has an entirely different object and is limited to determining, as between up and down vessels, which shall have the right of way and which shall have the right of election as to the side of the approaching vessel it will pass. These rights are perfectly consistent with an estab-

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lished custom on the part of up going steamers with tows to hug the United States shore, nor does the fact of such custom existing at all supersede or minimize the full effect of rule 24. The custom would show that the "Shenandoah" on the night in question was not in fault in taking her course close to the United States bank for she was in the customary track of up-bound vessels. But she had not the exclusive right to that side of the river, and the "Carmona," in coming down might be justified in taking that side too, but if she did she was bound to exercise unusual care and precaution. She would still, if she met up bound vessels and circumstances permitted it, be entitled to her right of way and her election to choose on which side of each other the vessel should pass. But she was not in fault in using any part of the channel she saw fit provided always she observed the rules of navigation which prevailed there and exercised the prudence and caution which, in my opinion, the existence of the custom followed by up bound vessels cast upon her.

It was, I venture to say, the wrong construction placed upon this rule that led the learned judge to pronounce the "Shenandoah" to be in the wrong and responsible for the collision. The vessels did not see each other far enough apart to enable the "Carmona" to exercise the election she undoubtedly had and for which the rule provided. If it is assumed that neither vessel was at fault in being where they were respectively when they first discovered each other, then where lies the fault of the "Shenandoah"? Both vessels signalled. The "Carmona" gave the port signal, the "Shenandoah" the starboard. As the judge finds, these signals were given practically simultaneously. The vessels were then within a few hundred yards of each other and almost opposite the elevator. As soon as the "Shenandoah" recognised that the

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"Carmona" had elected to go to starboard and pass her port to port she accepted the election and at once signalled the port signal and placed her helm aport. Looking at the relative position of the two steamers at the time they sighted each other, and the close distance of the "Shenandoah" from the shore, I am unable to say that her first signal was not a prudent one to give, nor am I able on the other hand to say that her acceptance of the "Carmona's" signal in lieu of the one she herself had first given was wrongful or bad seamanship. She recognised the right of the "Carmona" to elect which side she should pass on and accepted it. As a matter of fact the result proved that she did right. The two steamers were in the act of passing each other port to port when the "Carmona" fearing she had not room to pass, owing to the presence of another steamer lying at the end of the elevator dock, backed her engines and, as a consequence, slightly collided with the "Shenandoah." No real harm was done to either steamer and the "Carmona" by giving a couple of turns ahead to her engine passed by. Up to this moment of time I am unable to say that either vessel was seriously at fault. The signal at first given by the "Shenandoah" may have been accepted by her tow, the "Crete," and she may too have starboarded. Her captain says she did not, but the judge did not believe him. At any rate, it is asserted that the bow of the "Crete" was turned towards the shore at a few moments later when she collided with the "Carmona," which struck her on the starboard bow. The captain of the "Carmona" agrees that when he sighted the "Shenandoah" he saw her two white head-lights, indicating that the latter steamer had a tow. He was bound, therefore, to act with the knowledge that the fact of these two head-lights conveyed to him. Did he do so? He says himself that he found himself

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jammed in between the "Shenandoah" on the one side and the steamer lying at the end of the elevator wharf on the other, and did not think there was room for him to pass between. The learned trial judge finds most strongly that, in his opinion, the "Carmona" was not guilty of any fault; I am not satisfied that I would have reached the same conclusion. I incline to the opinion that he could have safely passed between the tow of the "Shenandoah" and the shore had he tried to do so. But I cannot ignore the fact that, at this moment of time, he was in extreme peril and the absence of the cool and calm judgment and decision which, under ordinary circumstances, would have been required of him, may, under the circumstances of extreme danger, arising from the fog, the collision with the "Shenandoah" and the proximity of the shore on the other side, be excused. At any rate, he did nothing.

The current running at the rate of obout five miles an hour speedily carried him towards the "Crete" approaching at the rate of about two miles an hour; his steamer got the tow-line under her guard and she swiftly met the "Crete" and collided, causing the damage to herself for which this action is brought. After getting clear of the "Crete" she drifted past her starboard side and then across her stern and between her and the "Grenada," avoiding further collision and damage.

Under these circumstances, we are of opinion that there is no ground for holding the "Shenandoah" liable for any damages. The only question is as to the liability of the "Carmona" for the damages to the tow-line of the "Shenandoah" and the losses caused to the tow of that ship for delays and otherwise consequent upon the collision.

Whatever conclusion I might have reached had I been determining this question in the first instance, I do not, under all the circumstances, feel justified in reversing the finding of fact which the learned trial judge has reached as to the proper navigation of the "Carmona." He had not only the advantage of hearing the witnesses and noting their demeanour, but, in a case where so much depends upon relative distances, the further great advantage, which we are denied, of having very many of their important statements explained and illustrated by the witnesses on the maps and charts of the river. Much of the evidence, without this advantage, is difficult to understand.

In addition to the judge's express finding of want of fault on the "Carmona's" part, there is the extreme peril in which she was placed at the critical moment immediately after his collision with the "Shenandoah" when everything depended upon the correctness of the judgment her captain formed. The fact of his not seeming to have paid the proper attention to the notice given to him by the presence of the two headlights of the "Shenandoah" that she had a tow is strongly against him. On the other hand, he undoubtedly thought himself jammed between the "Shenandoah" and the vessel lying at the wharf on his starboard beam. His attempt to extricate himself from the jam by backing had only resulted in his colliding with the "Shenandoah" and his lack of judgment, or inability to form a decision as to what he should do, may be pardoned, owing to the extreme peril and exceptional circumstances in which he found himself placed.

Under all the circumstances, therefore, we are of opinion that, while the action should be dismissed, the counterclaim should not be allowed.

The appeal will be allowed with costs to the appellant in both courts and the counterclaim is also dismissed, but without costs.

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MILLS J.—I agree with the conclusions reached by my brother Davies, in this case.

The "Carmona" a paddle-wheel steamer of Canadian register, which was on her way from Sault Ste. Marie to Cleveland, had, under the rules which regulate the navigation of the river on the United States side, the right of way. She chose the starboard side but, owing to the density of the fog, she was close upon the "Shenandoah" when her choice was made. The "Shenandoah" with her tow was very near the shore, too near to permit the "Carmona" to pass safely on her voyage between the "Shenandoah" and the docks and shipping before Port Huron. There can be no doubt that the position of the "Shenandoah" and her tow was one that she chose at her peril, for, while it was the custom of up-bound vessels, at this point, to keep near to the United States side of the river St. Clair, they must in doing so, not interfere with that freedom of choice which the descending vessels had a right to make. Owing to the density of the fog, the "Carmona" was unable to make known her choice of way until she was close upon the "Shenandoah." When she undertook to pass the "Shenandoah," and the barges which she had in tow, she found herself too near the shore to pass safely on her voyage. Not being able to direct her course in the dangerous position in which she was placed, she was carried by the current down the river at the rate of five miles an hour, while the "Shenandoah" with her tow was moving at half this rate of speed in the opposite direction. In this position, she ran upon the tow-line of the "Crete" and collided with her. The vessels were in a perilous position and I cannot say that, apart from the proximity of the "Shenandoah" to the United States shore, there was not, on the part of the officers in charge

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of each, due diligence and skill exercised to avoid collision.

Appeal allowed with costs.

Solicitor for the appellant: *F. A. Hough,*

Solicitor for the respondents: *J. W. Hanna.*

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*Nov. 17.

*Dec. 9.

THE CHAUDIÈRE MACHINE AND FOUNDRY COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANTS).. RESPONDENTS

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Nuisance—Trespass—Continuing damage.

In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work.

Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the defendants at the trial.

The facts of the case are sufficiently stated in the above head-note and in the judgment of the court on this appeal.

Aylesworth K.C. and *McVeity* for the appellants. The Railway Company had no authority to alter the grade of the street and being wrongdoers our action will lie. *Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2); *Darley Main Colliery Co.* v. *Mitchell* (3): *Backhouse* v. *Bonomi* (4);

The damages are continuing. *The Joseph Schlitz Brewing Co.* v. *Compton* (5); *Uline* v *New York Central and Hudson River Railroad Co.* (6).

Shepley K.C. and *J. Christie* for the respondents, cited as to continuing damages, *Backhouse* v. *Bonomi* (4).

The judgment of the court was delivered by:

The CHIEF JUSTICE—In 1900 the appellants, as owners of a lot of land on Britannia Terrace, in Ottawa, brought this action claiming damages from the respondents upon the ground that in 1888,

the defendants without any authority or justification in that behalf unlawfully and negligently constructed an embankment of rough stone and other material about ten feet high and sixty feet wide in and along the said Britannia Terrace street and in front and in the vicinity of the plaintiffs' said land fronting thereon for the purpose of building thereon a branch of their railway.

In or about the time aforesaid the defendants, without any authority and unlawfully and wrongfully and negligently raised the grade or level of the said street in front of the plaintiffs' said land to the great injury of the plaintiffs.

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 11 App. Crs. 127.
(4) 9 H. L. Cas. 503.
(5) 142 Ill. 511.
(6) 101 N. Y. 98.

The said defendants have since wrongfully and without any authority placed and constructed in and upon the said embankment and in and along the said Britannia Terrace street in front and in the vacinity of the plaintiffs' said lot a line of railway and other constructions and erections for the purposes of use for a branch railway as aforesaid.

Since the time aforesaid the defendants have wrongfully and without any authority kept, maintained and continued and still keep, maintain and continue the said embankment and line of railway on the said street.

The said embankment and railway have greatly injured and made difficult the said ingress as aforesaid to and from the lands and buildings thereon, from and to the said Britannia Terrace street, and the value of the said lands and buildings by reason thereof has been greatly and *permanently* injured and lessened.

The said embankment and railway placed thereon have been so negligently constructed, kept, maintained and continued that the surface water and rain falling thereon flows in and upon and accumulates on the plaintiffs' said land and renders the same and the buildings thereon unfit for use as a foundry and useless for the purposes of the plaintiff's said business.

The plaintiffs were and still are entitled to have and enjoy a right of egress from the said lands and the buildings thereon to the said Britannia Terrace street and back again from the said street for themselves, thier servants and workman on foot and with horses, carriages and cattle at all times of the year.

By reason of the construction, maintenance and continuance of the said embankment and line of railway as aforesaid the plaintiffs' said lands and their foundry erected thereon as aforesaid have been from time to time flooded and their castings, moulds, machinery, plant and other chattel property thereon have been destroyed and injured.

On or about the times herein before mentioned the defendants wrongfully trespassed upon the lands of the plaintiffs hereinbefore described and they have continued and still continue wrongfully to commit such trespassing upon the plaintiffs' said land although frequently requested by the plaintiffs to desist therefrom and the plaintiffs have thereby suffered serious loss and damage.

The appellants' action was dismissed at the trial (Street J.) and the Court of Appeal affirmed that dismissal. They now appeal from this last aforesaid judgment.

I would dismiss their appeal upon the simple ground, without dissenting from the reasoning adopted by the

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court *a quo*, that, upon their own allegations, the right to complain of what they call the trespass or nuisance by the respondents arose when that nuisance or trespass was committed, that is to say, over ten years before their action was instituted. The fact that they became the owners of this lot only in 1895 does not affect the case one way or the other. If they have an action against the respondents every spring after the melting of the snow, or after each rain storm during the summer, as they would contend, the party who owned the lot in 1888 would have the same right had he retained the ownership of it. Now that cannot be so. He had then a right of action for the waters shed upon the lot and the impaired access to the street, and the depreciation in value of his property in consequence thereof, and upon such an action the damages caused by the respondents' embankment would have been assessed once for all. *The Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2); *Arthur* v. *Grand Trunk Railway Co.* (3).

His right of action would therefore now be barred, or was barred when the present action was instituted, by the lapse of six years. And the appellants cannot recover damages upon that very same cause of action. The proposition that every conveyance of the title would revive a right of action arising out of the same tort for the additional damages suffered by the new owner is untenable. If an action had been taken by the then owner, when the respondents built this embankment, for the damages to this property, a judgment in his favour in that action would be a bar to any subsequent action for subsequent damages either

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.
(3) 22 Ont. App. R 89.

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at his instance or at the instance of the subsequent owners of the property. *Goodrich* v. *Yale* (1).

The cases of *Backhouse* v. *Bonomi* (2), and of *Darley Main Colliery Co.* v. *Mitchell* (3), relied upon by the appellants, are clearly distinguishable. In these two cases, the acts which had caused the damages were, when done, lawful, so that clearly no action for damages could be thought of till the damages accrued. Here the appellants' claim rests upon their allegation that the works done by the respondents at the outset constituted a nuisance and a trespass on their lot.

Appeal dismissed with costs.

Solicitors for the appellants: *McVeity & Culbert.*

Solicitors for the respondents: *Christie & Greene.*

(1) 8 Allen (Mass.) 454.
(2) 9 H. L. Cas. 503.
(3) 14 Q. B. D. 125; 11 App. Cas. 127.

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*Dec. 2.

*Dec. 9.

THE ATTORNEY GENERAL FOR ONTARIO AND OTHERS..... } APPELLANTS;

AND

CORNELIUS SCULLY.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—60 & 61 V. c. 34 (e)—Error in judgment—Concurrent jurisdiction—Procedure.

Special leave to appeal from a judgment of the Court of Appeal for Ontario, under subsec. (e) of 60 & 61 Vict. ch. 34, will not be granted on the ground merely that there is error in such judgment.

Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.

The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney General. S. having been refused such fiat applied for a writ of mandamus which the Div. Court granted and its judgment was affirmed by the Court of Appeal.

Held, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused.

The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which reversed the judgment of Falconbridge C.J. who refused the respondent a writ of mandamus to compel the Clerk of the Peace to furnish him

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

(1) 4 Ont. L. R. 394.

(2) 2 Ont. L. R. 315.

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a copy of the proceedings on a criminal charge in which he had been acquitted.

The only question involved in the judgment appealed from was whether or not the respondent Scully was entitled as of right to an exemplification of the record in the criminal proceedings or whether or not it could only be obtained on the fiat of the Attorney General which fiat had been refused. Scully having applied for a writ of mandamus it was refused by the Chief Justice of the King's Bench Division but granted on appeal to the Divisional Court whose judgment was affirmed by the Court of Appeal.

Cartwright K.C., Deputy Attorney General, moved for special leave to appeal under 60 & 61 Vict. ch. 34 (*e*) relying on *Lusty* v. *McGrath* (1); *Reg.* v. *Ivy* (2); *Hewitt* v. *Cane* (3).

Arnoldi K C. contra.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is a motion on behalf of the Attorney General for Ontario for leave to appeal under paragraph (*e*) of section 1, of 60 & 61 Vict. ch. 34 (*D.*) from a judgment of the Court of Appeal for Ontario. The history of the case is as follows:

In March, 1900, the respondent, Scully, was arrested upon an information laid by one Louis Peters charging him with having feloniously stolen forty-one sawlogs, the property of the said Peters. After trial in due course of law, the said Scully was acquitted by the jury. He thereupon brought an action against the said Peters claiming damages for malicious prosecution. It being necessary for him at the trial to have a copy of the indictment and of the record of his

(1) 6 O. S. 340.
(2) 24 U. C. C. P. 78.
(3) 26 O. R. 133.

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acquittal to prove the essential allegations of his said action, he applied for them to the Clerk of the Peace in whose custody they were. The Clerk of the Peace and Peter's solicitor happened to be one and the same person. That officer, prompted, it must be assumed, by what he believed to be his duty, refused to give them without the fiat of the Attorney-General, and that fiat was, subsequently, refused. Thereupon, Scully applied for a prerogative writ of mandamus to compel the said Clerk of the Peace to deliver him a copy of the said documents. This application was dismissed by Falconbridge C.J. (K.B.), but granted by the Divisional Court (1) upon an appeal by Scully. Upon an appeal to the Court of Appeal, on behalf of the Attorney-General, the judgment of the Divisional Court was affirmed (2). The Attorney-General now moves for leave to appeal from that last judgment.

The motion cannot be granted. This statute, 60 & 61 Vic. ch. 34 (*D.*), clearly takes away the right to appeal to this court from the Court of Appeal for Ontario in all the cases not coming within paragraphs (*a*), (*b*), (*c*) and (*d*) thereof. Now, when in paragraph (*e*) it allows an appeal in any other cases wherein the special leave of the Court of Appeal for Ontario or of this court to appeal to this court is granted, it seems evident that, to grant that special leave upon the ground only that the Court of Appeal has erred in the judgment attempted to be appealed from, would be to render the Act nugatory and to defeat the manifest intention of Parliament to restrict the right of appeal. There must be special reasons to support an application of this nature and none has been advanced in support of this application that cannot apply to the numerous cases where the unsuccessful party thinks that the judgment is wrong. What those reasons

(1) 2 Ont. L. R. 315. (2) 4 Ont. L. R. 394.

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must be we have not to determine here. All that we hold is that in this case none has been given in support of the motion sufficient to justify us in granting it. Public interest might perhaps have justified us in granting special leave had the Attorney-General succeeded in establishing his contention that a right of action which the law gives to the subject is dependent upon the discretion of the law officers of the Crown. But as the judgment of the Court of Appeal rejects this contention of the Attorney-General, it cannot be contended that it is in the interest of the public at large that an appeal from that judgment should be granted.

I refer to the six cases in which motions of this nature have been made since the said Act came into force, not a single one of which has been granted, to shew that under our jurisprudence such leave cannot be granted upon the ground only that there may be error in the judgment of the Court of Appeal,

1898, May 20th; *Fisher* v. *Fisher* (1). Leave refused.

1901, March 6th; *Grand Trunk Railway Company* v. *Atchison*, (not reported). Leave refused.

1901, March 18th; *Grand Trunk Railway Company* v. *Vallee*, (not reported). Leave refused.

1901, October 1st; *Dominion Council of Royal Templars* v. *Hargrove* (2). Leave refused.

1901, October 29th; *Robinson* v. *Toronto Street Railway Co.* (not reported.) Leave refused.

1902, June 9th; *Town of Aurora* v. *Village of Markham* (3). Leave refused.

The application, by the statute, may also be made to the Court of Appeal itself. Now, no one would, I think, apply to that court for special leave to appeal to this court upon the ground only that the judgment is

(1) 28 Can. S. C. R. 494. (2) 31 Can. S. C. R. 385.
(3) 32 Can. S. C. R. 457.

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wrong. And what cannot support an application in that court cannot support it in a court of concurrent jurisdiction, as we are, in this matter.

There is another view of the case upon which this application should not be granted.

The controversy relates to what may be considered in a great measure but a question of practice. It is treated generally as such in most of the cases cited in the provincial courts. Then the contention of the Attorney-General is principally based upon rules of practice for the Old Bailey Court made by the judges in the year 16th Car. II. (1). In one aspect of the question the right claimed by the respondent may not, strictly speaking, fall exclusively within the words practice or procedure, but the control of the provincial courts of justice over their own records and their officers should not, as a general rule, be interfered with by this court. And, when the court of last resort in the province has passed upon a question of this nature, we should refrain from exercising the discretionary power as to Ontario appeals that the statute under which the application is made confers upon us.

Motion refused with costs.

Solicitor for the appellants: *John R. Cartwright.*

Solicitors for the respondent: *Arnoldi & Johnston.*

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(1) Kel. C. C. 3.

THE GILBERT BLASTING AND DREDGING COMPANY (SUPPLIANTS) ..... APPELLANTS; 1902

AND *Dec. 11

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Abandonment and substitution of work—Implied contract.

The suppliants contracted with the Crown to do certain work on the Cornwall Canal the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging and other works connected with the deepening and widening of the Cornwall Canal on section no. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By sec. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract and adopted another plan the work on which was given to other contractors. After it was completed the suppliants filed a Petition of Right for the profits they would have made had it been given to them.

Held, affirming the judgment of the Exchequer Court (7 Ex. C. R. 221) that the contract contained no express covenant by the Crown to

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

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give all the work done to the suppliant and sec. 34 prohibited any implied covenant therefor. Therefore the Petition of Right was properly dismissed.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the suppliant's Petition of Right.

The suppliants, under contract with the Crown for constructing works in connection with deepening and widening the Cornwall Canal claimed the right to do all the work thereon and filed their Petition of Right for the profits they would have made on the construction of dams which was given to other contractors. The Exchequer Court held that they were not entitled to relief under the petition.

The material portions of the contract are sufficiently set out in the above head-note.

Aylesworth K.C. and *Belcourt K.C.* for the appellants.

Newcombe K.C, Deputy Minister of Justice, was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—Notwithstanding the able arguments in support of the appeal that have been addressed to us, we are of opinion that it is impossible to hold that words can be found in this contract amounting to an express covenant by the Crown that the contractors must have been allowed to do all the work that had been given to Davis. Then under section 34 no such covenant by the Crown can be implied. We therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Belcourt & Ritchie.*

Solicitor for the respondent: *E. L. Newcombe.*

(1) 7 Ex. C. R. 221.

THE SAULT STE. MARIE PULP AND PAPER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

HARRY MYERS AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS BY JOHN WILLIAM MYERS HIS FATHER AND NEXT FRIEND AND THE SAID JOHN WILLIAM MYERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Nov. 24,25.

*Dec. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Injury to workmen—Proximate cause—Ontario Factories Act.

A workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step ladder to get on a plank in front of the drier. The step ladder was movable and placed close to a revolving cog wheel. On returning from the drier on one occasion another workman, accidentally or intentionally, removed the ladder as he was about to step on it and before he could recover his balance his leg was caught in the cog wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded and the ladder fastened to the floor; and that the non-guarding and fastening constituted negligence on the part of the defendants.

Held, affirming the judgment of the Court of Appeal (3 Ont. L. R. 600), that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor for which the defandants were liable.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the verdict at the trial for the plaintiffs but reducing the damages.

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

(1) 3 Ont. L. R. 600.

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The material facts sufficiently appear from the above head-note and are fully stated in the judgment of the Court on this Appeal.

Riddell K.C. and *Colville* for the appellants. The Factories Act does not require all machinery to be guarded, and at all events the step ladder was a sufficient guard to the wheel.

The fact that the ladder was movable was not negligence. *Willetts* v. *Watt & Co.* (1).

The direct cause of the accident was the active intervention of the truckman in removing the ladder. *Groves* v. *Lord Wimborne* (2).

The defendants not being guilty of the first act of negligence are not liable. *Daniels* v. *Potter* (3); *Bartlett* v. *Baker* (4); *Mangan* v. *Atterton* (5); and see *Mann* v. *Ward* (6).

Douglas K.C. for the respondents. This second Court of Appeal will not disturb the verdict which is justified by the evidence. *George Matthews Co.* v. *Bouchard* (7); *Grand Trunk Railway Co.* v. *Rainville* (8).

The removal of the ladder was not the direct cause of the accident. If the wheel had been properly guarded it would not have happened anyway. *Baddeley* v. *Earl Granville* (9); *Clark* v. *Chambers* (10), and cases there cited.

The judgment of the court was delivered by;

THE CHIEF JUSTICE.—This case originated in an action on behalf of the respondents, father and son, to recover damages for an injury sustained by the son

(1) [1892] 2 Q. B. 92.
(2) [1898] 2 Q. B. 402.
(3) 4 C. & P. 262.
(4) 3 H. & C. 153.
(5) 4 H. & C. 388.
(6) 8 Times L. R. 699.
(7) 28 Can. S. C. R. 580.
(8) 29 Can, S. C. R. 201.
(9) 19 Q. B. D. 423.
(10) 3 Q. B. D. 327.

Harry, an infant under the age of twenty-one, owing, as they alleged in their statement of claim, to the negligence of the appellants and to their non-performance of a duty imposed upon them by the Ontario Factories Act. The facts may be summed up as follows:

The respondent, Harry Myers, was employed by the appellants in their pulp mill at the town of Sault Ste. Marie, and his duty under such employment was to attend to and take away the pulp from a machine in the said mill known as a press and drier, and in order to do this it was necessary for him to go up a step ladder from which he stepped on to a narrow plank in front of a large roller from which the pulp was to be taken away. The step ladder was placed by the appellants close to a large revolving cog wheel, part of the rim of which revolved between the top of the ladder and the plank, and it was necessary for the said workman to step over this revolving portion of the cog wheel in going to and returning from the plank. In descending from the platform it was necessary to hold on to one of the upright screws. In coming down from the press rolls the young man took hold of the upright screw (which was the one always used for the purpose by the employees) with his left hand, and was stepping from the end of the plank to the top of the step ladder with his right foot, but before his foot reached the top of the step ladder a truckman, also in the employment of the appellants, moved the step ladder away either accidentally or otherwise, and the respondent being unable to recover himself, the result was that his right leg was thrown between the spokes of the cog wheel and was broken, and subsequently had to be amputated.

The step ladder was the only means of access provided by the appellants for the workmen to get on and off the plank, and was used by the workmen in

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the position in which it was placed by the appellants and no other or better mode or means of access was provided, and the respondent, Harry Myers, was instructed to use the ladder, and to ascend and descend in the manner he adopted at the time of the accident.

The cog wheel was in no way guarded except by the ladder, which was light and frail and was not fastened to the floor or otherwise.

It is in evidence that the machine in question was dangerous, and could have been guarded as other machines of the same character in the same mill were guarded at the time of the accident, and if the machine in question had been so guarded the accident would clearly not have happened.

The case was tried before the Chief Justice of the Court of King's Bench and a jury.

The following are the questions which were submitted to the jury and their answers thereto:

1. Was the injury to the plaintiff, Harry Myers, caused by any negligence of the defendants? Yes. Or,

2. Was it caused by his own negligence and want of proper care and caution? No.

3. Was it caused by the negligence or improper conduct of a fellow-servant? Only to a certain extent, but if this wheel had been properly guarded and the ladder properly fastened to the floor the accident would not have happened.

4. If you find that the injury was caused by the negligence of the defendants wherein did such negligence consist? By in no way guarding the gear wheel and not fastening the ladder properly to the floor.

5. Was the machinery at which the plaintiff, Harry Myers, received his injury a dangerous part of mill gearing or machinery so that it ought to have been as far as practicable securely guarded? It was.

6. If so, was it as far as practicable securely guarded? It was not.

7. If you answer no to the last question, and if you also find that the injury to the plaintiff, Harry Myers, was in any way the result of negligence or improper conduct of a fellow servant, would the plaintiff, Harry Myers have received the particular injury which he complains of if the machinery had been as far as practicable securely

guarded, notwithstanding such negligence or improper conduct of the fellow servant? He would not.

8. At what sum do you assess the damages to the plaintiffs? Harry Myers, $4,000. To the father, $500.

Upon these findings judgment was entered for the said amounts. Upon appeal by the company the court upheld the said judgment, with the exception that the damages were reduced from $4,000 to $2,000 and from $500 to $100.

The company now appeal and the respondents cross-appeal from the reduction of the amount of the damages that the jury had awarded to them. As to this cross-appeal, we did not at the hearing call upon the company's counsel to answer his adversary's argument. As we then intimated, there is nothing in the case that would justify us in interfering with the judgment of the Court of Appeal which reduced the amount of the damages. The cross-appeal is therefore dismissed with costs.

As to the principal appeal, it should also be dismissed, in my opinion. The appellants base their principal defence to the action upon the ground that it was not the absence of a guard that caused the accident, or was the proximate cause of it, but that it was the act of the truckman, who by suddenly snatching away the steps had caused the plaintiff, Harry, to fall. They contend that where an independent cause, of a nature which could not have been anticipated, and without which the injury would not have occurred, has intervened between the defendant's negligence and the plaintiff's injuries, the defendant's negligence will be held too remote to warrant a recovery against him citing *Mangan* v. *Attertson* (1); *Hill* v. *New River Co.* (2); *Bartlett* v. *Baker* (3); *Daniels* v. *Potter* (4). That contention cannot prevail in this case. If a defendant

(1) 4 H. & C. 388.
(2) 9 B. & S. 303.
(3) 3 H. & C. 153.
(4) 4 C. & P. 262.

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is a wrong-doer without whose wrongdoing the plaintiff would not have been damaged, he cannot be heard to say that there is some other wrong-doer who contributed to the damage. Per Lord Bramwell in *Mills* v. *Armstrong*, (1). There is, it is true, no doubt that the accident in question would not have happened but for the act of the truckman taking away the steps, but it is as evident that, as found by the jury, it would not have happened had this cog wheel been securely guarded and the ladder properly fastened. Now it is expressly enacted by the *Ontario Factories Act* (2), that ;—

> In every factory (*a*) all dangerous parts of mill gearing, machinery, vats, pans, cauldrons, reservoirs, wheel-races, flumes, water channels, doors, openings in the floors or walls, bridges and all other like dangerous structures or places shall be as far as practicable securely guarded.

So that the appellants are proved to have committed a breach of a statutory duty by leaving this machinery not securely guarded and are therefore precluded from relying upon the doctrine of common employment raised by the fifth paragraph of their defence. The case of *Groves* v. *Lord Wimborne* (3) is in point. That was an action for damages for injury sustained by unguarded machinery. The plaintiff was a boy employed in the service of the defendant, working at a steam winch with revolving cog wheels. These cog wheels were dangerous to a person working the winch unless fenced, and they were not fenced. The plaintiff's right arm was caught by the cog wheels and injured. It was held that an action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing or guards to dangerous machinery imposed upon him by the Factory and Workshop Act,

(1) 12 P. D. 58 ; 13 App. Cas. 1. (2) R. S. O. [1897] ch. 256.
(3) [1898] 2 Q. B. 402.

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and that the defence of common employment is not applicable in a case where an injury has been caused to a servant by a breach of an absolute duty imposed by statute upon his master for his protection.

Smith L. J. said:

In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant nor any one else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence and therefore that he was not liable? The defendant cannot shift his responsibility for the non-performance of the statutory duty on to the shoulders of another person.

And Rigby L. J. said:

Where absolute duty is imposed upon a person by statute it is not necessary in order to make him liable for breach of that duty to show negligence. Whether there be negligence or not he is responsible *quacunque viâ* for non-performance of the duty. As authority for that the case of *Gray* v. *Pullen* (1) may be referred to, where it was held in the Exchequer Chamber by the whole court that breach of a statutory duty such as that now in question of itself gives a right of action to a person thereby injured, unless the case may be brought within some known exception of that rule.

And further:

There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of anyone in order to make out his cause of action; that being so the doctrine of common employment is out of the question (2).

It is unreasonable to contend that if any one, by an illegal act, causes damage to another, he is not liable for the consequences of his illegality. Offenders against the law are not entitled to claim such immunity.

The appellants cannot find an excuse for their own negligence in the negligence or wilful act of a third party where the doctrine of fellow servant or com-

(1) 5 B. & S. 970.

(2) I refer also to *Baddely* v. *Earl of Granville*, 19 Q. B. D. 423, and to *The Town of Prescott* v. *Connell*, 22 Can. S. C. R. 147.

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mon employment has no application. Contributory negligence by a third party cannot be assimilated to contributory negligence by a claimant. Pollock on torts, 6th ed. p. 454. Then, what happened should have been foreseen and guarded against. Whatever caused the ladder to move is immaterial. It moved because it was not properly fastened, and this man's leg was caught in the machinery because that machinery was not securely guarded. That was the efficient cause of the injury complained of. The appellants gave the truckman the means of injuring the respondent. Without their negligence he could not have done it, and it is not the law that any one is relieved from liability for injuries resulting from his negligence simply because he is not the sole cause of those injuries. Wharton on Negligence, 144.

In *Illidge* v. *Goodwin* (1), the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. But Tindal C. J. ruled that, even if this were believed, it would not avail as a defence.

> If (he says) a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done.

Lynch v. *Nurdin* (2), is a still more striking case. There also the defendants' cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says:

(1) 5 C. & P. 190. (2) 1 Q. B. 29.

It is urged that the mischief was not produced by the mere negligence of the servant, as assérted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a playground where school boys were at play, and one of the boys in play letting it off and wounding another.

I think it will not be doubted, says Lord Denman, that the gamekeeper must answer in damages to the wounded party.

"This", he adds,

might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support, in *Illidge* v. *Goodwin* (1).

In *Dixon* v. *Bell* (2), the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming which the latter, as he thought, did, but as it turned out, did not do effectually. The girl brought it home and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable. "As by this want of care," says Lord Ellenborough, that is by leaving the gun without drawing the charge or seeing that the priming had been properly removed,

(1) 5. C. & P. 190. (2) 5 M. & S. 198.

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the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable.

In *Engelhart* v. *Farrant & Co.* (1), the defendant employed a man to drive a cart with instructions not to leave it, and a lad who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart in which the lad was and went into a house. Whilst the driver was absent the lad drove on and came into collision with the plaintiff's carriage. In the action to recover for the damage caused by the collision it was held that the negligence of the driver in so leaving the cart was the effective cause of the damage and that the defendant was liable.

In *Mills* v. *Armstrong* (2), Lord Esher said:

If no fault can be attributed to the plaintiff and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all damages occasioned to him against either the defendant or the other wrong-doer.

And Lord Lindley said:

A., without fault of his own is injured by negligence of B., then B. is liable to A. If, now, another person is introduced the same principles will be found applicable. Substitute in the foregoing case B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the result except A. will have two persons instead of one liable to him. A. may sue B. and C. in one action and recover damages against them both or he may sue them separately and recover the whole damages sustained against the one he sues; *Clark* v. *Chambers* (3), where all the previous authorities were carefully examined by the late Lord Chief Justice Cockburn.

In *Thorogood* v. *Bryan* (4), the deceased (whose administratrix the plaintiff was) had been killed by the concurrent negligence of the driver of an omnibus upon which he, the plaintiff, was riding, and of the driver of another omnibus coming in an opposite

(1) [1897] 1 Q. B. 240.
(2) *The Bernina Cass*, 12 P. D. 58, affirmed, 13 App. Cas. 1.
(3) 3 Q. B. D. 327.
(4) 8 C. B. 115.

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direction. The action was taken against the owner of the latter. The court dismissed the action But that decision is expressly overruled in *Mills* v. *Armstrong, Bernina Case*, (1) by the House of Lords (affirming the Court of Appeal); and the settled law clearly resulting from that overruling is that a passenger who is injured by a collision between two omnibuses has a remedy against the proprietor of either, if the drivers of both were guilty of negligence, and he was not.

In the United States it is likewise held that

where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

Crandall v. *Goodrich Transportation Co.* (2). See *Grand Trunk Railway Company* v. *Cummings* (3). In *Wolff Manufacturing Co.* v. *Wilson* (4), the defendant's waggon negligently driven struck an iron post used by a barber as his sign that had been left near the sidewalk not securely braced or fastened. The post fell on the plaintiff, injuring his leg. He sued the owners of the waggon. It was held that though *he might have recovered against the barber*, yet that, as upon the evidence it was clear that he would not have been injured but for the additional negligence of the defendant, the negligence of the barber did not relieve the defendant from the liability for his own negligence. Where two persons are negligent, said the court, and the accident would not have happened but for the negligence of both, the person injured may proceed against both or either.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hamilton, Elliot & Irving.*

Solicitors for the respondents: *Hearst & McKay.*

(1) 12 P. D. 58; 13 App. Cas. 1
(2) 16 Fed. Rep. 75.
(3) 106 U. S. R. 700.
(4) 46 Ill. App. 381.

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*Dec. 2,3,4.

*Dec. 12.

CHARLES C. GRANT (DEFENDANT).....APPELLANT;

AND

W. S. FULLER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise for life—Remainder to devisee's children—Estate tail.

Land was devised to D. for life "and to her children if any at her death," if no children to testator's son and daughter. D. had no children when the will was made.

Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the plaintiff at the trial.

The only question decided on this appeal was what estate passed under the following clause, in the will of Matthew Dunham, executed in 1852.

"I devise and bequeath to Emma Dunham, my daughter, forty acres of land, the same being composed of the north part of the east half of lot No. 24, 4th concession, in the Township of Plympton, County of Lambton, Province of Ontario, during the term of her natural life and to her children if any at her death, if no children, then the said property to be equally divided between my son, Matthew Henry Dunham, and my daughter, Harriett Dunham, if living, or to their heirs in the same manner." The words "children if any" were interlined to replace the word "heirs" erased.

The defendant, claiming title through the son of Emma Dunham, contended that she took an estate tail under the rule in *Wild's Case* (1) as she had no

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

(1) 3 Coke 16 *b*.

children when the will was made, and the words "children if any" meaning "issue," and being equivalent to "heirs of her body." The courts below held that she took an estate for life and her children the fee. The plaintiff claimed through her daughter.

Other questions were raised on the appeal but, as pointed out in the judgment of the court, they were all disposed of during the argument.

John A. Robinson and *M. J. O'Connor* for the appellant. No estate in fee passed by the devise to Emma Dunham and her children. *Bowen* v. *Lewis* (1); *King* v. *Evans* (2).

If the interlineation is not a part of the will Emma Dunham took an estate tail. Jarman on Wills, (5 ed.) pp. 1247-56. And if it is she takes the same estate as the word "children" means "issue." *Clifford* v. *Koe* (3); *Roddy* v. *Fitzgerald* (4).

Riddell K.C. and *Cowan K.C.* for the respondent. *Wild's Case* (5) does not apply to a case of this kind. Jarman on Wills (5 ed.) p. 1246.

Under the Wills Act (6) Emma Dunham could not take an estate in tail. *Doe d. Ford* v. *Bell* (7); *Re Chander* (8); *Re Hamilton* (9).

The judgment of the court was delivered by

DAVIES J.—This was an appeal from the judgment of the Court of Appeal for Ontario confirming a judgment in favour of the plaintiff given by the trial judge Mr. Justice Lount. The action was one for the partition of 40 acres of land in the Township of Plympton. It was common ground that the lands were, at Matthew

(1) 9 App. Cas. 890.
(2) 24 Can. S. C. R. 356.
(3) 5 App. Cas. 447.
(4) 6 H. L. Cas. 823.
(5) 3 Coke 16 *b*.
(6) R. S. O. [1897] ch. 128.
(7) 6 U. C. Q. B. 527.
(8) 18 O. R. 105.
(9) 18 O. R. 195.

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Dunham's death, vested in fee simple in one David Dunham and that he had by his will devised the same to his daughter Emma for her natural life and after her death to her children, if any, with a devise over, in default of children, to his son Matthew and his daughter Harriet. But it was strongly contended that under the wording of the will Emma Dunham took an estate tail, and not an estate for life. Emma was married twice. By her first marriage she had one son through whom the appellant claimed title, and by her second marriage one daughter Flora, who subsequently married a man named Haight. The appellant's main contention was that the act abolishing primogeniture did not affect estates tail, and that therefore Emma's eldest son at her death became her sole heir, and that in any event Emma's second marriage was void on the ground that the man Lewis she intermarried with had a wife living at the time he went through the form of marriage with her. A great many other questions were raised as to the wrongful exclusion of evidence at the trial offered to shew Flora's illegitimacy, and as to the existence of a champertous agreement between the plaintiff and Flora Haight, but these were all disposed of at the argument and the only question that remained was the proper construction of the will. It was contended that the devise in question contained an important erasure and interlineation and that in the absence of evidence to the contrary the presumption was that this alteration and interlineation were made after the will was completed and that it must be read as if they were non-existent. But it was plain that the appellant by his complete silence at the trial on the point when if it had been raised the plaintiff might have given satisfactory evidence in explanation, and his continued silence in the Court of Appeal where the point was not taken at all as well

as by his statements and admission in the case on appeal to this court, could not now for the first time raise such a question, and therefore that the will must be read and construed as it had been in the courts below with the erasure and interlineation forming parts of it. The devise in question reads as follows:

I devise and bequeath to Emma Dunham, my daughter, forty acres of land, the same being composed of the north part of the east half of lot No. 24, 4th concession, in the Township of Plympton, County of Lambton, Province of Ontario, during the term of her natural life and to her children if any at her death, if no children then the said property to be equally divided between my son, Matthew Henry Dunham, and my daughter Harriett Dunham, if living, or to their heirs in the same manner.

The will was dated in 1852 and was recorded in the year 1857 the testator having died in the meantime. The chief argument pressed upon us was that at the time the will was made the Legislature of Ontario had not incorporated in the Wills Act the 29th section of the Imperial Act 1 Vict. ch. 26, defining the construction of the words "die without issue" or words of similar import; that the word "children" in the devise must be constructed as meaning "issue," and that under the rule in *Wild's Case* (1) and in consequence of the gift over in default of children the devisee, Emma Dunham, took an estate in tail and her eldest son alone became entitled at her death. Mr. O'Connor pressed his argument upon us on this point at great length and cited a great many cases which he submitted supported his contention. I am unable however to see that there can be any doubt upon the point. I fully agree with the learned judges of the Court of Appeal that the rule in *Wild's Case* (1) has no application to this devise. The estate given to Emma was explicitly for her life. The gift to the children was not "immediate," and the word children

(1) 3 Coke 16 b.

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cannot be construed as a word of limitation. The gift to the children did not take effect till after the death of their mother, who had first the life estate devised to her, and the rule therefore in *Wild's Case* (1) is not applicable. As the testator died in 1852 the Wills Act was in force, and by virtue of the 30th section, although there were no words of limitation in the devise to the children, they took the fee simple on their mother's death. The fact of there being a devise over in default of children can have no effect whatever in altering the proper construction of the gift to them. It does not in any way indicate any intention to give them a less estate than the fee, and under the Wills Act the children take under this devise the same estate as if the devise had been to them and their heirs.

The question is very fully discussed by the present Chief Justice Moss of the Court of Appeal for Ontario in the case of *Chandler* v. *Gibson* (2), and in the conclusions at which he arrived in that case as well as in the one at bar I fully concur.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John A. Robinson.*

Solicitors for the respondent: *Cowan & Towers.*

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(1) 3 Coke 16 *b.*

(2) 2 Ont. L. R. 442.

MICHAEL POWER (DEFENDANT).....APPELLANT; 1902

AND *Dec. 15.

JUDSON M. GRIFFIN AND WILLIAM E. BRINKERHOFF (PLAINTIFFS)... ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Manufacture—Extension of time.

A patent of invention expires in two years from its date or at the expiration of a lawful extension thereof if the inventor has not commenced and continuously carried on its construction or manufacture in Canada so that any person desiring to use it could obtain it or cause it to be made.

A patent is not kept alive after the two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it if he has not commenced to manufacture in Canada. *Barter* v. *Smith* (2 Ex. C. R. 455), overruled on this point.

The power of extension beyond the two years given to the Commissioner of Patents or his deputy can only be exercised once.

Quære. Can it be exercised by an Acting-Deputy-Commissioner?

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

The action was for infringing a patent of invention for improvements in abrading shoes for truing-up car wheels, and was brought against the appellant and the Toronto Railway Company. The Judge of the Exchequer Court held that the invention was new and useful and had been infringed and gave judgment against the defendant Power. The railway company had previously withdrawn its defence and submitted to judgment. The defendant Power appealed.

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Davies, Mills and Armour JJ.

(1) 7 Ex. C. R. 411 *sub nom. Griffin* v. *Toronto Railway Co.*

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W. Cassels K.C. and *Anglin* for the appellant.

Ridout for the respondents.

It appeared at the opening of the argument for the appellant that there had been no manufacture of the patented article within two years from the date of the patent and that the patent had lapsed unless the time was extended. One extension had been granted which expired in August last, and a second was obtained which, if authorized, kept the patent alive. Judgment was reserved on the question of the validity of the second extension and hearing on the merits was postponed in the meantime.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court upon an action by the respondents against the appellant for infringement of certain letters patent of invention for improvements in abrading shoes for truing up car wheels. That judgment maintains the respondents' action and restrains the appellant from using the invention in question, with a reference to ascertain the damages that the respondents may have suffered.

In my opinion we should rescind the said restraining order (upon which alone we can now pass, as I will state later on), for the reason that it appears upon the record that the respondents' patent has now lapsed.

The said patent bears date the 11th of August, 1899. It therefore lapsed on the 11th of August, 1901, under sec. 37, subsec. 1 of ch. 61 R. S. C. as amended in 1892 by sec. 2 of 53 Vict. ch. 13 (D) unless the respondents, before that last date (or before the expiration of any authorised extension thereof) commenced and, after such commencement, continuously carried on in Canada the construction or manufacture of their patented invention in such a manner that any person desiring to use it could obtain it, or cause it to be

made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada. The grant of the patent is expressly made subject to that statutory condition.

Now there is no evidence whatever that the respondents ever carried on in Canada the construction or manufacture of their invention. That the burden of proving it was on them is unquestionable. An essential allegation of their statement of claim is that their patent is in full force and valid, and that allegation is expressly put in issue by the appellant's pleas as allowed by sec. 33 of ch. 61 R. S. C. by which it is enacted that the defendant in any action for infringement

> may plead specially as matter of defence, any fact or default which by this Act, or by law, renders the patent void; and the court shall take cognizance of that special pleading and of the facts connected therewith, and shall decide the case accordingly.

Upon a suggestion by the court, during the argument at bar, that, if so desired, the case would be remitted back to the Exchequer Court in order to give the respondents an opportunity to prove that fact, if their not doing it before was due to an oversight or a misunderstanding, their counsel conceded that such a reference would not help their case as he was instructed that his clients had not at any time carried on in Canada the construction or manufacture of their invention.

It was urged, on behalf of the respondents, that under the decision of this court in *Smith* v. *Goldie* (1), their not manufacturing in Canada within two years was not fatal to their patent. But that case merely determines that, under the statute as it then read (35 V. c. 26, sec. 28), the Deputy Commissioner's decision as to the invalidity of a patent for the non-manufacturing

(1) 9 Can. S. C. R. 46.

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within the two years was final. Anything that may be found in the report of that case (and of any case) that was not necessary for the determination of the controverted points therein is *obiter* and not binding as authority. And the number of judges who concurred in such *obiter* does not make it anything else. Then a simple concurrence is nothing more than a concurrence in the conclusions, or at most in the reasons upon which exclusively the points actually determined are based. The statute is clear. There is no room for interpretation. It says in express words that if a patentee has not manufactured in Canada during the two years, the patentee's rights are at an end.

It is further argued, however, on behalf of the respondents, that their patent has been kept and is now in force in virtue of an extension of time granted to them by the Commissioner under the provisions of subsec. 2 of sec. 37 ch. 61 R. S. C. which reads as follows:

> Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee an extension of the term of two years on his proving to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above condition

of commencing and continuously carrying on in Canada within two years from the date of the patent the construction or manufacture of his invention as enacted in sec. 1 of said section 37.

It is in evidence that under the said provision a "further delay of twelve months to manufacture" (from the 11th of August, 1901) was granted to the respondents, on the 8th of June, 1901, by the Acting Deputy Commissioner. But these twelve months expired on the 11th of August last. Another extension, it is true, for another twelve months up to the

11th of August next appears to have been granted in May last by the same officer; but this last extension is absolutely unauthorised by the statute, and is an absolute nullity. Having once exercised the power given to him by the statute the commissioner was *functus officio*. He might have extended the delay for more than twelve months, but he could not twice exercise the same power. There is no possible room, under the wording of the statute, for the contention that the commissioner could extend this delay from time to time, and a jurisdiction of this nature cannot be extended by construction. We therefore have to hold that this patent lapsed on the 11th of August last.

The fact of their asking for these extensions, I may here notice, imports a clear admission by the respondents, that they had not within the two years fulfilled the obligations required from them by the statute in order to keep their patent in force, and that admission extends to the 11th of August last, for when they then applied for another extension up to the 11th of August next they admitted that without that extension their patent was gone.

Having come to the conclusion that the respondents' patent expired on the 11th of August last, it necessarily follows that the order restraining the appellant from using it must be set aside. But that does not put an end to this appeal. The patent issued on the 11th of August, 1899. The writ on the 5th of April, 1901; the trial in March, 1902, and the judgment of the Exchequer Court on April 21st, 1902. The patent, therefore, lapsed only since the judgment appealed from. So that we are not in a position to dispose of the whole case. The question of damages has to be disposed of. The respondents are entitled to the damages, if any, that they may have suffered up

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to the 11th of August last, from the alleged infringement by the appellant. And for determining whether they are entitled to any damages we will have to hear the parties upon their respective contentions as to the validity of the patent *ab initio* up to the 11th of August last, and the alleged infringement of it by the appellant, during three years from its date. It may be that now that their patent for the future is out of existence as we now determine, the respondents will not think it advisable to proceed further. But that must appear on the record. The case will, therefore, be postponed till the February term. The parties will, in the meantime, decide what to do, either re-inscribe the case for hearing upon which hearing the points we now determine will not be allowed to be re-opened, or file with the registrar the retraxit by the respondents of their claim for damages necessary to enable us to enter a final judgment in the case. We make no order as to costs for the present.

There is a point which it is expedient to allude to. The statute says that any extension of the two years term may be granted by the commissioner. Now the extension to the respondents' of June, 1901, is granted, not by the commissioner, not even by the deputy commissioner, but by an officer calling himself the acting deputy commissioner. In my opinion I would not be disposed to hold this extension void on that ground. The majority of the court, however, think it advisable to hear the parties on that point, if the respondents proceed further in the case. On this point depends whether it is for two or for three years that the respondents are entitled to damages.

The entry to be made by the registrar will be as follows:

The court declares the respondents' letters-patent to have lapsed on the 11th of August last. No order to

be drawn up till final judgment on the whole case. Costs reserved. Either party at liberty to re-inscribe the case for hearing at the next term or at any time thereafter. If respondents file in the registrar's office a retraxit of their claim as to damages, case to be re-submitted without argument. If no such retraxit is filed, case to be heard upon the respective contentions of the parties as to the validity of the patent before the 11th of August last and the alleged infringement thereof by the appellant, and whether, if respondents entitled to damages at all, these damages should be assessed for three years or only for two years.

SEDGEWICK J.—I concur in the judgment for the reasons stated by His Lordship the Chief Justice.

DAVIES J.—I concur with the judgment of the Chief Justice. I reserve my judgment as to the power of an *Acting* Deputy Commissioner of Patents to grant an extension of the term of the patent under the statute.

MILLS J.—I concur in the conclusions reached by His Lordship the Chief Justice.

ARMOUR J.—This is an appeal from the judgment of the Exchequer Court in an action brought by the plaintiffs against the defendants for infringement of their patent by which it was declared that the defendants had infringed the plaintiffs' patent.

The plaintiffs' patent was issued on the eleventh day of August, 1899, and by it was granted for the period of eighteen years the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used in the Dominion of Canada certain alleged new and useful "improvements in abrading shoes for truing-up car wheels," subject to adjudication

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before any court of competent jurisdiction and subject to the conditions contained in the Patent Act, chapter 61 of the Revised Statutes of Canada, and the Acts amending the same.

The defendants pleaded that the said patent had become void by reason of non-compliance with and breach of the terms and conditions of the Patent Act and amendments thereto.

Section 37 of the Patent Act provides that every patent granted under the Act shall be subject and be expressed to be subject to the following conditions; (*a*) that such patent and all the rights and privileges thereby granted shall cease and determine and that the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives or his assignee, within that period or any authorised extension thereof, commence, and after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making it or constructing it in Canada. And it also provides that whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee an extension of the term of two years, on his proving to the satisfaction of the Commissioner that he was, for reasons beyond his control, prevented from complying with the above condition. It was admitted on the argument before us that neither the construction or manufacture of the invention patented had ever been commenced or carried on in Canada. But it was

contended that this was not necessary in order to satisfy the above condition, and reliance was had for this contention upon the decision of Dr. Taché when Deputy Minister of Agriculture in the case of *Barter* v. *Smith* (1), and upon the reference thereto in *Smith* v. *Goldie* (2), and in the same case in this court. This decision was upon sec. 28 of the Patent Act of 1872, containing a similar provision to that contained in sec. 37 of the present Patent Act, but providing that in case disputes should arise as to whether a patent had or had not become void thereunder, such disputes should be settled by the Minister of Agriculture or his deputy whose decision should be final. The purport of Dr. Taché's decision will appear from the following quotations:

> The words "carry on in Canada, the construction or manufacture" with their context, cannot therefore mean anything else than that any citizen of the Dominion, whether residing in Prince Edward Island, in British Columbia, in Ontario, Quebec or elsewhere on Federal soil, has a right to exact from the patentee a license to use the invention patented or obtain the article patented for his use at the expiration of the two years' delay on condition of applying to the owner for it and on payment of a fair royalty.
>
> The real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using on reasonable terms to any person desiring to use it. But again that desire on the part of such a person is not intended by the law to mean a mere operation or motion of the mind or of the tongue, but in effect a *bonâ fidé* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear and acquiesce in such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights,

thus holding contrary to the express words of the condition that it was not necessary that the patentee should within the period mentioned commence, and

(1) 2 Ex. C. R. 455, at p. 474. (2) 7 Ont. App. R. 628; 9 Can. S. C. R. 46.

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after commencement continuously carry on, in Canada the construction or manufacture of the invention patented, and holding, without any words in the conditon to warrant it, that the condition would be sufficiently satisfied by the patentee granting to any person desiring to use the invention patented a license to use it upon applying to him for it and upon payment of a fair royalty. This decision cannot be supported, nor can it be held to be supported by the decisions in the Court of Appeal for Ontario, and in this court in *Smith* v. *Goldie* (1) for what was said by Mr. Justice Patterson in the former court, and by Mr. Justice Henry in this court, was plainly *obiter*, for each of them held that the decision of Dr. Taché was final and not subject to appeal.

Reliance was also had upon the following extensions indorsed upon the plaintiff's patent.

A further delay of twelve months to manufacture granted June 8th, 1901, A. L. Jarvis, Acting Deputy Commissioner.

A further delay of twelve months to manufacture granted May 14th, 1902, A. L. Jarvis, Acting Deputy Commissioner.

The power of granting an extension of the term when the patentee has been unable to carry on the construction or manufacture of his invention within two years from the date of his patent, is conferred upon the Commissioner upon the patentee proving to his satisfaction that he was, for reasons beyond his control, prevented from complying with the conditions. This power is, by the Patent Act, conferred upon the Commissioner alone, and having regard to the context and that the power so conferred is a judicial one and not a ministerial one, it is, in my opinion, doubtful whether the provisions of sec. 7 of the Interpretation Act and of its subsec. 40 apply so as to authorise the Deputy-Commissioner or the Acting-Deputy-Commis-

(1) 9 Can. S. C. R. 46

sioner, the Deputy-Commissioner being alive, to grant the extension. But assuming, without however determining, that they do so apply, the words used in granting the power authorise only one extension, and by the grant of the extension of the 8th June, 1901, the power was exhausted. The plaintiff's patent, therefore, became void on the 11th August, 1902, by reason of non-compliance with the conditions.

Order accordingly.

Solicitors for the appellant: *Blake, Lash & Cassells.*

Solicitor for the respondents: *John G. Ridout.*

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*May 15, 16.

*Oct. 7.

EDWIN HANSON *et al.* (PLAINTIFFS).....APPELLANTS;

AND

THE VILLAGE OF GRAND'MÈRE (DEFENDANT) ..... RESPONDENT.

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

Municipal corporation — By-law — Approval of Lieutenant-Governor — 60 V. c. 78, ss. 7, 27 (Que.)

Judgment appealed from (Q. R. 11 K. B. 77) affirmed, Girouard J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal (Curran J.) dismissing the plaintiffs' action.

A company incorporated under special charter granted by the Quebec statute, 60 Vict. ch. 78, obtained from the respondent the franchise for constructing and operation a system of waterworks and sewers within the limits of the municipality of the Village of Grand'mère, respondent, incorporated by 61 Vict. ch. 61 (Que.), and subject to the provisions of the Revised Statutes of Quebec relating to town corporations. The works to be constructed were to be the property of the company and residents of the municipality desiring to become consumers had the right to the use of the works on payment of such rates as might be agreed upon between them and the company. Under the provisions of

* PRESENT :—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

(1) Q. R. 11 K. B. 77.

sec. 27 of the company's charter and on petition of the inhabitants of the municipality, the respondent passed a by-law by which the franchise was granted and thereby agreed to collect the rates and to indorse a series of debentures to be issued by the company for the purpose of securing funds for the construction of the works. The debentures were accordingly issued, indorsed by the respondent and were sold and delivered by the company to the appellants for $43,513.50, the amount so realized being appropriated for the purposes for which the debentures had been issued. Upon the maturity of the first debenture default was made in payment and the appellants brought the action to recover its amount from the company and the respondent jointly and severally. The respondent resisted payment on the ground that the by-law was *ultra vires*, null and void, and that the debentures had been illegally indorsed and delivered and were not binding as an obligation on the municipal corporation. The company did not contest the action. At the trial the Superior Court, (Curran J.), dismissed the action, the material points at issue being mentioned in the notes of reasons for the judgment referred to at pages 77-78 of the report of the judgment of the Court of King's Bench (1) from which the present appeal is asserted.

T. Chase-Casgrain K.C. and *Falconer* for the appellants. The statute 60 Vict. ch. 78, authorized the corporation to contract with the power company to build the water-works and sewers and to indorse and guarantee payment of the debentures, issued by the company, for carrying out the works. The by-law was duly promulgated and accompanied by all the formalities required by law, a portion of such debentures to be delivered to the company as the work progressed and

(1) Q. R. 11 K. B. 77.

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the balance when the systems were in operation. The appellants were officially notified by the corporation that the systems were in operation and the debentures were delivered, before maturity, to the appellants, who are the *bonâ fide* holders thereof for value. In the hands of the appellants, they are indisputable and the corporation cannot set up the fraud, laches or negligence of its own officers. Again, if any fraud, laches or negligence existed on the part of the officers of the corporation, or of the company, it is not alleged or proved that the appellants were in any way privy thereto. The corporation is bound by the recitals in the by-law, and by the official documents issued by the corporation and its duly constituted officers, and, even if the appellants were bound to inquire, it would be unreasonable that they should impute fraud, wilful negligence or guilty misrepresentations to the officers of the corporation. They were entitled to rely on the certificates furnished them. We refer to *Parish of St. Césaire* v. *McFarlane* (1); Dillon on Municipal Corporations (4 ed.) ss. 485, 486, 512-549, 936; *In re Blakely Ordinance Co.* (2); *Young* v. *MacNider* (3); *In re Agra and Masterman's Bank* (4); *Wade* v. *The Town of Brantford* (5); *Connecticut Mutual Life Insurance Company* v. *The Cleveland, etc. Railroad Company* (6); *Hackensack Water Company* v. *DeKay* (7); *City of Cairo* v. *Zane* (8); Thompson on Corporations, ss. 4930, 4931, 4932, 5251, 5262, 6068, 6070.

Beaudin K.C. and *Bisaillon K.C.* for the respondent. The respondent, incorporated by 61 Vict. ch. 61 (Que) is declared subject to the statutes affecting town corporations, (R. S. Q. Acts, 4178 *et seq.*,) the

(1) 14 Can. S. C. R. 738.
(2) 3 Ch. App. 412.
(3) 25 Can. S. C. R. 272.
(4) 2 Ch. App. 391.
(5) 19 U. C. Q. B. 207.
(6) 41 Barb. 9.
(7) 36 N. J. Eq. 548.
(8) 149 U. S. R. 122.

material clauses now in question being arts. 4529, 4530 and 4531. These clauses gave the corporation no power to indorse or guarantee the debentures now sued upon; the necessary formalities not having been complied with, the indorsement was *ultra vires*. The special charter of the power company, 60 Vict. ch. 78 (Que.), of which sections 7 and 27 only are material to the issues, never contemplated that the corporation should assume any financial obligation but merely that collections should be made of the revenues from the works, in trust, the proceeds to be applied upon the debentures. The corporation could not and did not give any unconditional guarantee. No such guarantee was authorized by the ratepayers as required by the statute. The appellants were put upon inquiry as to the fulfilment of all necessary conditions for the validity of the debentures and cannot now plead ignorance or that they hold *bonâ fide*, for value and without notice of irregularities or illegalities. The indorsement is also a restricted one and prevented the negotiation of the debentures by delivery. See "Bills of Exchange Act," secs. 18, 19; Simmonton on Municipal Bonds, secs. 191, 192; Dillon on Municipal Corporations, secs. 163, 238, 546; *Village de la Pointe Gatineau* v. *Hanson* (1); arts. 365, 1703, 2279 C. C.; *Geddes* v. *Toronto Street Railway Co.* (2); *Wason Manufacturing Co.* v. *Compagnie du Chemin de Fer de Lévis et Kenebec* (3); *Ville d'Iberville* v. *La Banque du Peuple* (4).

The original by-law being subject to the approval of the electors and of the Lieutenant-Governor-in-Council could not be changed unless the substituted by-law, or its amendments, were again submitted to approval by the electors and the Lieutenant-Governor-in-Council.

(1) Q. R. 10 K. B. 346.
(2) 14 U. C. C. P. 513.
(3) 21 R. L. 161.
(4) Q. R. 4 Q. B. 268.

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The CHIEF JUSTICE pronounced the judgment of the majority of the court dismissing the appeal with costs but delivered no written reasons.

SEDGEWICK, DAVIES and MILLS JJ. concurred in the result of the judgment dismissing the appeal for the reasons stated in the court below.

GIROUARD J. (dissenting.)—The respondents contend that several recitals contained in the bonds are false, and that they have been the victim of a gigantic fraud. But who is to suffer from the culpable and almost criminal negligence or perhaps simple *naiveté* of their officials? Is it the innocent holder who in good faith has relied upon the statements made in the bonds and paid their par value? It cannot be so, if the issue was authorised by law. Nearly all the judges seem to have conceded this point, which is moreover established by what is considered now a well settled jurisprudence, the debentures being undoubtedly negotiable instruments, by mere delivery like bills and notes. (Art. 1573 C. C.) In fact, being under hand and not under seal, they possess all the essential requisites of promissory notes within the meaning of the Bills of Exchange Act, capable likewise of negotiable guarantee or *aval.*

It is mainly upon the question of authority of the municipal corporation to indorse the bonds that a diversity of opinion exists. In the Superior Court, Mr. Justice Curran, very properly, considered that he was bound by a previous decision of the Court of Appeal in the case of the *Village of Gatineau Point* v. *Hanson* (1). In appeal, this decision was simply re-affirmed, Mr. Justice Blanchet dissenting in both cases. Mr. Justice Hall thought that the present case

(1) Q. R. 10 Q. B. 346.

was distinguishable from the other in all points, except the want of power to guarantee. He said:

I find this case, in so far as the facts and procedure are concerned, much more favourable to the appellants than their previous one against the Corporation of Gatineau Point. The by-law adopted by the Village of Grand'Mère undertakes, unconditionally to guarantee the debentures of the Stadacona Water, Light and Power Company, for an annual amount not exceeding two-thirds of the probable revenues of the water and drainage systems, the amount of which probable revenues, estimated by their secretary-treasurer, was approved and adopted by the municipal council. The debentures thus guaranteed were to be handed over to the Stadacona Company as follows: 90 per cent upon statements approved by the engineer of the village establishing the value of work done, materials furnished and expense incurred to a like amount by the Stadacona Company in the prosecution of their contract for said water-works and sewers, and the balance upon the said systems being put into operation. A preliminary condition of the passage of said by-law, viz. a petition for its adoption signed by a majority in number and in value of the ratepayers of the municipality, was declared by the by-law itself to have been complied with; the debentures were prepared in exact accordance with the terms of the by-law, and were delivered from time to time by the trustees appointed by the by-law or subsequent resolution of the municipal council, such delivery being made in accordance with the opinion or certificates of those officials whom the council had appointed for that purpose, the last 10 per cent of them upon the certificate of the engineer of the village that the systems were in operation, and upon the formal written order of the mayor, the secretary-treasurer and the engineer. Declarations in such forms by the council and officials of a municipality as to the observance of formalities upon which their right to bind the municipality depended and as to the completion of works which it was their duty to inspect, and criticise or accept, must be held to be binding upon such municipality, especially when the rights of third parties are at stake who have incurred financial obligations in reliance upon such certificates and declarations. The appellants and their solicitors were thoroughly justified in my opinion in accepting said debentures as perfect in form and in concluding that said municipality had guararteed and delivered said debentures in strict compliance with its obligations to the said Stadacona Water, Light and Power Company.

Mr. Justice Bossé assented to the conclusion of the majority in the *Gatineau Point Case* (1), only upon the

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ground that the municipal by-law had not been promulgated. The guarantee of the municipal corporation was therefore set aside as being *ultra vires* and the judgment of the Superior Court (Charland J.) reversed with costs. It appears that a similar judgment was rendered by Mr. Justice Lavergne in another case of the *Stadacona Water, Light and Power Company* v. *The Corporation of Thurso*, not reported. So, upon the main point—the power of the municipal corporation—and that, in my humble opinion, is the only one open to any doubt, the judges so far seem to be at least equally divided.

As put by Mr. Justice Hall and Chief Justice Lacoste, the issue is narrowed down to the one question: had the municipal council of the Village of Grand'Mère the legal power to give the guarantee which is now attempted to be enforced? For if it was given without legal authority, it is absolutely void and can acquire no validity even in the hands of a *bonâ fide* holder. Every one is presumed to know the law of the country where he is dealing, and also whether the parties contracting with him have capacity to do so. (A. & E. Ency. of Law, vo. *Municipal Securities*, 2nd ed. p. 66).

Of course, that power can be conferred to municipal corporations only by the legislature. The appellants quote section 27 of this company's charter, 60 Vict. c. 78, and the respondents rely upon section 7 of the same statute. As the decision of the question turns entirely upon the interpretation of these two sections, it is of importance to place here the wording of these enactments:

Sec. 7, (c) Any contract or arrangement between a municipal corporation and the company for the construction and working of water-works systems and other works authorised by this Act, shall, if such contract or arrangement involves financial obligations on the part of such corportions, be valid only when the by-law authorising

such contract or agreement has been approved by the ratepayers and by the Lieutenant-Governor-in-Council according to the laws concerning the issue of municipal bonds.

Sec. 27. In the event of the company undertaking the construction of a system of water-works, drainage or lighting in any municipality, the company may make arrangements with the corporation from which it shall have obtained concessions or franchises for a certain number of years for the construction and working of such system in virtue whereof the revenues of said systems shall be collected or levied by the said municipal council. And notwithstanding any provisions to the contrary in the charter of such municipality, and provided it be thereto authorised by petition of the majority in number and in value of the ratepayers of that portion of the municipality in which the system shall exist, the council may, in such case, bind itself by by-laws to collect or levy the said revenues; and may, moreover guarantee the bonds or debentures issued by the company in connection with the said system, to the extent of two-thirds of the revenues, the collection whereof shall have been confided to it by the company; but such guarantee shall not be for a longer period than that of the concession of the franchise granted to the company by the said corporation in connection with the said systems. And in the event of the said revenues not being binding, the council of the municipality may cause to be prepared by its secretary an estimate of the probable revenue of the said systems, and such estimate, after having been approved by the council, shall serve as a basis for establishing the amount of said guarantee. The revenues so collected by the corporation shall be devoted to the payment of the interest of, and the capital of the bonds or debentures, which it shall have so guaranteed, either in the whole or in part, as the municipal council of such corporation shall decide."

The company was first incorporated by letters-patent which were confirmed by the said statute. The preamble recites that the main object of the corporators is to obtain extended powers, and that it is advisable to grant their prayer. Under the old letters-patent, any town corporation, like Grand'Mère, can guarantee bonds issued by the company in relation to the construction of waterworks and sewers, provided it is authorised to do so by by-law approved by the ratepayers in an election and the Lieutenant-Governor-

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in-Council (1). Evidently the statutory charter was passed not to confer this old power, but to extend the same. Art. 12 C. C.

It is contended that this legislation was of a private nature and cannot have the effect of repealing the general law concerning towns, villages and municipalities generally. But it is not given as private, quite the reverse; it is considered as urgent and an exception is even made as to its coming into force; section 30 declares that it will come in force on the very day of its sanction. (Arts. 2 and 10 C. C.)

In construing a statute of this kind, I find a most salutory rule laid down in recent text books and decisions, which strongly appeals to common sense and is highly beneficial, if not altogether indispensable to the public credit of municipal corporations and to the development of municipal works within their limits. It is thus stated in Vol. 21 of the American and English Encyclopœdia of Law, vo. *Municipal Securities*, page 33:

> Statutes relating to the issuance of municipal bonds should, it seems, when it is sought to prevent their issue, be strictly construed, and where it is doubtful whether it was the intention of the legislature to authorise the issuance of bonds, the doubt should be resolved against the authority to issue them. But where bonds have been issued in pursuance of an ambiguously worded statute, it has been held that the court should adopt a liberal construction in order to sustain them, though it would have prevented their issue had application been made therefor in season.

This rule of interpretation was applied in the case of *Woodhull* v. *Beaver County* (2), decided by the United States Circuit Court. See also *Stokes* v. *County of Scott* (3).

But is the language of section 27 of the Quebec statute really ambiguous?

In Mr. Justice Hall's opinion,

(1) R. S. Q. arts. 4404, 4406, 4794.

(2) 3 Wall. Jr. 274.

(3) 10 Iowa, 166.

this section gives no authority to the municipal council to do more than to give a guarantee to hand over to the debenture holder two-thirds of the actual revenue collected and held by them as trustees of of the Stadacona Company.

If so, why limit it to two-thirds only of the revenues?

In the next place, this result could be accomplished by merely enforcing that part of the clause making the corporation trustees without any guarantee.

And what can be the meaning of that part of clause 27 which authorises the municipal council to cause to be prepared by the engineer

an estimate of the probable revenues of the said systems, and such estimate, after having been approved by the council, shall serve as a basis for establishing the amount of the said guarantee?

Evidently to guarantee, unconditionally, a fixed amount. I feel certain that such was the intention of the legislature. The parties and their counsel so understood it. In the by-law it is declared:

Le conseil s'engage à garantir les débentures ou obligations qui seront émises par la compagnie en rapport avec les dits systèmes, pour un montant annuel n'excédant pas les deux tiers *des revenus probables*, et pendant la durée de la franchise.

The aggregate amount of these debentures ($3,125 each) is $43.513.50. The village corporation even took a mortgage or *hypothèque* upon the works and property of the company for the sum of $30,000,—

afin de garantir la dite corporation contre toute responsabilité, pertes, ou paiements, qu'elle pourrait encourir ou faire en conséquence de la garantie à être donnée par la dite corporation sur les débentures de la dite compagnie comparante comme susdit.

Finally, such an interpretation is clearly in harmony with the plain language of the statute. It declares expressly that

the council may, in such cases, bind itself by by-law to collect or levy the said revenues, and may moreover guarantee the bonds or debentures, etc.

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If the interpretation given by the Court of Appeal be adopted, these words are simply obliterated and the object of the statute is defeated, namely, to increase the powers of the company.

The endorsation does not necessarily involve financial obligations on the part of such corporations. They are not primarily liable and if the precautions and safe-guards provided for by the statute are honestly and fairly carried out, they will seldom become personally involved.

But, whether so involved or not, I consider that section 27 provides for a special case which does not fall within the reservations made in section 7 for ordinary and general cases.

I quite agree with Mr. Justice Blanchet that the two clauses can be reconciled and applied by holding that clause 7 contemplates direct obligations and clause 27 only indirect or secondary obligations, subject to the conditions therein indicated. To decide otherwise would simply mean the destruction of clause 27.

This conclusion is finally forced upon us by the words

> and notwithstanding any provision to the contrary in the charter of such municipality,

which, like section 7, requires the approbation of the ratepayers and of the Lieutenant-Governor-in-Council.

Under section 27, the petition of the ratepayers is substituted for the approbation of the ratepayers and of the Lieutenant-Governor, a course which is adopted in some States of the American Union.

Even if I had any doubt as to the true meaning of clause 27, I do not at all feel inclined to look upon municipal councils of towns and cities in the light of minors, although in this very instance the municipal representatives seem to have acted like children and

foolish children at that. They form important political corporations, elected by the taxpayers, and are in fact part of the internal government of the country, and it would be a very serious blot to the credit of public institutions, if debentures, like those in question, were allowed to be repudiated, for the defence here amounts to repudiation. But even viewed as mere civil corporations, they enjoy no greater rights than individuals. (Art. 356 C. C.) What would be the position of an individual denying his liability on a guarantee like that sued upon in this cause? True, corporations are subject to disabilities; true their capacity to contract is derived from the legislature; but when dealing in the commercial world, they should be treated like individuals, unless clearly disabled; and that is the reason why, if I was entertaining any doubt upon the authority of the Village of Grand'Mère to guarantee the bonds, I would apply the rule laid down in article 12 C. C. and in *Woodhull* v. *Beaver County* (1) and hold that section 27 was passed to meet this very case and that they are bound by the debentures. It seems to me that this court has practically sanctioned that rule in a very recent case. I refer to *Grimmer* v. *The County of Gloucester* (2).

The market value of municipal bonds is of such vital importance that the Supreme Court of the United States, a tribunal standing, in a case like this, almost as high as any British court, refused to set aside a negotiable bond held under an unconstitutional charter by a third party for value and in good faith, after it had been declared constitutional by the State Courts, which for a number of years at least were looked upon as supreme and final in a matter of this character.

(1) 3 Wall. Jr. 274.

(2) 32 S. C. R. 305.

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Gelcpke v. *Dubuque* (1). At the time of the issue and transfer, the legality of these bonds had been determined by a series of decisions of the highest court of the State, but some years later this jurisprudence was upset by the same court composed of new judges. Swayne J., speaking for the Supreme Court of the United States, said:

> We shall never immolate truth, justice and the law, because a State ribunal has erected the altar and decreed the sacrifice.

Mr. Daniel, in his learned work on Negotiable Instruments, tells us, par. 1526, that more recently the United States Supreme Court has taken a step further and held that the decisions of the highest court of a State relating to negotiable bonds and securities will not be respected by that tribunal, unless satisfactory to its judges, when the question arises upon a bond in the hands of a *bonâ fide* holder who is a citizen of another State, or a foreigner. *Township of Pine Grove* v. *Talcott* (2).

In England, likewise, the judges seldom overlook the legal prestige of public and semi-public negotiable securities. They look upon them in the same light as their American brethren. Lord Herschell, after quoting a decision of the Court of Appeal of the State of New York, in a case of this description, said a few years ago, while sitting in the House of Lords:

> I do not see any difference between the law of the State of New York and the law of England in this respect. *Colonial Bank* v. *Cady* (3).

I may add that I fail to see in the same respect any difference between the laws of those countries and the law of Quebec, or of any province of Canada. In several cases, the English judges have granted adequate equitable relief to a holder in due course, when the bonds were invalid in law. *Re The Queensland*

(1) 1 Wall 175.
(2) 19 Wall 666.
(3) 15 App. Cas. 267.

Land and Coal Company; *Davis* v. *Martin* (2); *Re The Strand Music Hall Co.* (3).

In this case, it is not strictly correct to say that no consideration whatever was given for the guarantee. Considerable work was done; scores of labourers were continuously employed; a great deal of material had been employed and thousands of dollars were expended. In the month of May, 1900, the council had the report of its engineer certifying that at least $23,929.65 had been expended for work and material, and that $4,000 were deposited to its credit in the Hochelaga Bank, making $27,959.65.

Instead of acting under clause 12 of the by-law and taking possession of and completing the works, or of notifying the appellants or making some effort to protect itself and the bondholders, it allows the whole property to be sold at sheriff's sale for a mere song, ($6,075), and then adopts the course of repudiation. The corporation officials displayed, at this stage of the proceedings, more incompetency and negligence of their obvious duties than at the time of the issuing of the debentures, for they had no longer any reason to rely upon hopes and promises. The true and unfortunate position was laid bare before the whole municipality, and yet they all remain idle and evidently trusted to Providence, but Providence, very merciful to individuals, generally takes little care of corporations, who have no soul.

It is especially in a case of gross neglect like that proved in this instance, that courts of justice should give the benefit of the doubt to the holder in due course when the statute authorising the issue of a bond is merely doubtful or ambiguous. But as I have already stated, I entertain no such doubt. I have

(2) 63 L. J. Ch. 810. (3) 3 DeG. J. & S. 147.

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come to the conclusion that upon the plain language of section 27, they must pay these debentures.

It is hardly necessary to say anything of the waiver made by the corporation, in the guarantee, to the benefit of notice, division and discussion, without being authorised thereto by the by-law. They got notice and, the obligation being commercial, they were by law jointly and severally liable. (Art. 1105 C. C.) Finally, the council has often ratified these debentures in the very form they now have.

For these reasons, I am of opinion that the appeal should be allowed and the Corporation of the Village of Grand'Mère condemned to pay to the appellants the amount demanded, in principal and interest, with costs before all the courts.

Appeal dismissed with costs.

Solicitors for the appellants: *Fleet, Falconer & Cook.*

Solicitors for the respondents: *Beaudin, Cardinal, Loranger & St. Germain.*

HENRY D. BLACKBURN AND ALFRED B. COX (PLAINTIFFS)... } APPELLANTS;

AND

J. H. McCALLUM (DEFENDANT)....RESPONDENT.

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*Mar. 19.
*Dec. 12.

1903
*Feb. 17.

ON APPEAL FROM THE HIGH COURT OF JUSTICE FOR ONTARIO.

Will—Devise—Restraint on alienation.

A devisee of real estate under a will was restrained from selling or encumbering it for a period of twenty-five years after the testator's death.

Held, that as the restraint, if general, would have been void the limitation as to time did not make it valid.

APPEAL *per saltum* from a decision of the High Court of Justice for Ontario on a special case in favour of the defendant.

The case submitted to the High Court of Justice by consent of parties was as follows:—

SPECIAL CASE.

1. Donald Chisholm, late of the township of Mosa, in the county of Middlesex, yeoman, deceased, died on the 27th day of February, A.D. 1887.

2. The said Donald Chisholm at the time of his death was seized in fee simple of the south half of lot number 3 in the 8th concession of the township of Mosa.

3. Prior to his death the said Donald Chisholm made his will (which has been duly proved and registered) in the words and figures following:

"This is the last will and testament of Donald Chisholm, of the township of Mosa, in the county of

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

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Middlesex, and province of Ontario, in the Dominion of Canada, yeoman.

"I will and desire that all my just debts, funeral and testamentary expenses be paid by my executors as soon as may conveniently be after my decease, and as to my worldly estate wherewith it has pleased God to bless me, I give and dispose of the same as follows:

"I give and bequeath to William Chisholm, my son, the east half of the south half of lot number 3, in the 8th concession of the township of Mosa. To Hugh Chisholm, my son, I give and bequeath the west half of the aforesaid lot, equally dividing the hundred acres between them

"I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease, and farther, I will that the said parcels of land shall remain free from all incumbrance, and that no debts contracted by my sons, William Chisholm and Hugh Chisholm, shall by any means incumber the same during twenty-five years from the date of my decease. I will that my personal property be equally divided between William Chisholm and Hugh Chisholm, my sons.

"I give and bequeath to Duncan Chisholm, my son, the sum of two hundred dollars, the same to be paid to him by William Chisholm, my son, out of my personal property, twelve months after my decease.

"I give and bequeath to Colin Chisholm, my son, the sum of three hundred dollars, the same to be paid to him by Hugh Chisholm, my son, out of my personal property, four years after my decease.

"And I hereby appoint the Rev. Neil McKinnon and Donald Chisholm, my son, to be the executors of this my last will and testament, hereby revoking all former wills.

"In witness hereof I hereunto set my hand and seal this twelfth day of February, in the year of our Lord one thousand eight hundred and eighty-three.

"(Sd.) DONALD CHISHOLM, (L.S.)

"Signed, sealed and delivered in the presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"(Sd.) ARCHIBALD McKELLAR,
of the Village of Glencoe.

"(Sd.) JOHN CAMPBELL,
of the Township of Ekfrid."

4. Hugh Chisholm, one of the devisees mentioned in the said will, on the 1st day of April, 1896, borrowed the sum of $500 from one John R. Turner. As security for the repayment of the said sum the said Hugh Chisholm executed a mortgage of the lands devised to him (the west half of the south half of lot 3, in the 8th concession of Mosa) in fee simple to the said John R. Turner, and by a covenant and proviso in the said mortgage contained, the said Hugh Chisholm covenanted with the said John R. Turner, his executors, administrators and assigns, to pay the said sum with interest thereon upon certain specified days mentioned therein, and that in default of payment of the interest the whole principal sum should become payable.

5. By deed of assignment dated the 12th day of December, 1898, the said John R. Turner assigned and set over unto the plaintiffs the said mortgage and all moneys due or which should thereafter become due by virtue of the said mortgage, and the full benefit of all the covenants and provisos in the said mortgage contained, and conveyed or purported to convey the said lands to the said plaintiffs.

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6. Hugh Chisholm failed to perform his covenant to repay the said moneys and interest, and on the 13th day of February, 1899, the plaintiffs recovered a judgment against him for $650.77, and issued a writ of execution directed to the sheriff of the county of Middlesex, by which he was required to levy the amount of the said judgment upon the goods and lands of the said Hugh Chisholm.

7. It was agreed between the defendant and the plaintiffs that if the plaintiffs should request the said sheriff to expose the said lands for sale in fee simple under the said writ, the defendant would buy the same at and for the price or sum of $2,350, which is the full value of the fee, and that the plaintiffs would also convey and assign the said mortgage. Doubt having been expressed prior to the sale as to whether the fee would pass to the purchaser under the sale by the sheriff and such assignment of mortgage, it was agreed on behalf of the plaintiffs that if the defendant would so purchase at the said sale he should be placed in the position as regards title of a purchaser buying under an open agreement, and that if the plaintiffs failed to prove a good title to the said lands the purchaser should not be bound to carry out his purchase.

8. Pursuant to the said writ, the interest of the said Hugh Chisholm in the said lands devised to him was regularly offered for sale by the said sheriff as a fee simple absolute on the 2nd day of March, 1901, and at the said sale the said lands were purchased by the defendant, subject to such agreement, for the sum of $2,350.

9. The defendant now objects that the restriction in the said will not only constituted a valid restriction upon alienation, and rendered the said mortgage void, but also prevented the lands devised to Hugh Chisholm from being exigible for debt, but in other respects the title has been accepted.

10. It has been agreed that the validity of the said objection shall be submitted for determination to this honourable court by way of a special case, and that the objection for the purpose of such submission shall be stated in the following form:

1. Did Hugh Chisholm take a fee simple absolute by the said will in the said lands, and was he able to convey the same in fee notwithstanding the restriction in the will?

2. In any event was the fee simple in the lands subject to sale under execution as against Hugh Chisholm for his debts?

3. If the court is of opinion that the plaintiffs can make title in either or both ways, judgment is to be for the plaintiffs, otherwise for the defendant.

The judgment of the High Court on this special case was that the restraint on alienation was valid though the provision that no debts of the son should encumber the land devised for twenty-five years was void; that the violation of the restriction forfeited the devise and the fee simple did not pass to Chisholm by the sheriff's sale; and that plaintiffs could not give title to the land. The plaintiffs obtained an order under sec. 26 of The Supreme Court Act for leave to appeal to the Supreme Court without a preliminary appeal to the Court of Appeal for Ontario.

Armour K.C. for the appellant. At one time the Ontario courts held that a partial restraint against alienation was void; *Fulton* v. *Fulton* (1); *Crawford* v. *Lundy* (2); *Gallinger* v. *Farlinger* (3); but in 1881 they adopted the contrary jurisprudence; *Earls* v. *McAlpine* (4), owing to the decision of Jessel M. R in *Re Macleay* (5).

(1) 24 Gr. 422.
(2) 23 Gr. 244.
(3) 6 U. C. C. P. 512.
(4) 6 Ont. App. R. 145.
(5) L. R. 20 Eq. 186.

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The courts in England, on the contrary, have uniformly held partial restraints, as to time at all events, to be void. See *Re Rosher* (1); *Renaud* v. *Tourangeau* (2); *Re Machu* (3).

J. Travers Lewis appeared for the respondent but did not wish to be heard.

THE CHIEF JUSTICE.—The late Donald Chisholm by his will dated the 27th day of February, 1887, bequeathed a certain lot of land to his son Hugh Chisholm. Added to the bequest are the following words:

I will that the aforesaid parcel of land shall not be at his disposal at any time until at the end of twenty-five years from the date of my decease, and further, I will that the said parcel of land shall remain free from all incumbrance, and that no debts contracted by my son Hugh Chisholm shall by any means incumber the same during twenty-five years from the date of my decease.

He died soon afterwards.

In April, 1896, the said devisee, Hugh Chisholm, having borrowed $500 from one Turner executed as security therefor a mortgage on the said land devised to him as aforesaid with an express covenant to repay the said loan.

Upon an assignment by Turner to them of the said sum of $500, the appellants recovered judgment upon the covenant against the said Hugh Chisholm for the amount thereof and interest accrued. They then issued a writ of execution directed to the sheriff, by which he was required to levy the amount of the said judgment upon the goods and lands of the said Hugh Chisholm. It was then agreed between the appellants and the respondent, McCallum, that if the appellants would request the said sheriff to expose the said land for

(1) 26 Ch. D. 801. (2) L. R. 2 P. C. 4.
(3) 21 Ch. D. 838.

sale in fee simple under the said writ, he, the respondent, would buy the same at and for the price of $2,350, the full value of the fee, and that the appellants would also convey and assign to him the said mortgage, which had previously also been assigned to them by Turner. Doubts having been expressed as to whether the fee would pass to the purchaser under the sale by the sheriff and such assignment of mortgage, it was agreed on behalf of the appellants that if the respondent would so purchase at the said sale he should be placed in the position as regards title of a purchaser buying under an open agreement, and that if the appellants failed to prove a good title to the said land the purchaser should not be bound to carry out his purchase. Thereupon, pursuant to the said writ, the interest of the said Hugh Chisholm in the said land devised to him was regularly offered for sale by the said sheriff as a fee simple absolute, and at the sale the said land was purchased by the respondent, subject to the aforesaid agreement, for the sum of $2,350.

The respondent, however, objected that the restriction in the said will not only constituted a valid restriction upon alienation and rendered the said mortgage void, but also prevented the land devised to Hugh Chisholm from being liable to execution for debt. In all other respects he was willing to accept the title.

The appellants having brought an action for specific performance, it was agreed between the parties to submit the following questions for determination to the court, without pleadings.

1. Did Hugh Chisholm take a fee simple absolute by the said will in the said land, and was he able to convey the same in fee notwithstanding the restriction in the will?

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The Chief Justice.

2. In any event was the fee simple in the land subject to sale under execution as against Hugh Chisholm for his debts?

3. If the court is of opinion that the plaintiffs can make title in either or both ways, judgment is to be for the plaintiffs, otherwise for the defendant.

Meredith C. J., the learned Chief Justice of the Common Pleas, before whom the case was heard, held that the provision in Donald Chisholm's will that no debts contracted by his son Hugh should incumber the land devised to him during twenty-five years after his decease was void, but held further that:

> This court doth declare that the restriction against alienation of the land in question herein contained in the will of Donald Chisholm in the special case set out is a valid restriction upon alienation of the said land, and that the mortgage made by the said devisee, Hugh Chisholm, to the plaintiffs, being against the terms of the said restriction, occasioned a forfeiture of the said devise, whereby the heirs at law of the said testator became entitled to enter upon the said land and doth order and adjudge the same accordingly.
>
> 2. And this court doth further declare that the fee simple in the whole of the said land did not pass by the sale under the said execution against the said Hugh Chisholm, and doth order and adjudge the same accordingly.
>
> 3. And this court doth adjudge that the plaintiffs cannot make a good title in fee simple to the said land, and that the said action be and the same is hereby dismissed without costs.

The plaintiffs now appeal from the said judgment. The case was argued *ex parte* before us by appellants' counsel, counsel for respondent submitting to the judgment of the court without argument.

It is one that has given me much trouble. I am glad to see that the conclusions I have reached will not affect the result. I give my views of it with great diffidence. Though I have to admit that in certain

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respects they come in conflict with those that have hitherto prevailed in many quarters on some of the questions that arise in the case, yet I do not think that I am disregarding any authority that is binding on this court. I certainly do not intend to do so.

First, I fail to understand why the sheriff's sale upon the execution of the judgment for a personal debt of Hugh Chisholm did not convey to the respondent purchaser the fee simple absolute of this property, it being conceded, as held by the court below and not controverted here, that the provision in Donald Chisholm's will that no debts contracted by his son should incumber the land during twenty-five years after his death is void and consequently that the land could be sold under execution for his son's debts. The respondent, of course, bought subject to the Turner mortgage, if valid. But when he gets a conveyance of that mortgage from the appellants, as they agree to do before he takes title, the mortgage and the equity of redemption will be merged in him. It seems to me that under these conditions he would have a perfect title.

However, it is assumed, I suppose, though not exactly put forward in so many words by the learned Chief Justice of the Common Pleas, that because the appellants had taken a mortgage to secure their loan to Hugh Chisholm, they had lost the right they otherwise would have had to execute against the land in question the judgment they had recovered against him; or, in other words, that the provision prohibiting the mortgage of the land by the devisee for his debts was valid though the provision that the land could not be sold under a *fi-fa* for the same debts was void. If such is the law, it would seem to be a very irrational one. If it had been to a third party that a mortgage had been previously given on the land by Hugh

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Chisholm, for another debt, would it have disabled the appellants from executing their judgment against the fee? Or would it be in the power of judgment debtor in the position of Hugh Chisholm to set at naught the judgment creditor's right of execution by giving a mortgage to a third party before the registration of the judgment and the issuance of the execution to the sheriff?

As to the principal question submitted to us at the argument, without dissenting from the conclusions reached by the majority of the court, I would think it immaterial, as between the parties in this case, whether the restraint upon alienation in question is valid or not.

If it is invalid as against public policy, as held by my learned brothers, the fee simple absolute of course passed to the devisee, and the sheriff's sale passed it to the respondent. If the restraint is valid, as held by the court below, the mortgage to Turner in breach thereof is void, but the fee remained in Hugh Chisholm and was conveyed to the respondent by the sheriff's sale. A void act cannot operate a forfeiture. *Quod nullum est nullum producit effectum.* The testator willed this land with prohibition to the devisee to alienate or incumber it. But what is the consequence if he attempts to alienate or incumber? Nothing else but the complete nullity of any act done in contravention of the prohibition, but not forfeiture or nullity of the devise.

"I give you this property," says the testator to the devisee, "but I prohibit you from selling it or incumbering it during 25 years;" or in a more correct construction, "I withhold from you the power of so doing that you would by law have."

Now if the devisee does what he is prohibited from doing, he does what he has not the power to do, and the result is that what he has done is void, and if it is

void, it is in law as if he had not done it; and if he has not done it, it cannot work forfeiture of the devise. It is the prohibited act that alone is void. The prohibition is the law decreed by the testator, and any act done in contravention of that law is void, as is any act done in contravention of any prohibitive law. But the devise holds good. To hold that the devisee had the power voluntarily to forfeit it would be setting at naught the clear intention of the testator. And I take it to be the law that in construing a will the testator's intention is the primary object to be ascertained. Had he intended that a breach of the prohibition should work forfeiture of the devise he would have said so, as was done for instance *inter alia*, in the cases of *Barnett* v. *Blake* (1); *Hurst* v. *Hurst* (2), and *re Porter* (3). But he cautiously refrained from doing so. He, on the contrary, virtually added to the restraint, "but I do not make it a condition of my devise."

By the judgment *a quo* which holds that the restriction in the will under consideration is valid, but that it should be read as a condition of the devise the breach of which annulled it and wrenched the property out of the hands of the devisee, the very object that this testator had in view is defeated. It is not to expose the devisee to be deprived of this property that he attached to the devise the disability to alienate it, but, on the contrary, to force upon him, as it were, for twenty-five years the benefit of the devise; to ensure his holding of the property during twenty-five years; to render it impossible for him, as much as it was in his power to do it, to part with it directly or indirectly. It seems to me illogical that the very act he has forbidden with the view to keep and secure the land in his devisee's hands should be invoked as a

(1) 2 Dr. & Sm. 117. (2) 21 Ch. D. 278.
(3) [1892] 3 Ch. 481.

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reason to turn him out of it. His intention was to take away from him the right he would by law otherwise have had to defeat the object he had in view and to set at naught the provisions he had enacted to force him to execute his decrees. He cannot have intended to leave him the power of voluntarily forfeiting the devise. The law would be inconsistent if it authorised the restraint and at the same time authorised the devisee to brush it away and, if he himself is the sole heir at law, allowed him to so get rid of the restraint. The interpretation, by construction, of the penalty of forfeiture in the will in question would import an intestacy resulting in a gift over of which the testator has not said a word, and bring about the very result he cautiously guarded against for twenty-five years. And the fact that he did not provide for a gift over has great importance in the construction of his will. It shows that he did not anticipate the possibility of a voluntary forfeiture of the devise by his devisee. And he did not intend to leave an intestacy. I would think, consequently, that in any case, the provision in Donald Chisholm's will that no debts contracted by his son should incumber the land devised to him during twenty-five years being void, as held by the judgment appealed from, the execution against Hugh Chisholm of the judgment recovered against him by the appellants bound the land seized, and under the sheriff's sale to the respondent, the fee simple absolute of the said land vests in him. If the restraint is valid, the mortgage is void and his title from the sheriff is good. If the restraint is invalid, the mortgage is valid and as he is the mortgagee and owner of the equity of redemption, the whole estate is vested in him.

By what Fry L. J. said in *Hurst* v. *Hurst* (1), I cannot but admit that he would probably qualify this

(1) 21 Ch. D. 278.

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reasoning as absurd. But I cannot here be bound by that opinion. Even the adherents of the waning colonial servilism that has hitherto found such strong retrenchments in the courts of Canada must concede that we have no claim to the monopoly of absurdities.

In reference to the decision of the Privy Council in *Renaud* v. *Tourangeau* (1), which has been cited at bar, and commented upon in *Earls* v. *McAlpine* (2), I refer to the late Sir William Collis Meredith's judgment in *Bourget* v. *Blanchard* (3). More than usual weight attaches to the judgment of that eminent lawyer in that case upon the cognate question there before him from the fact that it was his opinion that had prevailed in the Privy Council in the *Renaud* v. *Tourangeau* (1) case. Now *Renaud* v. *Tourangeau* (1), as explained in *Bourget* v. *Blanchard* (3), is a clear authority that as the will did not say in that case that the breach of the prohibition would work forfeiture of the bequest, the breach did not work forfeiture. Of course, if it were the express provision imposing forfeiture in a will that made the prohibition illegal, such a provision could not by construction be read in any will if not in it in express terms.

In fine, I have not failed to notice that the heir-at-law is not a party to the case, and that the judgment as to him will not be *res judicata.*

I would have hesitated, under the circumstances, to force this title on the respondent. However, under the form in which the case has been submitted to the court, he must be taken to have consented that the question of its validity should be determined in the absence of the heir-at-law.

The appeal will be allowed, judgment to be entered for the appellants in the action. No costs are allowed to either party in either court.

(1) L. R. 2 P. C. 4 ; 7 L. C. Jur. 238 ; 13 L. C. R. 278 ; 17 L. C. R. 451.

(2) 6 Ont. App. R. 145.

(3) 7 Q. L. R. 322.

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SEDGEWICK J. concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

GIROUARD J.—I have doubts in this case but not strong enough to dissent from the result.

DAVIES J.—The question raised for our decision in this case is whether a general prohibition on alienation attached to a devise in fee of lands which prohibition would, if unlimited, be bad by the rules of Common Law, is made good by being limited as to time. I am of opinion that it is not. The will of Donald Chisholm after devising his farm of 100 acres to his two sons William and Hugh in fee and equally dividing it between them, contained the following provision:

> I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease, and farther, I will that the said parcels of land shall remain free from all incumbrance, and that no debts contracted by my sons, William Chisholm and Hugh Chisholm, shall by any means incumber the same during twenty-five years from the date of my decease.

With the exception of the limitation as to time the restraint upon alienation by the devisees is general. The question is one of real property law, and it is a pure question of authority. The general rule avoiding conditions which prohibited a grantee in fee from alienating his land is to be found clearly laid down in all the earlier books of authority, and is founded upon principles about which there can be no doubt and which are easily intelligible. But there can be equally little doubt that upon this general rule there have been grafted several exceptions. The cases of *Gill* v. *Pearson* (1), in which the judgment of the full

(1) 6 East 173.

Court of King's Bench was delivered by Lord Ellenborough, and the later case of *In re Macleay* (1), decided by Jessell M. R., establish the existence of exceptions to the general rule which it is not necessary for us to call in question. These two cases determine that a restriction upon alienation prohibiting it to a particular class of individuals is good. All the leading text writers upon real property law cite these cases with approval and in my opinion it is too late in the day now for us to call them in question. The whole subject is reviewed exhaustively by Pearson J. in the case of *In re Rosher* (2). The same question that is now before us was there before him and he held that the proviso in the will he was construing amounted to an absolute restraint upon alienation during the life of the testator's widow and that it was void in law. The learned judge, while admitting that authority could be found in the notes to Shepherd's Touchstone, 7th ed., p. 130, for the proposition that a "grantee might also be restrained from alienation for a particular time being a reasonable one," went on to declare, p. 821:

> But there has been no judicial decision to that effect; and it is a curious thing that although Littleton's book is more than 400 years old and although Lord Coke died 250 years ago there is not a single judicial decision to be found in the books shewing that a limitation as to time added to such a condition makes it a valid condition.

He further stated that even without judicial decision, if he found that this had been an "accepted dictum of law," and that by not following it he should be disturbing anything done in former times over and over again on the faith of the dictum, he should feel himself bound by it, and that it would be exceedingly mischievous to attempt to alter any rule which had been adopted and acquiesced in for more than a century. But he does not find that any such rule existed

(1) L. R. 20 Eq. 186. (2) 26 Ch. D. 801.

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with respect to the validity of a general restraint upon alienation being validated by a limitation of the time within which it is to be exercised, and he concludes as follows:

> I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule. So far as I can find that an exception to the rule has been laid down and judiciously decided, I am bound by that exception. But I will not add other exceptions for which I can find no authority and the addition of which to my mind will only introduce uncertainty and confusion into the law which we have to administer.

If an exception to a general rule of law is well established by the cases I am not bound to inquire into the logical sufficiency of the reasons given. And so I do not feel it necessary to discuss the cases of *Gill* v. *Pearson* (1), or *In re Macleay* (2), or to justify the reasons which underlaid these decisions. In allowing this appeal we are, it is true, following the decision of *Re Rosher* (3), but we are not over-ruling either of the other cases above referred to in which limited restraints upon alienation were allowed. The decision we have reached while not being contrary to any judicial decision in England follows that of Pearson J. in *Re Rosher*, (3) and is in line with the late cases of *Re Parry* v. *Daggs* (4); *Corbett* v. *Corbett* (5); and also with *Renaud* v. *Tourangeau* (6); and the Irish case of *Martin* v. *Martin* (7).

We have of course been pressed by the case of *Earls* v. *McAlpine* (8) decided by the Court of Appeal for Ontario in 1881. The restriction upon alienation in that case was no doubt one limited as to time and on the point we have now before us. But the case of *Re Rosher* (3)

(1) 6 East 173.
(2) L. R. 20 Eq 186.
(3) 26 Ch. D. 801.
(4) 31 Ch. D. 130.
(5) 14 P. D. 7.
(6) L. R. 2 P. C. 4.
(7) L. R. Ir. 19 Ch. 72.
(8) 6 Ont. App. R. 145.

had not then been decided, and the authorities cited by Mr. Justice Patterson, namely, *Daniel* v. *Abby* (1); *Doe* v. *Pearson* (2); and *In Re Macleay* (3); while they support the contention that a restriction upon alienation limited to a specified class only may be good, do not support the proposition we are asked to indorse that a general restriction upon alienation which, if unrestricted as to time would be admittedly bad, is made good by a time limitation. It seems to me that a time limitation is necessary in any case where restrictions upon alienations are attempted to be imposed upon a fee simple devise, even with respect to a class of persons; otherwise the devise might be bad as contravening the rule against perpetuities. But I cannot concur in the proposal that we should enlarge the exceptions to the general rule against restrictions upon alienations by the addition of one not at any rate judicially adopted in England and which would give validity to a restriction otherwise bad simply by limiting the time during which it should last. I cannot find any rule for determining how long this time might be beyond that suggested by Mr. Preston in his note to Shepherd's Touchstone, p. 130, that "it must not trench on the law against perpetuities." But while that suggestion with respect to a time limitation may be good and necessary when applied to restrictions limited to a class of persons, and which might otherwise be bad for remoteness, I cannot, either on reason or authority, find that its application to a general restriction bad in itself operates to make that restriction good.

The appeal should be allowed with costs and it should be declared that Hugh Chisholm took a fee simple absolute by his father's will in the lands

(1) Sir W. Jones R. 137. (2) 6 East 173.
(3) L. R. 20 Eq. 186.

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devised to him and was able to convey the same in fee notwithstanding the restriction in the will. And also that the fee simple in the lands was subject to sale under execution as against Hugh Chisholm for his debts.

MILLS J.—This case arose in reference to the construction of a clause in the will of the late Donald Chisholm, of the township of Mosa, in the county of Middlesex and province of Ontario. The testator died on the 27th February, 1887, and at the time of his death was seized, in fee simple, of the south half of lot No. 3, in the eighth concession of Mosa. He made a will which was duly proved, and by which he devised to two of his sons, William and Hugh, his real estate. To William, he devised the east half of the south half of the lot before mentioned; and to Hugh, he devised the west half of the south half of the said lot. The will of the testator contained a clause which restrained the devisees from encumbering, for a number of years, the land devised to them. The clause in question is as follows:

> I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease, and farther, I will that the said parcels of land shall remain free from all incumbrance, and that no debts contracted by my sons, William Chisholm and Hugh Chisholm, shall, by any means, incumber the same, during twenty-five years from the date of my decease.

The question whether or not his absolute restraint of alienation, and the withholding of power to charge the land with the debts of the devisees, is a restraint allowed by law, is the question to be decided.

It is not necessary to enter into a very full discussion of the origin and history of estates in land which the English law permits, and how those estates arose,

with the incidents which the law now attaches to them.

I may say that, at one time, the tenant held whatever estate he possessed from the lord of the fee, for his own life, upon condition of certain service, and he could make no transfer of his tenure to another without his lord's consent. He had sworn fealty to his lord, and was bound to render the necessary service for the estate which he held. Subsequently, the tenant of the fee was permitted to part with a portion of his holding, so long as he retained enough in his possession to give security for the service which, by his oath, he was bound to perform. All this was changed by the statute *quia emptores*, enacted in the eighteenth year of Edward I., and which, while it authorised the tenant to sell his estate in the land, forbade subinfeudation. Thereafter, the holder of the fee had the right to alienate his interest, and to grant an estate in fee simple, and the purchaser stood to the superior lord in the same position as the vendor had done before him. The holder of the fee has, by law, since then, the right to convey away his tenure, and any attempt to restrain him and to limit his exercise of powers which are incident to the estate, are repugnant to it, and therefore void. Littleton, in his works on Tenures, says:

Sec. 360. Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, the condition is void, because when a man is infeoffed of lands or tenements, he has power to alien them to any person by the law. For if such condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore, such a condition is void

But the following section qualifies this and says:

But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which condition does not take away all power of alienation from the feoffee, then such condition is good.

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This is not a general restraint on alienation, but only a restraint which prevented the property from passing into the hands of one who might be an enemy As put by Mr. Stephen in his commentaries:

> It was owing to the power of the nobles to make war upon each other, and the frequent use of this right, which made it necessary that a lord might not have a tenant imposed upon him, or the tenant a lord.

Mr. Stephen says:

> For we may remember that, by the feudal law, a pure and genuine feud could not be transferred by one feudatory to another without the consent of the lord, lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. As the feudatory could not alien it in his lifetime, so neither could he by will defeat the succession by devising his feud to another family, nor even alter the course of it by imposing particular limitation, or by prescribing an unusual path of descent. Nor could he alien the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir. And therefore it was usual, in very ancient feoffments, to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant. And on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not alien or transfer his seigniory without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due; and be able to distinguish a lawful distress for rent, from a hostile seizing of his cattle by the lord of a neighbouring clan. (1)

The restraints upon alienation, which were the logical outcome of the feudal system, were gradually relaxed. There was the law of Henry I which enabled a man to dispose of the land which he himself had purchased, for over them the law recognised in him a more extensive power than over those which had come

(1) Stephens's Commentaries 464, 465.

to him by descent from his ancestors He was not, however, to dispose of the whole of what he had acquired, if by doing so he disinherited his children. He might sell one-fourth of what he had inherited, with the consent of the heir. These restrictions were removed by the statute of *Quia Emptores*, which conferred upon all tenants, whether tenants in chivalry or in sergeanty, the liberty to alien their lands except in the case of the King's tenants *in capite*, subject to the condition that the purchaser of the fee should hold of the chief lord, and not of the grantor. Pearson J., in referring to the restraint upon alienation mentioned by Littleton, says :

> I confess that I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases includes a liberty to alien to J. S. if he chooses to do so.

I think when we trace the history of real property law, that it is not difficult to understand how the limited restraint mentioned by Littleton came into existence. It must not be forgotten that under the feudal system the right of alienation was restrained. That system established certain relations between the lord and his tenant. It was based upon an implied contract upon which the structure of society, as it then existed, rested, and it could not be departed from without the common consent of those concerned. The relaxations in the system are indicative of the changes which society itself was undergoing, and these relaxations did not proceed equally in the direction of all parties concerned. The law, as we would be inclined to make it so as to give to it logical consistency, did not at any time exist.

It is the scientific and systematised view that we get from looking back historically over the field after

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a good deal of progress has been made. It is reasonable to say that where an estate is bestowed, of which the power of alienation is an incident, that one conveying such an estate to another shall not have the power to alter its character, and to make it something wholly different from what it has been made by the law. To do so is to assume the power to make an estate unknown to the law. It is an attempt not simply to convey away an estate, but to exercise a legislative power, and to create a new form of property in land. It was decided in the Wiltes claim of peerage

> that the Crown could not give to the grant of a dignity or honour, a quality of descent unknown to the law,

and much less can a private party create an estate in fee simple divested of an alienable character. When we examine the history of real property, we find that after a long series of years there was gradually attached to it those incidents which it now possesses.

In 1325 complaint was made in Parliament that the rule applicable to tenants in chief of the Crown were being extended to tenants who held of honours, which had fallen into the King's hands. The King acknowledged the distinction, and admitted that, as the lord of an honour, he had only such rights as were given to other lords by the charter.

In 1327, a statute was passed to provide that where alienation was made without a license the King was only entitled to a reasonable fine, and not to a forfeiture of the land.

In 1341, it was suggested in the courts of law that before the thirteenth year of Henry III a tenant in chief might alien without a license from the King.

In 1346, it was asserted and denied that prior to the thirteenth year of Henry III a tenant in chief of the Crown was as free to alien as any other tenant.

In 1352, the question was discussed whether in Henry III's reign the tenant in chief could subinfeudate without license, and it seems to have been held that he could.

In 1355, the lawyers again discuss the subject whether anything happened after the twentieth year of Henry III to prevent subinfeudation by tenants in chief.

In 1360, a statute was passed which confirmed all subinfeudations made under Edward III and earlier Kings (1).

The changes that took place in the law of real property were usually more favourable to the lords than to the tenants. If we look to the charters of the time, it would seem as though from the conquest onward the tenant could alien without the lord's consent; but this was not the case, for we find that in Chester, after the conquest, the confirmation both of the earl and the King was sought, and it is shown by Pollock and Maitland, in their history of the law, that no gift was considered safe that was not confirmed by the King, and that confirmations were paid for, which show that the lord might call in question a feoffment to which he had not given his consent. They also point out that the fee simple is the starting point of English real property law. That the tenant could lawfully do anything which did not damage the interest of the lord. The function of declaring the law fell, in time, to professional lawyers, who favoured men of religion. They were, for the most part, ecclesiastics, and their inclination was to loosen the feudal burden whenever that could be done without prejudice to the King's interest, and they were disposed to concede to the tenant the power of dealing with his own interest in the land. For a time the tenant who

(1) 1 Pollock and Maitland's Hist. Eng. Law, Bk. 2, c. 9.

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wished to alienate had to obtain the consent of his presumptive heir. But early in the thirteenth century this restraint had disappeared, and the word "heir" which at one time meant the party who was to succeed the holder, came to show that the tenant held an estate that would continue as long as any heir of his was living, and so the word indicated the endurance of an estate held by one who might have no heir to succeed.

The King's prerogative grew gradually out of the right allowed to the lord, though it exceeded it. It was first asserted in an Ordinance of 1256, though it was not strictly enforced. It was said that no one could alien unless his assigns had been mentioned. This assumed that the power of conveying away his estate was bestowed upon him by the previous holder, and without it he could not transfer it. There can be no doubt that the use of the term assigns played an important part in the destruction of those old rules by which the alienation of real property was fettered.

The liberty of disposition which the King's courts, in their interpretation of the law, conceded to landholders was so large that it sometimes gave rise to new forms of restraint. As the common law about alienation became clear and well defined feoffors sought to place themselves outside of it by express bargains. Sometimes the stipulation is that the lord shall have the right of pre-emption, sometimes that the lands shall not be conveyed to men of religion. We have seen that the King's tenants *in capite* could never safely alien their lands without the King's license, and if they did the land might be seized by the King as a forfeit, according to the rigour of the old law regulating the relation between lord and vassal. But by the time of Edward III this was thought too severe a penalty; and it was enacted by 1 Edward III, St. 2 c. 12 that the King should not, in such a case,

hold the land in forfeit, but that in all cases of such alienation he should have such a reasonable fine as Chancery might determine. This forfeiture for alienation was wholly taken away, and a fine to be paid by the King's tenants, as a matter of course, was substituted therefor. Some years later, to quiet the title in property, a statute was passed to confirm all alienations made by tenants in chief during the reign of Henry III and before.

The law, as it was ultimately shaped in respect to restraints upon alienation, is very fairly stated by Mr. Cruise in his Digest of the Law of Real Property. He says:

Where a sum of money is charged upon a real estate, which estate comes to a person entitled to the money, if in fee the charge is merged; and where the money is secured by a term of years, or other legal estate, in the third person, there the charge is also merged, except where the creditors are concerned, or where the person becoming entitled to the charge is an infant and dies during his minority, having by will disposed of the charge (1).

A condition repugnant to the nature of the estate to which it is annexed is void in its creation. Thus a feoffment in chief upon condition that the feoffees shall not take profits is void, as repugnant and against law, and the estate given is absolute.

Sec. 22. A condition annexed to the creation of an estate in fee simple that the tenant shall not alien is void, being repugnant to the nature of the estate, a power of alienation being an incident inseparably annexed to an estate in fee simple. * * * *

Sec. 26. If lands be given in tail, upon condition that neither the tenant in tail, nor his heirs, shall alien in fee, or in tail, or for the term of another's life, but only for their own lives, such a condition is good because these alienations are contrary to the Statute *De Donis* (2).

These citations from Cruise are in harmony with nearly all the decisions of recent years. The power of alienation is an inseparable incident to an estate in fee simple and there is no power in the proprietor of such

(1) 1 Cruise Tit. 1s. 49. (2) 1 Cruise Tit. 13.

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an estate to devise it upon condition that the devisee shall have no power to a lienate. In the case of *Re Macleay* (1) the devise was "to my brother John of the whole of the property given to me by my aunt, Clara Perkins, on the condition that he never sells it out of the family" and this restraint Sir George Jessel, the Master of the Rolls, held was a valid condition. There were two previous cases upon which he chiefly relied *Daniel* v. *Ubley* (2) and *Doe d. Gill* v. *Pearson* (3).

In the case of *Daniel* v. *Ubley* (2), a man had devised his lands to his wife to dispose at her will and pleasure, and to give to such of their sons as she thinks best. It was held by Crew C. J. Whitlock, and Dodridge JJ. against Jones J. that the wife had a fee simple in point of interest in the estate, while Jones J. held that she had a life estate with a power to dispose of the fee simple. If Mr. Justice Jones' view were correct there would be nothing in that case at variance with the principle contended for by Pearson J. in *Rosher* v. *Rosher* (4), and this seems to have been the view taken by Parker C. J. in the case of *Tomlinson* v. *Dighton* (5), in which he says "with respect to the first question, viz, what estate passes by the will to Margaret, the testator's wife," we are all of opinion she has but an estate for life, with the power of disposing of the inheritance. And to this the difference is, where a power is given with a particular description and limitation of the estate (as here), and where general, as to the executor to give or sell; for in the former case, the estate limited being expressed and certain the power is a distinct gift, and comes by way of addition; but in the latter, the whole is general and indefinite; and

(1) L. R. 20 Eq. 186.
(2) Sir W. Jones 137.
(3) 6 East 173.
(4) 26 Ch. D. 801.
(5) 1 P. Wm. 149.

as the persons entrusted are to convey a fee, they must consequently, and by necessary construction, be supposed to have a fee themselves. This is an important rule, for distinguishing between a power and an estate *Doe d. Gill* v. *Pearson* (1). Here one having real and personal estate gave by his will several legacies and annuities, which he directed to be paid by his executrices out of his real and personal estate, which he charged therewith; and then devised certain lands, in the County of York, to his daughters Anne Collut and Hannah Collut, subject to certain legacies and annuities, and in case that either of them should have no issue, they or she having no issue should have no power to dispose of her share, except to her sisters, or their children; and he devised all the rest and residue of his real and personal estates to Anne Collut and Hannah Collut in fee, whom he made his executrices. There were three other sisters. On his death, the executrices entered into possession; afterwards Anne Collut levied a fine of her moiety to the use of her husband in fee, and died. The court held that the condition against alienation, except to sisters or their children, annexed to the devise to Anne and Hannah Collut, and their heirs, was good; and that for the breach of it by Anne, in levying such fine, the heirs of the devisor might enter on her moiety, it being a remainder undisposed of by the residuary clause, which was intended to operate upon such things of which no disposition had been made by the will, and not contemplating the devise over of the respective moieties of the daughters on non-performance of the condition; and held, that one of the several heirs of the devisor might enter for non-performance or breach of the conditions, and recover her own share in ejectment. For that where the entry

(1) 6 East 173.

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upon a claim by one of several co-parceners, who make but one heir, is unlawful, such entry made generally will vest the seisin in all as the entry of all. The English cases, apart from these, all recognise the principle that the right of alienation is a necessary incident of the fee.

Chitty J. says *In re Machu:*

> The principle that existed in the minds of the old lawyers is clear; they held that an estate could be limited to a person until the happening of an event, and then over, so that when the event happened the estate in that person ceased, and went over; but that if a deed or will contained a devise or gift of an estate in fee simple, and then went on to state that provided something happened the estate should be defeated, that was a condition, and void because it would not operate as a remainder in common law. Therefore, in the law of real property a distinction was made between a condition pure and simple, and a conditional limitation; and that distinction subsists at the present day.

Ct. Attwater v. *Attwater* (1); *Ware* v. *Cann* (2); *Gulliver* v. *Vaux* (3); *Porter* v. *Baddeley* (4); *Doe d. Stevenson* v. *Glover* (5); *Watkins* v. *Williams* (6); *Shaw* v. *Ford* (7); *In re Rosher; Rosher* v. *Rosher* (8); *In re Parry & Daggs* (9); *Renaud* v. *Tourangeau* (10); *Corbett* v. *Corbett* (11); *In re Machu* (12); *Holmes* v. *Godson* (13); *Fuller* v. *Chamier* (14).

Where property is given absolutely a condition cannot be annexed to the gift inconsistent with its absolute character, and where a devise in fee is made upon condition that the estate shall be shorn of some of its necessary incidents, as that the wife shall not be endowed, or that the husband shall not have curtesy, or that the proprietor shall not have the power to

(1) 18 Beav 330.
(2) 10 B. & C. 433.
(3) 8 DeG. M. & G. 167.
(4) 5 Ch. D. 542.
(5) 1 C. B. 448.
(6) 3 Mac. & G. 622.
(7) 7 Ch. D. 669.
(8) 26 Ch. D. 801.
(9) 31 Ch. D. 130.
(10) L. R. 2 P. C. 4.
(11) 14 P. D. 7.
(12) 21 Ch. D. 838.
(13) 8 DeG. M. & G. 152.
(14) L. R. 2 Eq. 682.

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alien, either generally, or for a time limited, such conditions are void, because they are repugnant to the character of the estate (1).

In my opinion this appeal should be allowed, and it should be declared that Hugh Chisholm took an estate in fee simple, relieved from the restrictions imposed by his father's will upon the sale of the estate, and against incumbering it with any debts which he may contract.

Appeal allowed without costs.

Solicitor for the appellants: *H. C. Becher.*

Solicitors for the respondent: *Stuart, Stuart & Bucke.*

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(1) *Sir Anthony Mildmay's case,* 6 Coke 40*a*; *Mary Portington's case,* 10 Coke 35*b*; *Mandlebaum* v. *McDonell,* 29 Mich. 78.

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THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THE AGRICULTURAL SAVINGS AND LOAN COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Void policy—Renewal—Mortgage clause.

By sec. 167 of The Ontario Insurance Act a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy.

Held, reversing the judgment of the Court of Appeal (3 Ont. L. R. 127), and restoring that at the trial (32 O. R. 369), Girouard J. contra, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval.

Held, per Girouard J. that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy.

The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy.

Quære. Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy?

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of defendant company.

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

(1) 3 Ont. L. R. 127. (2) 32 O. R. 369.

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The facts of the case are stated by Armour C. J. O. in the Court of Appeal as follows:

"By a policy of the defendant company, under the hand and seal of one of its directors, it was witnessed that one Calvin Randolph Annott, Esq., of the Village of Watford, having paid to the defendant company the sum of $26.25 for the insurance against loss or damage by fire (subject to the conditions and stipulations indorsed thereon which constituted the basis of the insurance) of the property thereinafter described to the amount thereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely:—'$300 on the building only of his brick galvanized iron roofed building, 24 x 45, occupied by the assured as a cold storage building, situate and being on a part of lot No. 27, west side of Main street, Village of Watford, Ont., marked No. 1 on diagram, indorsed on assured's application No. 140312, which form part hereof and are his warranty;' '$1,200 on his machinery and fixtures therein attached and affixed thereto;' '$1,500. Fifteen hundred dollars. Loss, if any, under this policy payable to Agricultural Savings and Loan Company, London, Ont.' 'Other concurrent insurance $600 on first item and $700 on second item on Alliance,' 'Subject to mortgage clause hereto attached.' And the defendant company did thereby agree that from the 9th day of May, 1898, until 12 o'clock noon on the 9th day of May, A.D. 1899, and for so long afterwards as the said insured, his or her or their heirs, executors or administrators, should from time to time pay or cause to be paid the sum of $26.25 to the defendant company or to the known agents thereof, on or before the commencement of each and every succeeding twelve months, and the board of directors should agree thereto by accepting the same, the funds and property of the

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defendant company should (subject to the conditions and stipulations indorsed thereon which constituted the basis of that insurance) be subject and liable to pay, reinstate or make good to the said insured, his or her or their heirs, executors or administrators, such loss or damage as should be occasioned by fire to the property therein above mentioned and thereby insured, not exceeding in each case respectively the sum or sums thereinbefore severally specified and stated against each property.

"The 'conditions and stipulations' indorsed on the policy were not the conditions prescribed by the statute, and this policy must be held to be subject not to the conditions and stipulations indorsed thereon, but to the statutory conditions.

"The mortgage clause to which this policy was made subject was as follows:—'It is hereby provided and agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge, and that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates for the use of such increased hazard during the continuance of this insurance. It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed,

it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or at its option the company may pay to the mortgagees the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim. It is also further provided and agreed that in the event of this property being further insured with this or any other office on behalf of the owner or mortgagee, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained. At the request of the assured the loss, if any, under this policy is hereby made payable to the Agricultural Saving and Loan Company as their interest may appear, subject to the conditions of the above mortgage clause.'

"The plaintiffs were the mortgagees of the insured property by virtue of a mortgage bearing date the 7th day of May, 1898, made by Calvin Randolph Annott and one James Annott, who executed the same as surety for the payment of the mortgage money in pursuance of the Act respecting short forms of mortgages, securing payment to them of the sum of $3,000 and interest as therein set forth, which said mortgage contained the following covenant: 'And that the said mortgagors will insure the buildings on the said lands to the amount of not less than three thousand dollars currency.'

" C. R. Annott in his application for this policy in answer to the question, 'What other insurance and where? Name companies and amounts?' said '$1,500

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on above property just being taken to-day in the Alliance Assurance Company.' And by this application the applicant agreed with the defendant company 'that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract,' and on the margin of the application appeared these words: 'Loss, if any, payable to the Agricultural Savings & Loan Co., London, Ont., as their interest may appear.'

"Prior to the date of this policy and on the 25th day of April, 1898, C. R. Annott had insured the property covered by this policy in the Perth Mutual Fire Insurance Company for three years from that date in the sum of $4,000, which insurance was on the 14th April, 1899, cancelled by that company.

"The insurance effected by this policy was renewed by the following renewal receipt:

'THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

'Receipt No. 160389. Renewing Policy, No. 3732312
Sum insured, $1,500. Premium, $26.25.

Received the 9th day of May, 1899, from C. R. Annott, Esq., the sum of twenty-six 25-100 dollars, being the premium for the renewal of policy above named to the ninth day of May, nineteen hundred.

Not valid until countersigned by the company's authorized agent. at Watford.

Countersigned at Watford, this
8th day of May, 1899.
W. E. FITZGERALD,
Agent.

G. F. C. SMITH,
Resident Secretary,
Canada Branch."

On February 20th, 1900, the insured premises were destroyed by fire. The insurance company refused to

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pay the policy on several grounds which they pleaded in the action, namely, that the mortgagees could not sue in their own names; that the non-disclosure of the insurance in the Perth Mutual avoided the policy; that the policy had been cancelled before the fire; and that there had been a material increase of the risk by a change in the use of the premises. The mortgagees met these objections by contending that the policy being a deed poll in which they were named as having an interest entitled them to sue; that the policy in the Perth Mutual was cancelled before the renewal sued on which was a new contract and not affected by the non-disclosure; that the alleged cancellation of the policy in suit was made without authority; and that there was no increase of risk. They also contended that the mortgage clause protected them against the concealment of the original action.

The Court of Appeal held against this last contention but decided in favour or the plaintiffs on the other grounds reversing the judgment of Mr. Justice Rose at the trial by which the action was dismissed. The insurance company appealed.

Riddell K.C. and *Hoskin* for the appellants. The policy was void for non-disclosure under the statutory conditions (1).

Irrespective of these conditions the policy was void at its inception. See *Clarkson* v. *Macmaster & Co.* (2); *McCrea v. Waterloo Co. Mut. Ins. Co.* (3); *Venner* v. *Sun Life Ins. Co.* (4); *Thomson* v. *Weems* (5).

The policy being void the renewal had no effect. *Howard* v. *Lancashire Ins. Co.* (6); *London West* v. *London Guarantee & Acc. Ins. Co.* (7); *New England Ins. Co.* v. *Wetmore* (8).

(1) R. S. O. [1897] ch. 203, secs. 168, 170.
(2) 25 Can. S. C. R. 96.
(3) 1 Ont. App. R. 218.
(4) 17 Can. S. C. R. 394.
(5) 9 App. Cas. 671.
(6) 11 Can. S. C. R 92.
(7) 26 O. R. 520.
(8) 32 Ill. 221.

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The contract of insurance was not with the mortgagees, and they have no right to sue. May on Insurance (4 ed.) vol. 2 sec. 424; *Tweddle* v. *Atkinson* (1); *Ex parte Richardson* (2); *In re Rotherham A. & C. Co.* (3); *Livingstone* v. *Western Assurance Co.* (4).

The mortgage clause does not protect the mortgagee against defects in the application but only applies to acts of the mortgagor after the policy is issued. *Omnium Securities Co.* v. *Canada Fire Ins. Co.* (5); *Davis* v. *German-American Ins. Co.* (6).

The risk was materially increased by the premises being left vacant. *McKay* v. *Norwich Union Ins. Co.* (7); *Hervey* v. *Mutual Fire Ins. Co.* (8); *Kuntz* v. *Niagara District Fire Ins. Co.* (9); *Sovereign Fire Ins. Co.* v. *Moir* (10); *Guerin* v. *Manchester Fire Assurance Co.* (11).

The respondents surrendered the policy so far as their interest was concerned, and it is immaterial in this action whether the rights of the mortgagor remain or not. *Marrin* v. *Stadacona Ins. Co.* (12); *Schwarzchild* v. *Phœnix Ins. Co.* (13).

It is claimed that the 19th statutory condition was not complied with. But that only provides for one mode of cancelling a policy and does not prevent the parties from adopting another. *Schwarzchild* v. *Phœnix Ins. Co.* (13).

Bayley K.C. and *Aylesworth K.C.* for the respondents. The mortgagees had a right to sue, the policy being a deed poll and mentioning them as parties

(1) 1 B. & S. 393.
(2) 14 Ves. 184.
(3) 25 Ch. D. 103 at p 111.
(4) 16 Gr. 9.
(5) 1 O. R. 494.
(6) 135 Mass. 251.
(7) 27 O. R. 251.
(8) 11 U. C. C. P. 394.
(9) 16 U. C. C. P. 573.
(10) 14 Can. S. C. R. 612.
(11) 29 Can. S. C. R. 139.
(12) 43 U. C. Q. B. 556; 4 Ont. App. R. 330.
(13) 115 Fed. Rep. 653.

entitled to payment. *Green* v. *Horne* (1); *Mitchell* v. *City of London Fire Ins. Co.* (2); *Bower* v. *Hodges* (3); *Gandy* v. *Gandy* (4).

As to concealment of a prior insurance we contend that the renewal is a new contract the risk being a "mercantile" risk which the statute only allows to continue for one year. See May on Insurance (4 ed.) sec. 70*a*; Holt on Insurance, sec. 95.

A fire policy differs from a life policy which is a continuing insurance so long as the premiums are paid. *New York Life Ins. Co.* v. *Statham* (5); *Long* v. *Ancient Order United Workmen* (6).

The plaintiffs had no power to cancel the policy. See *Caldwell* v. *Stadacona Fire & Life Ins. Co.* (7); *Morrow* v. *Lancashire Ins. Co.* (8).

There was no material increase of risk. The use of the premises was changed from cold storage to ordinary storage, the insurance rate being the same for both. See *Ardill* v. *Citizens Ins. Co.* (9); *Johnston* v. *Dominion Grange Mut. Fire Ins. Co.* (10).

The CHIEF JUSTICE.—I would allow this appeal and restore the original judgment which dismissed the respondents' action.

There never was in law a contract by the appellants to insure this property, and the policy dated the 9th of May, 1898, was vitiated by fraud *ab initio*. The essential allegations of the respondents' statement of claim are not proved. The expressions "continued insurance" and "renewed insurance," as I view the case, are therefore inaccurate, to use an euphemism. It seems to me

(1) 1 Salk. 197.
(2) 12 O. R. 706.
(3) 13 C. B. 765.
(4) 30 Ch. D. 57.
(5) 93 U. S. R. 24.
(6) 25 Ont. App. R. 147.
(7) 11 Can. S. C. R. 212.
(8) 29 O. R. 377; 26 Ont. App. R. 173.
(9) 22 O. R. 529; 20 Ont. App. R. 605.
(10) 23 Ont. App. R. 729.

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inconsistent and illogical, after determining that the first policy was invalid, to assume that it could be in law continued or renewed, without waiver or estoppel which are not, in the least, contended for here.

There was by the respondents, in their argument at bar, a misapplication of the Ontario Insurance Act. The insurance of a mercantile risk, it is true, sec. 167, cannot be for more than one year, and may be renewed by renewal receipt instead of a policy. But clearly what can be renewed is a valid contract, a prior valid policy. There is no insurance of a mercantile risk if there is no insurance at all.. And the statute does not say and cannot be construed as intending to say that a contract that never existed can be renewed; it has no application whatever when there has been no prior insurance.

Then the so-called renewal receipt is not a new contract, since there had been no prior one. It is the only contract, if any, that had existed between the appellants and the insured. Now the insured obtained the appellants' assent to this contract by his concealing from them that he had previously deceived them. By applying for a renewal, instead of a new policy, he impliedly represented to them that he had previously a valid contract with them, which he knew was a false representation. He induced them by his conduct to believe in a state of facts which, to his knowledge, was not true. By the very form and terms of the receipt, he knew that they contracted with him on the assumption that he had been insured with them previously, and he, knowing the contrary, suppressed the truth from them, and that, under the circumstances, was in law equivalent to a fraudulent misrepresentation.

As to the respondents' contention that they are protected by the mortgage clause we disposed of that at

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the hearing. That clause, as held in *The Omnium Securities Co.* v. *The Canada Fire and Mutual Insurance Co.* (1), applies only to the subsequent acts of the insured.

The United States decisions to the contrary cannot be followed.

It is moreover doubtful, in this case, if this mortgage clause can be read into the contract between the appellants and the insured.

The first contract being invalid the mortgage clause should share its fate. However, this is immaterial in the view I take that the clause, assuming it to form part of the contract, affords no protection to the respondents in this case.

SEDGEWICK J.—I concur in the judgment of Mr. Justice Davies.

GIROUARD J.—The action arose out of a policy of fire insurance issued in the City of Montreal by the appellants in favour of one Calvin Randolph Annott on the ninth of May, 1898, for $1,500, for one year, and renewed at the end of that year, on property situated in the Village of Watford, in Ontario. The respondents held a mortgage on that property made on the seventh of May, 1898, and the loss, if any, under the policy was made payable to the respondents.

The appellants contend, among other things:

1. Prior insurance with the Perth Mutual not disclosed, and even misrepresentations in this respect in the written application for the policy;

2. The respondents are not the proper parties to sue upon the said policy; and

3. Material facts and circumstances in the risk omitted at the time of the contract of insurance set forth in the statement of defence.

(1) 1 O. R. 494.

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The trial judge, (Rose J.,) dismissed the action upon the first ground. But, on appeal, this judgment was reversed upon both the first and the second grounds. Without expressing any opinion upon these two points, which present serious difficulties, I think the appellants are entitled to judgment upon the third ground, namely that, at the time of the renewal, the insured had not disclosed material facts and circumstances in the risk, whether requested to do so or not.

The conditions under which the policy was issued are the "statutory conditions" contained in chapter 203 of the Revised Statutes of Ontario, 1897.

Section 167, paragraph (1) provides that contracts of fire insurance of "mercantile and manufacturing risks shall, if on the cash system," as this risk certainly was, "be for terms not exceeding one year." At the time of the renewal, therefore, a new contract of insurance was entered into, the renewal receipt being evidence of it instead of a policy. Section 167, paragraph (2), provides for renewal "by renewal receipt instead of a policy," and section 168 adds that this renewed contract shall be subject to the same statutory conditions.

Section 168, paragraph 1, under the heading "statutory conditions," declares that

> if any person or persons insures his or their buildings or goods, and * * * * misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

The present case comes within this section of the Ontario statute. The insured obtained his policy, notwithstanding the misrepresentation in his written application that there was only one prior insurance with the Alliance for $1500, whereas there was another one for $4,000 with the Perth Mutual, which was

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unknown to the appellants. True, he allowed this prior policy to drop during the currency of the first year, not being able to pay the premium for the same, and at the time of the second contract this objection did not exist. Probably the company cannot plead prior insurance, but can they not allege misrepresentation and omission of material facts at the time of the renewal? I think that, at that time, the insured was bound to disclose his false representation with regard to the prior insurance and also the circumstances of its surrender. These facts and circumstances, in my humble opinion, were material and should have been made known to the company at the time of the renewal in order to enable it to judge of the risk it undertook especially as the renewal, under the statute of Ontario, is equivalent to a new and separate contract, as held by the Court of Appeal, and correctly held it seems to me. Applying, therefore, par. 1 of section 168 of the Ontario Insurance Act, I have come to the conclusion that the contract of insurance sued upon is of no force, null and void.

The appeal should, therefore, be allowed and the action dismissed with costs.

DAVIES J.—This was an action brought by the mortgagees, the above named respondents, against the insurance company (appellants), to recover the amount of a policy issued by the latter for $1,500 on a building and machinery and fixtures therein, used as a cold storage building. The insurance had been effected on the application of the owner and mortgagor, one C. R. Annott, and pursuant to a general covenant to insure contained in his mortgage. In his application, Annott had answered in reply to the questions,

What other insurance and where? Name companies and amounts? $1,500 on above property just being taken to-day in the Alliance Assurance Co.

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In answer to the further question:

State fully the applicant's interest in the property, whether owner, mortgagee or lessee?

he had answered that he was "the owner in fee simple," and that

the property insured was mortgaged to the Agricultural Savings and Loan Co. of London (the respondents), for $3,000.

He also stated the cash value of the property to be $7,000. At the foot of the questions answered by the applicant and forming part of his application was the following covenant or agreement which was signed by him.

> And the said applicant hereby covenants and agrees to and with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same shall be held to form the basis of the liability of the said company, and shall form part and be a condition of this insurance contract. It is further agreed between the contracting parties that if the agent of the company fill up the application he will, in that case, be the agent of the applicant and not the agent of the company.

The application also provided that loss, if any, should be made payable to the Agricultural Savings and Loan Co., of London, as their interest might appear.

The policy issued pursuant to this application was what was known as a "mercantile risk" on the cash system and by the terms of the Ontario statute governing such contracts, section 167, c. 203, was obliged to be for a term not exceeding one year.

Sub-sec. 2 of the above section provides that;

> Any contract that may be made for one year or any shorter period on the premium note system, or for three years or any shorter period *on the cash system* may be renewed at the discretion of the board of directors by renewal receipt instead of policy on the insured paying the required premium, etc.

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The policy issued to Annott pursuant to his application made the loss, if any, under it payable to the mortgagees the respondents, and declared, following the application, that other concurrent insurance was $1,500 in the Alliance Insurance Co. The policy was, on its face, made subject to "mortgage clause thereto attached" which clause amongst other things provided that

the insurance as to the interest only of the mortgagees therein should not be invalidated by any act or neglect of the mortgagor or owner of the property insured nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

At the time this insurance was effected there was not only the concurrent insurance of $1,500 in the Alliance Insurance Company, as stated in the application of Annott, but there was also another policy of insurance on the same property outstanding in the Perth Mutual Fire Insurance Company for the sum of $4,000, and of which the applicant said nothing, which made a total of $7,000 existing insurance, if all the policies attached, or the *full value of the property*, as given by Annott in his application.

This policy of the Perth Mutual, although in force at the time of the application for insurance to the appellant company, had ceased to exist, either by cancellation or by failure to pay the renewal premiums, some time before the 9th of May, 1899, on which date the receipt was issued by the appellant company to Annott in renewal of the contract and policy made and issued by them to him on the 9th of May, 1898. That receipt was as follows:

RENEWAL RECEIPT.

The Liverpool and London and Globe Insurance Company.

Receipt No. 160,389. Renewing Policy, No. 3732312.

Sum insured, $1,500. Premium, $26.25.

Received the 9th day of May, 1899, from Calvin Randolph Annott, Esq., the sum of twenty-six $\frac{25}{100}$ dollars, being the premium for the renewal of policy above named, to the 9th day of May, nineteen

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hundred. Not valid until countersigned by the company's authorized agent at Watford.

Countersigned at Watford, this
8th day of May, 1899.

W. E. FITZGERALD, *Agent.*

G. F. C. SMITH, *Resident Secretary, Canada Branch.*

Annott, on whose application the policy issued, left the country after the renewal receipt was issued, and in February, 1899, the property insured was destroyed by fire, and this action was brought by the respondents, the mortgagees, to whom the policy, in case of loss, was made payable in their own name alone.

The late Mr. Justice Rose, before whom the action was tried, dismissed it on the ground of the non-disclosure by the applicant, Annott, at the time he made his application, of the existence of the $4,000 insurance in the Perth Mutual Fire Insurance Company, and held that the subsequent payment of the renewal premium could not operate to validate an invalid policy.

Many other important questions were afterwards raised in the Appeal Court of Ontario, and amongst them was one challenging the right of the plaintiffs, as mortgagees, to sue in their own name on the insurance contract. The plaintiffs contended that their mortgage contained a general covenant by the mortgagor to insure for $3,000; that the policy sued on was one of those taken out by the mortgagor in compliance with his covenant and contained not only a provision making the loss, if any, under it payable to them as mortgagees, but was also issued expressly subject to what was known as the "mortgage clause" and which was attached to the policy. It was contended by them that under such a policy and mortgage clause they had a beneficial right and a beneficial interest, and that, without their consent, the insurance company and Annott could not have cancelled the policy before a loss or made accord and satis-

faction with respect to it after a loss, and that the mortgage clause constituted a specific and independent agreement with them, apart from Annott, which entitled them to sue on the policy. On the other hand, the company submitted that the policy was under seal and the covenants and agreements to pay in it were with Annott, the applicant, and with him alone, and that, as there was no assignment of the policy, no action would lie against them on it unless Annott was, at any rate, one of the plaintiffs.

The question is one of some doubt and there are some observations made in cases already decided in this court which seem to support the appellant company's contention, but it is not necessary for us to decide the point on this appeal. The decisions upon the point in the courts in the United States do not seem to agree as to the reason of the rule permitting mortgagees to sue in their own names nor as to the precise extent of the rule, while in England there does not appear to be any decision upon this special point. It is difficult to understand why mortgagees desirous of securing themselves collaterally by insurance upon the mortgaged property should not either have the policy assigned to them or so framed as to exclude doubts of their right to sue in their own name and without joining the mortgagor. One of the learned judges who delivered the judgment appealed from, Mr. Justice Osler, and whose reasons are stated in a similar case heard at the same time and brought by the mortgagees (appellants) against the Alliance Assurance Company (1), stated that in the case at bar,

> The policy contained what was known as the subrogation or mortgage clause which is a contract by the company directly with the mortgagees, and in terms expressly renounces the right of the com-

(1) 3 Ont. L. R. 141.

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pany to set up as a defence against the mortgagees any act or neglect of the mortgagor. There was, therefore, no difficulty in holding, in that case, that neither the omission of the insured to communicate to the insurance company the existence of the policy in the Perth Mutual Insurance Company, nor the alleged change of occupation, was any answer to the action on the policy at the suit of the mortgagees whose right to sue did not rest solely upon the "loss if any" clause.

I have already stated that it is not necessary on this appeal for us to determine, and we do not determine, whether such a mortgage clause as was inserted in this policy gave the mortgagees such a beneficial right and interest or constituted such a direct contract between the mortgagees and the insurance company as would enable the former to sue in their own name alone and irrespective of Annott. But we are all of the opinion that whether there was or was not such a direct contract, it did not cover or relate to the statements or omissions made by the applicant, Annott, in his application for insurance and which were expressly made

> the basis of the liability of the company, and a part and a condition of this insurance contract.

In our opinion the provision in the mortgage clause already quoted in words by me to the effect that

> the insurance should not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.

had reference to the subsequent acts or neglects of the mortgagor only and did not apply to his application for insurance or his statements or omissions therein.

The question which was argued at great length and with great ability before us, and on the true solution of which this appeal depends, was whether there was any valid contract of insurance at all existing, at the time the fire took place, with the London and Liverpool and Globe Insurance Company, and we are of the opinion that there was not.

The application on which the contract was first entered into contained the express covenant of the applicant which I have already set out, and which was declared to *form the basis of the liability of the company and a part and to be a condition of the insurance contract.*

That covenant was that the answers of the applicant immediately foregoing to the questions put to him were a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured so far as they were known to the applicant and material to the risk. It was admitted that Annott knew of the insurance policy for $4,000 in the Perth Mutual, that he concealed the fact of its existence from the Liverpool and London and Globe Insurance Company to whom his application was being made, that the fact was a material one to be known to the insurance company to which he was applying, that its concealment sufficed to have avoided the policy issued on his application. In my judgment the truth of the representation made of these material facts was a condition precedent to the risk attaching at all. I am clearly of the opinion that there was not any binding insurance contract existing when the renewal premium was paid and the renewal receipt issued on the 9th of May, 1899. If the premises insured had been burnt during the term of the year for which the policy in this case was issued and whether before or after the Perth Mutual insurance policy was cancelled or expired, no action would have lain against the present appellants, the Liverpool and London and Globe Insurance Company, either in the name of the mortgagor, Annott, or the mortgagees, the Repondents, or in their joint names. The condition precedent to the existence of any contract on which an action could be brought had not been performed.

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Whether fraudulently or not makes no difference, the existence of the $4,000 of insurance had been suppressed. Mr. Aylesworth did not argue that any valid and binding contract existed before the renewal receipt, but simply that the contract was a voidable one and not a void one. Then, as already stated, I am of the opinion that the applicant's covenant, already set out, making the truth of his answers to the questions put to him on matters within his knowledge and material to the risk the basis of the liability of the company and a condition of the contract, settles the question. The truthfulness of the answers is a condition precedent to the liability of the company attaching.

If any doubt remained upon the point, it would seem to me to be removed by the first statutory condition which was admittedly binding on this contract and which expressly provides that the misrepresentation or suppression of circumstances material to the risk by the applicant renders the insurance of "no force" in respect of the property in regard to which the misrepresentation or omission is made.

Then, did the acceptance of the renewal premium and the issuance by the insurance company of the renewal receipt, in ignorance of the truth of the facts which Annott had suppressed or misrepresented constitute a renewal or a new contract? The statute already quoted only pretends to give to the renewal receipt efficacy so far as there was a prior valid contract existing. It does not give and was never intended to give to the renewal receipt the effect of reviving a void contract or one which was of "no force." The Act assumes the existence of a valid policy and points out a simple mode by which it may be renewed. But, if there was not originally a valid policy of insurance there cannot be a renewal of it.

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Nor, apart from the statute, do I think that there was any new contract, and that for the reasons already given. The original contract or policy was of "no force" and the condition necessary to liability attaching on the part of the company never existed.

The appellants' policy was subject to the statutory conditions (1).

Condition (1) already referred to, provides;

If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

There can be no question that the knowledge of the amount of insurance already on the property was very material to the risk and necessary to be known to the appellants "in order to enable it to judge of the risk" it was undertaking, and being withheld and misrepresented in the answers made by the applicant to the questions put to him and which answers he agreed should form the basis of the liability of the company and be a condition of the insurance contract, the risk never attached. If the risk never attached before the issuance of the renewal receipt, what was there to renew? If the original contract had been voidable merely and not void, there might have been colour for the argument that the renewal receipt issued after the Perth Mutual policy had expired operated in some way as a renewed contract. But without passing upon that, I am of opinion that once it is established that the original contract either by virtue of statutory condition (1) or of the express agreement of the applicant, or of both combined, was of "no force," and that the

(1) R. S. O. [1897] ch. 203, s. 168.

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risk never attached, the mere receipt of another and subsequent premium by the company in ignorance of the material facts could not operate to instil life into that which was lifeless or give virtue to that which was, otherwise, without it. It cannot be successfully argued that the renewal receipt created a new contract not dependent upon the policy, or of which the latter did not form part. Such an agreement would, of course, be fatal to the plaintiffs' right to sue, which, if it exists at all, must only do so by virtue of the covenant to insure in their mortgage coupled with the mortgage clause in the policy. But on its face it is apparent that no new contract was intended to be made, but that the old contract as contained in the policy and application referred to in the receipt was intended to be renewed.

The money was paid and received and the receipt given on the assumption by both parties that there was a valid existing contract which could be renewed and continued in this way. The facts when proved established that no such contract did exist. It could not, therefore, be continued, nor can it be said to be renewed either under or outside of the statute, for the plain and simple reasons that the misrepresentation or non-representation of facts material to the risk which prevented the original policy from ever attaching, would operate to prevent the law creating out of the payment of the premium a new contract based upon the old one which in law did not exist.

I think the appeal should be allowed with costs.

MILLS J.—I concur in the above judgment of Mr. Justice Davies.

Appeal allowed with costs.

Solicitors for the appellants: *Hoskin, Ogden & Hoskin.*

Solicitors for the respondents: *Bayly & Bayly.*

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

AND

FRANKEL BROTHERS (PLAINTIFFS)..RESPONDENTS.

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*Nov. 18.
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*Feb. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railways—Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.

F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G. T. R. had no station at Sunnyside the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G. T. R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in Oct., 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to Jan. 2nd, 1900, five cars, one addressed to the Company and the others to themselves at Sunnyside. On Jan. 10th the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th F. Bros. were notified that the cars were there subject to their orders and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence and negotiation they took

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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them away in the following October and brought an action against the G. T. R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills.

Held, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them.

The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head.

Held, reversing such decision, Mills J. dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring a further action should they see fit.

APPEAL from a decision of the Court of Appeal for Ontario setting aside the judgment at the trial which awarded the plaintiffs damages and costs against the defendant company as common carriers and ordering a reference to ascertain the damages against them as warehousemen.

The facts of the case as stated by Armour C. J. O. in the Court of Appeal, will be found in the judgment of Mr. Justice Sedgewick published herewith. They are sufficiently set out also in the above head-note.

Nesbitt K.C. for the appellant. The consignees could accept the iron at Swansea; *London & North Western Railway Co.* v. *Bartlett* (1); and therefore they could reject it there.

On the refusal to accept, the transitus was at an end; *Hudson* v. *Baxendale* (2); and the defendants

(1) 7 H. & N. 400. (2) 2 H. & N. 575.

then became involuntary bailees and not liable except for negligence; *Heugh* v. *London & North Western Railway Co.* (1); or rather for gross negligence; *Giblin* v. *McMullen* (2).

Shepley K.C. and *Baird* for the respondents. The defendant company were agents of the plaintiffs to carry the iron to Sunnyside and could not be relieved of their obligation as carriers without the plaintiffs' consent. See Hutchison on Carriers, 2 ed., sec. 395.

As to the delay being caused by the act of God see Hutchison on Carriers, 2 ed., sec. 174.

TASCHEREAU J.—I am of opinion that the appeal should be allowed.

SEDGEWICK J.—The plaintiffs' (respondents') claim is based upon the alleged failure of the defendants (appellants), to carry five car loads of scrap iron to, and deliver it at Sunnyside, where the mills of the McDonell Rolling Mills Company are situate.

The trial judge, Lount J., held that there had been a breach of the contract alleged and awarded damages, and he dismissed a counterclaim of the defendants for demurrage or car rental claimed by the defendants because of the delay of the plaintiffs in unloading the scrap iron.

The defendants appealed to the Court of Appeal for Ontario, contending that they had performed their contract and that, even if they had not, the damages were assessed upon a wrong basis and that the counterclaim ought to have been allowed.

In the Court of Appeal Maclennan J. A. was of opinion that the appellants had performed their contract and that the action ought to be dismissed. Armour C.J.O. was of the same opinion as regards the

(1) L. R. 5 Ex. 51. (2) L. R. 2 P. C. 317.

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case made on the pleadings, but he thought the evidence justified a judgment in favour of the plaintiffs, (respondents), upon an entirely different claim which he thought ought to be substituted for that set out in the statement of claim. Moss J. A. agreed with Armour C.J.O. and Maclennan J.A. as to the original cause of action, but he also thought that the plaintiffs should succeed on a claim which they had never set up and which he does not state in exactly the same way as Armour C.J.O.

The plaintiffs have never amended, nor asked leave to amend, their pleadings so as to make either the claim suggested by Armour C.J.O. or that suggested by Moss J.A. Osler J.A. agreed with the trial judge that there was a breach of the contract of carriage but he did not agree with his method of assessing damages; on the contrary he joined with Armour C J.O. and Moss J.A. in ordering a reference to ascertain the damages. Lister J.A. who was present when the case was argued in the Court of Appeal, died before judgment was pronounced.

The defendants' appeal from the judgment dismissing the counterclaim was dismissed by the Court of Appeal, no reason being given, and they now appeal to this court.

The facts are stated by Armour C.J.O. as follows:

> The defendants had a station on their line west of Toronto called Swansea, and between Swansea and Toronto, and about a mile east of Swansea, was Sunnyside, where the rolling mills of the McDonell Rolling Mills Company were, but where the defendants had no station, but there was a switch about three hundred feet long running from the main track to the defendants' railway into the rollings mills, and freight for the rolling mills was handled by the station agent of the defendants at Swansea and could be sent to the rolling mills by this switch.
>
> The plaintiffs carried on business in Toronto and were dealers in scrap iron and had been for a considerable time sellers of scrap iron to

the Rolling Mills Company, which they had purchased in different places.

In April 10th, 1897, the plaintiffs wrote to the station agent of the defendants at Swansea: "We authorise you to deliver all cars which may arrive at Swansea addressed to us to McDonell Rolling Mills Co. and oblige." And on December 1st, 1897: "Kindly deliver all cars addressed to our order Swansea or Sunnyside to McDonell Rolling Mills Co., and oblige." And again, on May 11th, 1899, "We have your advice regarding car No. 35,810 ex Belleville. Kindly forward same as usual to McDonell Rolling Mills Co. You are holding a general order to forward such cars to McDonell Rolling Mills Co., and this order is good until cancelled by us."

In October, 1899, a contract was made for the sale of scrap iron by the plaintiffs to the Rolling Mill Company, evidenced by the following document: "October 28th, 1899. McDonell Rolling Mills Co., Sunnyside, Ont.,—Dear Sirs,—We herewith beg to inform you that our tender on scrap iron was accepted and we herewith confirm having sold to you about 400 tons of scrap, consisting of the following: About 100 to 150 tons of ship iron; about 50 to 100 tons of boiler plate which may be soft steel, and about 200 tons of No. 1 collection and piling scrap. Price $23.50 per net ton F.O.B. your works. Terms as usual. Kindly confirm this. Yours truly, Frankel Bros."

In fulfilment of this contract the plaintiffs caused to be shipped the five cars in question in this suit, which were numbered, sent to, and arrived at Swansea as follows:

FREIGHT NOT PAID.

Car No.	Sent.	Arrived.
19496	Nov. 30, 1899.	Dec. 11, 1899.
28610	Dec. 23, 1899.	Jan. 1, 1900.

FREIGHT PAID.

29090	Dec. 27, 1899.	Jan. 15, 1900.
62780	Jan. 4, 1900.	Jan. 15, 1900.
60071	Jan. 2, 1900.	Jan. 17, 1900.

Car No. 62,780 was shipped from Toronto, and by the shipping receipt was addressed "McDonell Rolling Mills, Sunnyside;" all the other cars were addressed "Frankel Bros., Sunnyside, Toronto," except one which was addressed "Frankel Bros., Sunnyside Mills, Toronto."

Notice of the arrival of each of these cars was sent to the plaintiffs and to the Rolling Mills Company.

After two of these cars, numbered 19496 and 28610 had arrived and on the 10th January, 1900, the Rolling Mill Company wrote to the

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plaintiffs as follows: "We beg to notify you that we will not accept delivery of any more scrap iron in cars until further arrangements are made; our agreement with you was for a special lot of about 400 tons composed of strictly No. 1 wrot and a quantity of soft steel boiler plate at the high price of $23.50 per net ton at our works, but the scrap you have been delivering to us in cars is composed of all kinds of mixtures invoiced to us as No. 1 wrot iron; therefore we cannot accept delivery of mixed cars until arrangements are made as to price to be paid for different kinds. The Grand Trunk agent at Swansea informed Mr. McDonell this morning that there were nine cars there loaded with scrap iron under demurrage and subject to your orders and his orders are not to deliver any of those cars until demurrage is paid. We find, on examining the cars at Swansea, they are all loaded with mixed material, which is not included in our agreement with you. Hoping to hear from you in the matter, we remain."

Immediately after the receipt of this letter, according to McDonell, and about the 20th of January, according to Lee Frankel, the latter and McDonell went to see the officials of the defendants respecting the demurrage therein referred to, and the latter represented that, as the cars had not gone to their destination, the rolling mills, demurrage should not be charged, and the claim for demurrage was abandoned.

The station agent swore that McDonell, the manager of the Rolling Mills Company, refused to receive either two or three of the five cars about the middle of January, and that he refused to receive the residue of them before the end of January, and it is plain, from the evidence of McDonell, that before the end of January he had refused to receive the whole of the five cars, and he said that, so far as the agent was concerned, it would have been idle to send them to Sunnyside, and that he would not have taken them if they had been sent without he had made arrangements with the plaintiffs, or without further instructions to the agent, and he never gave such instructions and never countermanded such refusal.

When cars containing scrap iron sent by the plaintiffs to the Rolling Mills Company arrived at Swansea, the station agent generally awaited McDonell's instructions before sending them down to the rolling mills, but sometimes they were sent without his instructions, but, if they contained material not according to contract or not suitable for the purposes of the rolling mills he would refuse to receive at Swansea, if there, or at the rolling mills, if sent down there without his orders, and would notify the plaintiffs of his refusal, and they would sometimes arrange with him to receive the cars and take from them what material suited them and to send the balance back on the cars.

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And with respect to such dealing the station agent of the 3rd of February, 1900, wrote to the plaintiffs the following letter: "Mr. H. E. Whittenberger, our train master, London, was here last week, and informed me that cars that are only partly unloaded at McDonell's and sent back here to finish unloading must be charged haulage for same. I presume the usual charge of $2.50. He told me I should have done so in every case."

In answer to a telephone message from the plaintiffs the station agent at Swansea on the 3rd of February, 1900, sent to them a list of the cars sent by them and then at Swansea, eight in all, including the five in question, with the weights, accompanied by the following letter indorsed thereon: "These cars are all here at Swansea and will be sent down to McDonell's siding in order marked on weighing."

The station agent explained in his evidence that when he said the cars would be sent down to McDonell's siding he said so in anticipation that some arrangement would be come to between the plaintiffs and McDonell by which McDonell would agree to receive them.

On the 4th of February, 1900, the station agent, the cars of which he sent the plaintiffs a list being in the way of the traffic of the defendants' railway, had them run up the belt line to be out of the way of such traffic, and while on the belt line, in a cutting, a thaw set in, and clay from the embankment ran down and covered their wheels up to the axles and then frost setting in froze them fast.

The station agent swore that when McDonell refused to receive the two or three of the five cars about the middle of January, he telephoned the plaintiffs to that effect, and that when McDonell refused to receive the residue of them before the end of January, he again telephoned the plaintiffs to that effect, but it was denied that the plaintiffs ever received such telephones and McDonell said that he did not notify the plaintiffs of his refusal until the 9th of February, when he wrote the following letter to the plaintiffs: "We are in receipt of your invoices for three cars of wrought scrap iron, but we find on examining the cars which are now at Swansea they contain uncut burnt steel boiler plate and steel rails, material we do not use; therefore we must refuse delivery of them, and they remain there subject to your order. The numbers are 19496, 60071 flat cars and 28610 box car; the box car contains the steel rails."

On the 12th or 13th of February, one of the plaintiffs and McDonell went to Swansea, and McDonell's account of what took place did not differ substantially from that of the plaintiff who went with him. He said: "Mr. Frankel and I went and looked at the cars, tried to see them, but we could not get very well into where they were on account of the banks sliding, and we came back to the station and Mr.

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Frankel made arrangements with Mr. Girard (the station agent) to have the cars placed on the siding brought out of the belt line and placed on the Swansea siding. Of course I refused to accept the cars; and Mr. Frankel came to the conclusion that he would team the contents of them down—at least what we would take of the contents—down to our mill; and Mr. Girard and himself and I went over across the tracks and Mr. Frankel pointed out the place where he thought it would be suitable too unload them and Mr. Girard said he would have them placed there.

The cars were not, however, got out until the end of April, 1900, when the plaintiffs were notified that they were got out. A good deal of correspondence and negotiation took place between the parties and it was not until the 22nd of October that the plaintiffs took away the scrap iron and on the 3rd of November, 1900, they brought this action.

There can be no doubt that as to that one of the five cars of scrap iron in question in this suit addressed to McDonell Rolling Mill, Sunnyside, the McDonell Rolling Mills Company were the consignees of the scrap iron contained in it. And I think that, notwithstanding the fact that the other four cars of scrap iron were addressed to Frankel Bros., Sunnyside, the effect of the instructions given to the station agent of the defendants at Swansea from time to time by the plaintiffs by their letters dated respectively the 10th April, 1897, the 1st December, 1897, and the 11th of May, 1899, coupled with the fact that the McDonell Rolling Mills Company were the purchasers of the scrap iron contained in them, was to constitute the McDonell Rolling Milling Company the consignees of such iron as fully to all intents and purposes as if the bills of lading had been indorsed by the plaintiffs to them.

The learned Chief Justice then proceeds to discuss the legal questions involved. He says

it was contended that as to these cars the McDonell Rolling Mills Company were merely the agents of the plaintiffs, but this they were in no sense, but the purchasers of the scrap iron contained in them with the right of inspection and rejection of it.

Being such consignees of the scrap iron, the McDonell Rolling Mills Company had the right to put an end to its transitus by receiving it at Swansea. *L. & N. W. Railway Co.* v. *Bartlett* (1); *Foster* v. *Frampton* (2); *Scothorn* v. *South Staffordshire Railway Co.* (3); *Cork Distilleries Co.* v. *G. S. & W. Railway Co.* (4); *Southern Express Co.* v. *Dickson* (5).

(1) 7 H. & N. 400.
(2) 6 B. & C. 107.
(3) 8 Ex. 341.
(4) L. R. 7 H. L. 269.
(5) 94 U. S. R. 549.

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It follows, I think, that being such consignees, they had the right to put an end to its transitus at Swansea by refusing to receive it.

In an action by the plaintiffs against the McDonell Rolling Mills Company for not accepting the scrap iron, the plaintiffs could not have been prejudiced by the defendants, after the refusal of the McDonell Rolling Mills Company, at Swansea, to receive it, not sending it down to the rolling mills, because such a refusal would have been a waiver by the McDonell Rolling Mills Company of their right to have the scrap iron delivered at the rolling mills; *Cort* v. *Ambergate &c. Railway Co* (1).

The refusal by the McDonell Rolling Mills Company to accept the scrap iron was an absolute one, and it is plain from the course of dealing between the plaintiffs and them and from what took place when one of the plaintiffs and McDonell went to Swansea on the 12th or 13th of February, that the plaintiffs acquiesced in the right of the McDonell Rolling Mills Company to refuse the scrap iron at Swansea.

This conclusion disposes of the case so far as the cause of action set forth in the statement of claim is concerned.

With all this I most entirely agree. The authorities cited shew conclusively that the transitus had come to an end, that the scrap iron was thereafter held by the defendants not as carriers, (and therefore insurers,) but as involuntary bailees or warehousemen, (and therefore only liable for gross negligence). That opinion was, therefore, against the judgment of the trial judge, and the result of it, in ordinary cases, would have been the dismissal of the action. But here the majority of the judges below, in examining the evidence, considered that there was sufficient material upon which still to base a judgment for the plaintiffs, the learned Chief Justice stating that

the defendants became involuntary bailees of the scrap iron and were bound to take reasonable care of it, and were under an implied contract to deliver it to the plaintiffs when they came for it, placing the cars containing it in such a position that the plaintiffs could receive, unload and remove it * * * *

This, in my view is too broad a statement of the law. There is the obligation of reasonable care, as

(1) 17 Q. B. 127.

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well as the obligation to deliver, but all this is subject to the qualification that there has been no negligence. If, without their fault, the defendants were unable to make delivery—if, for example, the goods were accidentally destroyed or were stolen, or were overwhelmed by a landslide or avalanche—there would be no liability. This must be so, even in the case of common carriers. Though generally bound to deliver they are bound to deliver only within a time that is reasonable looking at all the circumstances of the case and they are not responsible for the consequences of delay arising from causes beyond their control. *Taylor* v. *Great Northern Railway Co.* (1)

A common carrier, if the road is obstructed by snow, is not bound to use extraordinary diligence or means involving additional expense for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though, by extra exertions, they might have been forwarded, and this would apply to other obstructions caused by the act of God. *Briddon* v. *Great Northern Railway Co.* (2)

All this applies with greater force to the case of a warehouseman, who is only bound to act with reasonable care and caution with respect to the custody of the goods. See *Heugh* v. *London and Northwestern Railway Company* (3) and the old case of *Garside* v. *Trent and Mersey Navigation* (4).

It, therefore, is fundamentally necessary in an action for damages of this nature to prove negligence. If there has been due care on the part of the bailee that is sufficient defence.

Now this question, negligence or no negligence, was not tried. It was not set up in the pleadings. It was not raised—it was in express and emphatic terms

(1) L. R. 1 C. P. 385.
(2) 28 L. J. Ex. 51.
(3) L. R. 5 Ex. 51.
(4) 4 T. R. 581.

repudiated by the plaintiffs' counsel at the trial. The learned trial judge did not consider or make a finding regarding it. No reference to it appears in the plaintiffs' reasons against appeal, nor is there any evidence that at the argument below the point was taken. Notwithstanding this the court below makes a finding upon this crucial point, amends the pleadings, substitutes a new case—a case repudiated by the plaintiffs—and upon that case fixes liability on the defendants without hearing and without evidence adduced for that purpose. One could have understood the allowing of the amendment had a new trial been ordered so that it might be determined by further testimony whether there was care or want of care. I do not know whether there was or was not. I do not even know what is the particular act or fault complained of. It is true the cars were frozen in—that the plaintiffs could not get their goods as soon as they wanted them—but cars are often snowed up without fault anywhere. It is a question of evidence, and all that is wanting here.

I need not not elaborate further because Maclennan J. in his able dissenting judgment in the court below has dealt most satisfactorily with the case as presented before that court.

The appeal, therefore, should be allowed and the action dismissed, the appellants having their costs in all the courts. But inasmuch as the appellants' liability as warehousemen remains now undetermined, the right is reserved and given to the respondents to take such further action as they may be advised upon the alleged liabilitity of the appellants to them as bailees or warehousemen of the goods in question.

GIROUARD and DAVIES JJ. were also of opinion that the appeal should be allowed for the reasons stated by His Lordship Mr. Justice Sedgewick.

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MILLS J. (dissenting.) In this case the respondents brought an action to recover from the appellants, as carriers for hire, damages for not carrying and delivering to them at Sunnyside in Toronto, a place near the defendants' line of railway, five car loads of scrap iron, which the appellants had received from the respondents, and agreed to carry upon terms set out in five separate contracts, dated on the 30th November, 23rd of December and 27th of December, in the year 1899, and on the 2nd of January and the 4th of January, in the year 1900. Two of these cars were forwarded from Levis, in the Province of Quebec, two from the City of Kingston, in Ontario, and the fifth car from another part of the City of Toronto. In the first four contracts the respondents are the consignees, and the iron is consigned to them as follows:—Frankel Bros., Sunnyside, Toronto. By the fifth contract the consignees are the McDonell Rolling Mills Co., Sunnyside. These cars were all sent by the Grand Trunk Railway Company to Swansea, and when they arrived with the scrap iron at that station the company did not at once shunt the cars upon the side track, or spur, which leads to the rolling mills, and which was put there solely for the purpose of enabling the McDonell Rolling Mills Co. to receive the raw material which they required to enable them to carry on their business, and to send away from their mills the finished product. The railway company sent from Swansea to Sunnyside from time to time, as they were required by the Rolling Mills Company, the cars laden with scrap iron, which Frankel Bros. furnished. This track, which extended from the main line of the Grand Trunk Railway to the rolling mills, was about three hundred feet in length, and it seems that nothing was sent over it to the mills to which the manager of the mills, Mr. McDonell, objected. Mr. McDonell in two

communications to Frankel Bros. pointed out to them the character of the scrap iron upon these five cars, which Frankel Bros. intended to deliver at the rolling mills, and he informed them that the quality of the scrap iron was not such as his contract called for, and on the 9th of January, he wrote to Frankel Bros. a letter in which he said:—

We are in receipt of your invoices for three cars of No. 1 wrot iron scraps, but we find on examining the cars which are now at Swansea that they contain uncut burnt steel boiler plate and steel rails, material we do not use; therefore, we must refuse delivery of them, and they remain subject to your orders.

And on the following day he wrote:

We beg to notify you that we will not accept delivery of any more scrap iron in cars, until further arrangements are made. Our arrangement with you was for a special lot of about 400 tons, composed of strictly No. 1 wrot, and a quantity of soft steel boiler plate at the high price of $23.50 per net ton at our works, but the scrap you have been delivering to us is composed of all kinds of mixtures, invoiced to us as No. 1 wrot iron; therefore, we cannot accept of these cars until arrangements are made as to the price to be paid for the different kinds.

I am of opinion that the company were not, under these circumstances, required in fulfilment of their contract to send these cars, without further instructions, from Swansea up to the rolling mills.

A contract had been made by Frankel Bros. with the Rolling Mills Company, for the delivery of four hundred tons of a certain kind of scrap at the price per ton of $23.50 at their works. In October' 1899, Frankel Bros. made a tender for the supply of scrap iron under which they proposed to ship this quantity to the mills of the company, 150 tons of which they said were of ship iron, from 50 to 100 tons of boiler plate, which might be of soft steel, and about 200 tons of No. 1 collection and piling scrap, which was to be delivered at Sunnyside, the terms to be as usual in the

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fulfilment of the contract. The cars upon which the scrap iron was shipped, arrived at Swansea with moderate promptness, 11th of December, 1899, and on 1st, 15th and 17th of January, 1900, two of the cars arrived at Swansea on the 15th of January, and on the 9th and 10th of January McDonell had notified Frankel Bros. that he would not accept until arrangements were made as to the price to be paid for the different kinds of material which they contained. These communications were written before three of the cars had reached Swansea, and it is clear that he did not regard the material as of the kind he had contracted for, but of an inferior quality which he was not willing should be sent up to the rolling mills until the price had been agreed upon. It seems to me preposterous to contend that the company were bound to make delivery of this scrap iron at the McDonell rolling mill, in the face of his objection, until an understanding between the parties had been reached, and I think that the subsequent action of Mr. Frankel with reference to the delivery of the scrap iron, shows that he did not expect the railway company, in the face of McDonell's objections, to send the cars from Swansea to Sunnyside, at all events, not until matters were satisfactorily arranged between Frankel and McDonell, and McDonell gave the usual notice to have the cars forwarded.

The railway officials were dissatisfied with the delay which had taken place, and gave notice that the railway company would claim demurrage, which, I think, was not unreasonable under the circumstances, but, after discussing the matter with Frankel and McDonell, they ceased to press this claim, and both Frankel and McDonell were under the impression that the claim for demurrage was abandoned. Mr. Girard, the station agent, went with Frankel and McDonell on

the 10th of February, and saw the cars containing the scrap iron upon the belt line siding. And then it was that Frankel pointed out a suitable place for unloading, and Mr. Girard agreed, says Frankel, that the cars should be placed at that point immediately, so that they might be unloaded and their freight assorted, in order that it might be sent up to the rolling mills upon waggons. The cars were not brought out from the belt siding to the place which Mr. Frankel had selected. Indeed, at that time, the siding where the cars were placed was covered to a considerable depth with mud which had become frozen, and the cars could not have been removed from where they were standing without some delay, and a considerable expenditure of money, a larger sum than the railway company were willing to make.

When McDonell refused to receive the cars at his siding the company were not, I think, under a legal necessity of sending them away from Swansea station. The carriage must there have ended unless Frankel and McDonell came to a speedy understanding, which they did not, and it is contended that the railway company were, thereafter, but involuntary bailees. Of this, I do not at all feel that the contention is clear beyond question. No doubt they might have become so, but cars, where there is a freight house, are not usually regarded as such, and as long as the freight remains in them it is usually regarded as freight in transit, even though the cars in which it is have reached their ultimate destination. In the case of *Norway Plains Company* v. *Boston and Main Railroad Co.* (1), Shaw C.J. says, after quoting the decisions of *Rowe* v. *Pickford* (2), and *In re Webb* (3):

This view of the law as applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical

(1) 1 Gray, Mass. 263. (2) 8 Taunt. 83.
(3) 8 Taunt. 443.

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rule of duty, of easy application, well adapted to the security of all persons interested. It determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform ; that if, on account of their arrival in the night, or at any other time, when by the usage and course of business the doors of the merchandise depot or warehouse are closed, or from any other cause, they cannot then be delivered ; or if, for any reason, the consignees are not ready to receive them ; it is the duty of the company to store them and to preserve them safely, under the charge of competent and careful servants ready to be delivered, and actually deliver them when duly called for by the parties authorized and entitled to receive them ; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case that the railroad company are responsible as common carriers of goods until they have given notice to the consignees of the arrival of the goods. The Court are strongly inclined to the opinion that, in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railway company and without additional expense, seems to be a substitute better adapted to the convenience of both parties. Mr. Justice Story, in his work on bailments, says (sec. 445) :—

> The termination of the carrier's risk. As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases. His character as carrier is superseded by that of warehouseman, not when the car arrives at the station, but when the crane of the warehouse is applied to raise the goods into the warehouse. *Thomas* v. *Day* (1) and *Randleson* v. *Murray* (2)

Here the scrap iron was allowed to remain in the cars, and the cars were run off the main track into a cutting which was so imperfectly made that the clay from the cut-banks ran down and covered the tracks upon which the cars were standing.

(1) 4 Esp. 262. (2) 8 A. & E. 109.

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There can be no doubt that when the cars arrive at their destination the responsibility of the railway company as carriers does not at once terminate. Cockburn C.J., in *Chapman* v. *The Great Western Railway Co.* (1) held that when an interval of time had been allowed to elapse after the arrival of the goods the character of carrier ceased and they had become simply warehousemen. He says that the contract of the carrier being not only to carry but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration. Next there is the time which, in most instances, must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter—which, however, is seldom the case—is on the spot to receive them on their arrival. Where this is not the case some delay, often a delay of some hours—as for instance when goods arrive at night, or late on Saturday, or when the train consists of a number of trucks which take some time to unload,—unavoidably occurs. In these cases, while on the one hand the delay, being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carriage.

If there had been no disagreement between McDonnell Rolling Mills Company and Frankel Bros., the transitus of these cars would have terminated only when they reached the rolling mills, but, as the spur

(1) 5 Q. B. D. 278.

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of the mill is spoken of by one of the witnesses as the property of McDonell, and not of the railway company, when it was found that McDonell refused to receive the scrap iron in the cars, I think, looking at the facts and the previous practice of these parties, that the compulsory carriage by the company ended at Swansea, and that the further carriage, which they retained the scrap iron on the cars to perform, was a part of the process of unloading, as Mr. Justice Moss says. The notification before the cars were sent up to the mills came from McDonell, and I think the observations of Lord Ellenborough in *Dixon* v. *Baldwen* (1) are fairly applicable to the present case :

> That the goods had so far gotten to the end of their journey, that they awaited for new orders from the purchaser to put them again in motion.

And in the case of *Ex parte Miles ; in re Isaacs*, (2) in respect to goods that were sent to a specified shipping agent at Southampton to be thence shipped to Kingston, Jamaica, the cost of the carriage to Southampton was paid. The commission agent at Southampton was to send them to parties whose agent he was. The court held that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton.

I am of opinion that here, under the circumstances, the transit had ended when the goods reached Swansea. I am of opinion that when the railway company claimed they were bailees of the scrap iron and that these cars in which it was were warehouses and denied any responsibility beyond that of bailees for hire, it was their duty to be in a position to deliver those goods to Frankel Bros. whenever called for, and when this scrap iron was left in the cars instead of being put into a warehouse from which it could be delivered when called for, they made themselves responsible to the

(1) 5 East 175 at p. 186. (2) 15 Q. B. D., 39.

proprietors in damages for the delay which occurred prior to the time when they could make delivery. It is not correct to say that the cars were confined on this side track by the act of God. They were confined in consequence of a defective cutting. If a vessel was so badly constructed that it could not survive an ordinary storm its loss could not be called a loss due to the act of God. If a cutting is not made so as to render the track free from the flow of mud down its sides, the accident is due not to the act of God but to improper construction, and when the railway company ran these cars upon the belt line into this cutting they did this at their peril, and are justly held in damages for all the loss that Frankel Bros. sustained in consequence. I therefore concur in the conclusion reached by the majority of the Court of Appeal.

Appeal allowed with costs.

Solicitor for the appellants: *John Bell.*

Solicitor for the respondents: *James Baird.*

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*Feb. 17, 19.

MARY DONOHUE *et vir* (PLAINTIFFS)..... } APPELLANTS;

AND

ANN DONOHUE *et al.*, ÈS QUALITÉ (DEFENDANTS) ..... } RESPONDENTS.

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

Appeal—Jurisdiction—Matter in controversy—Removal of executors—Acquiescence in trial court judgment—Right of appeal—R. S. C., c. 135, c. 29.

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed. *Noël* v. *Chevrefils* (30 Can. S. C. R. 327) followed; *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished.

APPEAL from the judgment of the Court of Appeal, King's Bench, appeal side, reversing the order made by the Superior Court, District of Montreal, at the trial (Lavergne J.), which ordered the removal of the defendants as executors of the estate of the late Eleanor Ann Donohue (Mrs. Daoust) deceased, and dismissing the plaintiffs' action with costs.

The case is stated in the judgment now reported.

Motion to quash the appeal on the ground that the matter in controversy on the present appeal is merely an issue regarding the removal of executors, in respect of which the Supreme Court of Canada has no jurisdiction to entertain appeals.

Belcourt K.C. for the motion cited *Noël* v. *Chevrefils* (1).

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

(1) 30 Can. S. C. R. 327.

Falconer, contra, relied upon *Lebarge* v. *The Equitable Life Assurance Society* (1), and *Levi* v. *Reed* (2).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a motion to quash the appeal for want of jurisdiction. The plaintiff, now appellant, alleged in her declaration that the late Mrs. Daoust had by her will named the respondents her executors, who, upon her death, had accordingly entered into possession of her estate and had since been administering the same. She concluded, first, that the respondents be ordered to render an account of their administration and, in default of so doing, that they be condemned to pay her the sum of $2,000. Secondly, that the said respondents be, for the future, dismissed from their said office as executors for certain acts detailed at length which she alleges to have been illegal and contrary to their duties.

The Superior Court rendered judgment maintaining the appellant's action in part and ordering the removal of the respondents as executors of the said estate but not granting her conclusions for an account, reserving her right to enforce the other conclusions of her declaration by another action.

Upon appeal to the Court of King's Bench by the executors from that judgment ordering their removal as such, the judgment of the Superior Court was reversed and the appellant's action dismissed altogether. The plaintiff, present appellant, had not appealed from that part of the Superior Court judgment which refused her demand for an account. That amounted to an acquiescence by her in the judgment of the Superior Court, which had refused her demand for such an account.

(1) 24 Can. S. C. R. 59. (2) 6 Can. S. C. R. 482.

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DONOHUE v. DONOHUE.

The Chief Justice.

The plaintiff now appeals from that judgment so rendered by the Court of Appeal, exclusively upon her conclusions asking the removal of the respondents. I am opinion that we have no jurisdiction. It is conceded by the appellant that the Court of Appeal was right in holding that they had no jurisdiction, in respect to that part of her conclusions asking for an account which the Superior Court had refused her as she had not appealed therefrom to that court. Now we could not here, were we of opinion that the judgment *à quo* is wrong, give any other judgment than that which the Court of Appeal should have rendered. And that would be simply to restore the judgment of the Superior Court, ordering the respondents' removal as executors. And it is settled in this court that an action simply to remove a tutor or an executor is not appealable. *Noél* v. *Chevrefils* (1).

The appellants relied upon *Laberge* v. *The Equitable Life Assurance Society* (2) in support of their right to appeal. But that case has no application. The right to appeal here does not, as it did there, depend upon the amount in controversy, and this is not a case where the amount demanded and the amount recovered are different, provided for by 54 & 55 Vict. ch. 25, sec. 3, sub-sec. 4. There is no amount in controversy here at all. The only contestation on this part of the case is on the appellant's demand for an account. And by not appealing to the Court of King's Bench, the plaintiff virtually withdrew from the court that part of her demand.

The motion is granted and the appeal quashed with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Fleet, Falconer & Cook.*

Solicitors for the respondents: *Demers & deLormier.*

(1) 30 Can. S. C. R. 327. (2) 24 Can. S. C. R. 59.

THE CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF ST. JAMES.

JOSEPH BRUNET (RESPONDENT) .....APPELLANT;

AND

JOSEPH GEDEON HORACE BERGERON (PETITIONER) ..... } RESPONDENT.

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*Feb. 17.
*Feb. 23.

*Mar. 3, 4.
*Mar 11,

ON APPEAL FROM THE JUDGMENT OF SIR MELBOURNE TAIT A.C.J., AND LORANGER J.

Controverted election—Stay of proceedings pending appeal on preliminary objections—Trial within six months—Extension of time—Disqualification.

Preliminary objections to an election petition filed on 22nd Feb. 1902, were dismissed by Loranger J. on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on Oct. 10th, making Nov. 17th the day fixed for the trial under the order of 31st May. On Nov. 14th a motion was made before Loranger J. on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th Nov., but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on Dec. 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed.

Held, that the effect of the order of May 31st was to fix Nov. 17th as the date of commencement of the trial; that the time between May 31st and Oct. 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted

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

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as part of the six months within which the trial was to be begun, and that Dec. 4th on which it was begun was therefore within the said six months.

Held also, that if the order of 31st May could not be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergne on Nov. 17th was proper.

As to the disqualification of the member elect by the judgment appealed from the members of the court were equally divided and the judgment stood affirmed.

APPEAL from the judgment of Sir Melbourne Tait A.C.J. and Loranger J. sitting for the trial of a petition against the return of the appellant as a member of the House of Commons for St. James Division, Montreal, at a bye-election on 15th January, 1902, by which judgment the appellant was unseated and disqualified for personal corruption.

The appeal was directed only against the disqualification, the voiding of the election being accepted subject, however, to an objection taken to the jurisdiction of the judges who tried the petition, namely, that the trial had not been commenced within six months from the date on which the petition was filed, which, if successful, would set aside the whole judgment.

The dates of proceedings on the petition and orders made on which the objection to the jurisdiction was founded are given in the above head-note and in the judgment overruling it.

The court ordered the question of jurisdiction to be first argued and the hearing on the merits, if necessary, to take place at a later date.

Belcourt K.C. and *Roy K.C.* for the appellant.

Bisaillon K.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appeal in this case is from a judgment of the Election Court at Montreal ren-

dered on the 22nd of December last by which the election of the appellant, as member of the House of Commons for the electoral district of St. James was annulled and he was disqualified by reason of corrupt practices committed by and with his knowledge and consent.

The appellant's contentions are, 1o. That because the trial had not been proceeded with within six months after the filing of the petition as enacted by sect. 32 of the Controverted Elections Act, the Election Court had no jurisdiction in the case on the 4th of December, when the trial began.

2o. That there is error in the judgment in finding him guilty of bribery, assuming that the Court had jurisdiction, and that the said judgment should be reversed so far as the finding on the personal charge is concerned.

3o. That the evidence did not even authorize the Election Court, assuming it had jurisdiction, to find against him on the charge of bribery by agents and that it should not have voided the election.

The first point is the only one upon which we have so far heard the parties, with the understanding that should it be determined against the appellant, the case will be heard later upon his other contentions.

The following are the material dates upon the question now to be determined as aforesaid.

The petition was filed on the 22nd of February 1902.

On the 27th of February the appellant filed preliminary objections which were dismissed by Mr. Justice Loranger on the 24th of April.

Appeal was taken from that judgment to the Supreme Court on the 2nd of May.

On the 22nd of May the respondent moved before Mr. Justice Robidoux that a day be fixed for the trial of the petition at the city of Montreal.

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ST. JAMES ELECTION CASE.

The Chief Justice.

The appellant opposed that motion on the ground that the record was before the Supreme Court at Ottawa. On the 28th of May Mr. Justice Robidoux refused to grant the respondent's said motion, and ordered that, considering that an appeal had been taken to the Supreme Court and that the record was then before that court, the trial be suspended until judgment on the said appeal. This order would seem not to have been authorized by the statute. As the court or judge who had rendered the judgment dismissing the preliminary objections had not then ordered, as provided for by sec. 50 of the Act, that the proceedings be stayed or the trial be delayed by the appeal from the judgment upon the preliminary objections, the learned judge should perhaps have granted the respondent's motion. It must be noticed, however, that it was upon the appellant's objection that the respondent's said motion was refused.

A few days afterwards. on the 31st of May, the respondent, seeing that Mr. Justice Robidoux had so refused his application for fixing a day for the trial, and aware of the fact that the learned judge's order postponing the trial until after the Supreme Court's judgment, was open to the objection that such an order could have been legally given but by the judge who had rendered the judgment upon the preliminary objections, presented a petition to Mr. Justice Loranger, who had, as aforesaid, rendered the judgment on the preliminary objections, asking him to order that the commencement of the trial be adjourned to the thirtieth of the juridical days to follow the judgment of the Supreme Court on the appellant's appeal.

This petition was granted on the same day.

On the 10th of October, 1902, the Supreme Court gave judgment dismissing the appeal.

The 17th of November, it is admitted by both parties, was the thirtieth juridical day after that judgment upon which the trial should have taken place according to the above order of Mr. Justice Loranger of the 31st of May.

On the 14th of November the appellant moved before Mr. Justice Lavergne to set aside that judgment of Mr. Justice Loranger, so fixing the trial for the 17th of November, and to have the petition declared lapsed because the respondent had not proceeded with the trial within the six months of the filing of the said petition.

On the 17th of November Mr. Justice Lavergne dismissed the appellant's motion to have the petition declared lapsed, but held that the trial could not take place on that day because Mr. Justice Loranger had adjourned the trial without fixing a day for it and without ordering the place at which such trial should take place.

On the same day, upon the respondent's motion, Mr. Justice Lavergne ordered that the trial of the petition be fixed for the 4th of December then next in the Court House at the city of Montreal, and on the said last mentioned day the trial was accordingly begun, the court dismissing the appellant's renewed contention that the petition had lapsed, and on the 22nd of December judgment was given unseating the appellant and declaring him personally guilty of corrupt practices. As I have mentioned before, the only point we have to determine upon the present appeal is whether or not the Election Court had jurisdiction to try the merits of the petition on the 4th of December last.

In my opinion the appeal should be dismissed. The case is a simple one.

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Reading out of the record Mr. Justice Robidoux's order of the 28th of May, as immaterial and of no possible bearing on the case, the petition having been filed on the 22nd of February, only three months and nine days had elapsed thereafter when, on the 31st of May, Mr. Justice Loranger adjourned the trial till the thirtieth juridical day after the judgment of the Supreme Court. Now, that order clearly fixed that thirtieth juridical day as the day upon which the trial was to take place. The appellant's contention that to adjourn a trial to a certain date was, under the circumstances, not to appoint a day for the trial, cannot be taken seriously. I would say the same of his contention that the order did not operate as a stay of the proceedings or did not delay the trial under sec. 50 of the Act, or that the order was illegal because it did not fix a place for the trial. The appellant had, under sec. 13 of the Act, himself the right to apply for an order to that effect. Now, it follows that on the 10th of October, when the Supreme Court rendered its judgment on the appeal from the judgment upon the preliminary objections, only three months and nine days could be counted out of the six months from the date of the filing of the petition, leaving two months and twenty-one days to complete the six months. And the trial began on the 4th of December, less than two months after the judgment of the Supreme Court.

If, as the appellant would contend, the order of Mr. Justice Loranger cannot be considered as fixing a day for the trial, it certainly operated as a stay of the proceedings until the 17th of November, or at least until the 10th of October, and Mr. Justice Lavergne could then, as he did, on the 17th of November, fix the date and place of trial for the 4th of December. Not counting the delay between Mr. Justice Loranger's order of the 31st of May, and the judgment of the Supreme

Court on the 10th of October, Mr. Justice Lavergne's order and the date fixed by him for the trial were clearly within six months from the filing of the petition.

The appellant's contentions are therefore clearly unfounded.

The only appeal before us, I may remark, is from the final judgment. That is the only one allowed by the statute.

The appellant principally relied upon the *Glengarry Election Case* (1). The law of that case can certainly not now be questioned. Their Lordships in the Privy Council, upon an application for leave to appeal (2), said, in refusing the application:

> There can be no other case till fresh elections take place; and if the decisions now given have really misinterpreted the mind of the legislature, and are calculated to establish rules of procedure less convenient than those intended, the legislature can at once set the matter right.

Now the fact that Parliament has not, during the fifteen years since our decision in that case was rendered, legislated on the points there in controversy, is equivalent to a declaration that we had not thereby misinterpreted the mind of the legislature. But that case has no application whatever where, as here, there is a stay of proceedings ordered upon an appeal to the Supreme Court, which was not the case there. None of the parties have it then in their power to have a day fixed for the trial; and the rule *contra non valentem agere non currit prescriptio* must be given full application. The case may be ten, twelve or more months before the Supreme Court, and it is impossible then to give to sec. 32 of the Act the strict construction that the appellant contends for. It was he who now would have the petition dismissed because

(1) 14 Can. S. C. R. 453. (2) 59 L. T. 279.

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the respondent did not proceed to trial within six months after the filing of the petition who objected to the respondent's first application to fix a day and actually succeeded in having the trial postponed. And he now asks that the petition against him be dismissed because the respondent did not proceed diligently enough for him. This does not affect directly the merit of this appeal, but I cannot help saying that, under these circumstances, I am not sorry to have to dismiss it.

On this branch of the case the appeal is dismissed with costs.

On a subsequent day the appeal was heard on the merits.

Aylesworth K.C. and *Belcourt K.C* for the appellant.

Bisaillon K.C. and *Bastien K.C.* for the respondent.

THE CHIEF JUSTICE.—Upon the appeal as to the personal charges the court is equally divided so that the appeal is dismissed with costs. The registrar will make the report required to the Honourable the Speaker of the House of Commons. Under the circumstances no opinion is possible as the opinion of the court, and individual opinions are inexpedient, especially in a case where there is no possibility of any further appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Roy, Roy & Sénécal.*

Solicitors for the respondent: *Bisaillon & Brossard.*

WILLIAM McDONALD, EXECUTOR OF MICHAEL McDONALD, DECEASED (DEFENDANT)..... } APPELLANT;

AND

DANIEL McDONALD AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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*Dec. 15.

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*Feb. 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Donatio mortis causâ—Deposit receipts—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.

McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each payable out of the deposit receipt to the respective beneficiaries which McD. signed and returned to his brother who handed to McD's wife the one payable to her and the receipt and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards.

Held, affirming the judgment appealed against (35 N. S. Rep. 205) Sedgewick and Armour JJ. dissenting, that this was a valid *donatio mortis causâ* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for interest not specified in the gift.

By R. S. N. S. [1900] ch. 163, sec. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence.

Held, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential.

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

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour JJ.

(1) 35 N. S. Rep. 205.

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The trial was on an interpleader issue settled under an order of McDonald C.J. as follows:

"Whereas the plaintiffs affirm and the defendant denies:

"1. That on or about the 13th day of October, A.D. 1900, during the lifetime of the late Michael McDonald, deceased, the said Michael A. McDonald gave, transferred and assigned to the plaintiffs a certain deposit receipt number 2793 for the sum of $6,000 deposited in the Union Bank of Halifax, and the amount due upon and secured by said receipt, and thereupon gave to the plaintiffs three orders in writing requiring said bank to pay to the plaintiffs the amount due upon and secured by said receipt.

"2. That the said deposit receipt and the amount due upon and secured by said deposit were so given, transferred and assigned to the plaintiffs and said orders were so drawn and given to the plaintiffs by the said Michael A. McDonald in expectation of death, and in his last illness as *donatio causâ mortis* and that the said Michael A. McDonald died on or about the 21st day of October, A.D. 1900, without having repossessed himself of said deposit receipt or of the amount due upon and secured by said deposit (or of the said orders), and that the said deposit receipt and the amount due upon and secured by said deposit receipt became and are the property of the plaintiffs, and it has been ordered by His Lordship the Chief Justice that the said question shall be tried at Sydney, in the County of Cape Breton, or at Halifax, in the County of Halifax, as the judge may direct; therefore let the same be tried accordingly."

Mr. Justice Ritchie, who tried the issue at Sydney, held that there was not a *donatio mortis causâ* and that the money belonged to the estate. This judgment was reversed by the full court and the executor appealed.

W. B. A. Ritchie K.C. for the appellant. We rely upon the reasons given by Mr. Justice Ritchie at the trial and in which the Chief Justice concurred on the appeal. There is a marked contrast between this case and *Walker* v. *Foster* (1). In *Bryson* v. *Brownrigg* (2) the language of the Master of the Rolls is very much in point. We refer also to *Reddel* v. *Dobree* (3) at page 251; *Ward* v. *Turner* (4) at page 437; *Hawkins* v. *Blewitt* (5); and 14 Am. & Eng. Ency. of Law (2 ed.) p. 1056.

As to corroboration and the evidence generally we refer to *In re Mead; Austin* v. *Mead* (6); *Cosnahan* v. *Grice* (7); notes to *Ward* v. *Turner* (4); *McGonnell* v. *Murray* (8); *Finch* v. *Finch* (9); *Hall* v. *Hall* (10); *Hill* v. *Wilson* (11); *Whittaker* v. *Whittaker* (12).

The delivery of the cheques did not constitute a valid *donatio mortis causâ*; *Hewitt* v. *Kaye* (13); *Ward* v *Turner* (4); Byles on Bills (16 ed.) p. 206; *Tate* v. *Hilbert* (14); *In re Beaumont; Beaumont* v. *Ewbank* (15). The evidence negatives any intention to make a gift *mortis causâ*. See also *Edwards* v. *Jones* (16) at page 234; *Bunn* v. *Markham* (17); *Duckworth* v. *Lee* (18); *McGrath* v. *Reynolds* (19).

Russell K.C. and *Harris K.C.* for the respondents. It is certain that if the deposit receipt alone had been dealt with in the way it was, and these so-called cheques had not been drawn, there would have been a

(1) 30 Can. S. C. R. 299.
(2) 9 Ves. 1.
(3) 10 Sim. 244.
(4) 2 Ves. Sr. 431.
(5) 2 Esp. 662.
(6) 15 Ch. D. 651.
(7) 15 Moo. P. C. 215.
(8) 3 Ir. R. Eq. 465.
(9) 23 Ch. D. 267.
(10) 20 O. R. 684; 19 Ont. App. R. 292.
(11) 8 Ch. App. 888.
(12) 21 Ch. D. 657.
(13) L. R. 6 Eq. 198.
(14) 2 Ves. 112.
(15) [1902] 1 Ch. 889.
(16) 1 My. & Cr. 226
(17) 7 Taunt. 224.
(18) [1899] 1 Ir. 405.
(19) 116 Mass. 566.

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good *donatio mortis causâ* of the deposit receipt to the three donees. *Amis* v. *Witt* (1); *Moore* v. *Moore* (2); *Cassidy* v. *Belfast Banking Co.* (3); *In re Dillon, Duffin* v. *Duffin* (4); *Westerlo* v. *DeWitt* (5). It cannot make any difference that these orders were drawn up by way of dividing the amount named in the deposit receipt. Reference may usefully be made to *Rolls* v. *Pearce* (6), at pages 733 and 734; *Lawson* v. *Lawson* (7); *Gardner* v. *Parker* (8); Byles on Bills, p. 201, *note;* Story Eq. Jur., p. 396, *note; Walker* v. *Foster* (9); *Boutts* v. *Ellis* (10); *Lawson* v. *Lawson* (7); *Bromley* v. *Brunton* (11); *Corle* v. *Monkhouse* (12).

The so-called cheques are not really cheques but only orders; Bills of Exch. Act, sec. 72; sec. 3, subsection 3; McLaren on Bills, pp. 46, 380. An order to pay out of a particular fund is not unconditional within the meaning of this section; *Ockerman* v. *Blacklock* (13). These orders would be equitable assignments of the fund; *Bank of British North America* v. *Gibson* (14), at page 614 per Falconbridge J., and at page 617 per McMahon J.; Chalmers on Bills, 12, 13; *Munger* v. *Shannon* (15). They were irrevocable in equity as soon as delivered to holder, and at law as soon as assented to by defendant; Story's Eq. Jur. sec. 1044.

The Act, R. S. N. S. (1900) ch. 163, is similar to R. S. O. (1897), ch. 73, and it has been held by the Court of Appeal in Ontario that the "material evidence" in corroboration required under the Ontario

(1) 33 Beav. 619.
(2) L. R. 18 Eq. 474.
(3) 22 L. R. Ir. 68.
(4) 44 Ch. D. 76.
(5) 36 N. Y. 340.
(6) 5 Ch. D. 730.
(7) 1 P. Wm. 441.
(8) 3 Madd. 102.
(9) 30 Can. S. C. R. 299.
(10) 4 Deg. M. & G. 249.
(11) L. R. 6 Eq. 275.
(12) 25 Atlantic Rep. 157.
(13) 12 U. C. C. P. 362.
(14) 21 O. R. 613.
(15) 61 N. Y. 251 at p. 258.

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Act may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. *Green* v. *McLeod* (1). See also *Cole* v. *Manning* (2); *Willcox* v. *Gotfrey* (3); *Grant* v. *Grant* (4); all decided under similar statutes in England. The evidence of Daniel McDonald is amply corroborated within the rule laid down in these cases.

The delivery was sufficient. The fact that Mrs. McDonald, after receiving the deposit receipt, put it back in the trunk from which it was taken, is immaterial. It kept company with her own cheque. The donor was helpless and bedridden, expecting to die, having disposed finally of every earthly concern and exercising no control over his trunk or anything else that belonged to him. At Cape Breton, after the funeral, the deposit receipt was with Mrs. McDonald's cheque and a deed of the house in which she lived which her solicitor had drawn up for her. See *Westerlo* v. *De Witt* (5). The replacing of the receipt in the trunk of the deceased was the act of Mrs. McDonald, not the act of the deceased. See *In re Taylor* (6); 14 Am. & Eng. Enc., 1058, 1059; *Ellis* v. *Secor* (7).

THE CHIEF JUSTICE.—I agree with Mr. Justice Davies that this appeal should be dismissed, and I fully concur with the reasoning upon which he reached that conclusion.

In France and the Province of Quebec, the *donationes causâ mortis* of the Roman law are illegal and no other dispositions of property by gratuitous titles are allowed than by will or irrevocable gifts *inter vivos*. A gift,

(1) 23 Ont. App. R. 676.
(2) 2 Q. B. D. 611.
(3) 26 L. T. N. S. 328.
(4) 34 Beav. 623.
(5) 36 N. Y. 340.
(6) 56 L. J. Ch. 597.
(7) 31 Mich. 185, 18 Am. Rep. 178.

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under that law, as a general rule, is presumed to have been made in contemplation of death and, therefore, void, when made during the mortal illness of the donor.

Here, however, under the law that rules this case, the gift to the respondents *propter suspicionem mortis*, of the deposit receipt in question, was, in my opinion, a valid one, and they, at Dr. McDonald's death, became the sole owners of it. It cannot be doubted that the deceased handed it over to Daniel McDonald with the intention and for the sole purpose of giving it to him and his co-donees. It is not the cheques or orders that he gave. Those were merely given, upon Daniel's suggestion, to ensure the execution of the gift of the deposit receipt and as evidence of the way in which the donor intended the division of the proceeds thereof to take place amongst the three donees. The gift of the receipt and the delivery of it to Daniel, and his acceptance, were complete before these cheques or orders were made out. Had the doctor died immediately after handing it to Daniel, before signing the cheques or orders, the gift would have been just as valid. Now, the cheques cannot have operated as a revocation of that gift, nor have been intended by the deceased as a substitution for it as the appellant would contend. He never intended to give anything else but the receipt.

It is upon the alleged want of the required *traditio*, however, that the appellant seemed to rely principally at bar. But, upon that point also, his contentions are unfounded It being conceded, as I think it must be, that the deceased intended to give this deposit receipt to the respondents, *causâ mortis*, everything that he did on the occasion must be presumed to have been done by him in furtherance of his intention to give the receipt, and everything that the donees did must, like-

wise, be presumed to have been done by them in furtherance of their intention to accept that gift. When the deceased handed the receipt to Daniel, he did all he could then to divest himself of the control and dominion over it and to vest the donees with that control and dominion. And, by receiving it from the hands of the deceased and taking possession of it, Daniel did all that he could do then and there to accept the gift for himself and his co-donees and take it under his control.

Now, it cannot be assumed that, by subsequently handing this receipt to Eunice McDonald, he intended to repudiate the gift. Common sense would not countenance such a proposition. And, when Eunice McDonald put it back in the trunk, she, likewise, never intended thereby to refuse the gift and return it to the deceased. She put it there because she knew that, under the circumstances, it was as much under her control as if it had been put in her pocket or in her own trunk. It would have been in her power next day to take it out of that trunk and to put it anywhere else without, in the least, exposing herself to any accusation of dishonesty. There is no evidence that the deceased ever knew that Daniel had handed it over to her and that she had put it back into the same trunk. And I cannot see any room for doubting that, if he had seen Daniel put it into his pocket, or had seen Eunice put it into her own trunk, he would not have objected to it.

Had he intended to retain the possession of it, and desired that it should be returned to his trunk, as still his own, it is to his wife who was in charge of that trunk and had taken it out of it at his request, and not to Daniel, that he would have handed it back.

On the point of corroboration I have had more doubts. The Nova Scotia statute (ch. 163 R. S. N. S.,

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1900, sec. 35), (corresponding to the Ontario statute, ch. 73, sec. 10, R. S. O., 1897), enacts that

> provided that in any action or proceeding in any court 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, award or decision therein on his testimony, or that of his wife, or of both of them, in respect to any dealing, transaction or agreement with the deceased, or in respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.

However, I do not feel justified in holding that the court appealed from was clearly wrong in determining that Daniel McDonald's evidence was sufficiently corroborated. The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.

I refer on the question to the following cases in England under the statute providing that in actions for breach of promise of marriage the plaintiff cannot recover upon his own testimony unless it is corroborated by some other material evidence. *Bessela* v. *Stern* (1); *Weidmann* v. *Walpole* (2); *Hickey* v. *Campion* (3).

I agree with the court below on this point as on the others.

SEDGEWICK J., dissented from the judgment of the majority of the court but delivered no written reasons.

DAVIES J.—There is really very little dispute between the parties as to the law governing a *donatio mortis*

(1) 2 C. P. D. 265.
(2) [1891] 2 Q. B. 534.
(3) 20 W. R. 752.

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causâ. The difficulty lies in its application to the facts of this case. The trial judge, though as he says with some doubt, thought the evidence insufficient to prove an actual delivery of the deposit receipt itself and that the intention of the sick man was merely to give the three parties, objects of his bounty, his wife, his brother and his sister, $2,000 each out of the amount he held on special deposit and that this appeared from the orders he had signed.

The total amount of the deposit receipt was $6,000 and the orders signed by the sick man amounted to just that amount. But it was contended that, as there was an amount of $17, by way of interest, due upon this $6,000, and as the signed orders made no reference to interest, the case came within *In re Mead* (1) as a gift of only a portion of the moneys for which a deposit note had been given by the bank and that there was not a valid *donatio mortis causâ*.

The learned judge further held that there was not such corroborative evidence of the plaintiff's statement with regard to the gift as satisfied the statute.

I am unable to accept either of these conclusions. I agree with the majority judgment of the Supreme Court of Nova Scotia and generally with the reasons for that judgment given by Mr. Justice Graham.

There is no doubt that the evidence to establish a *donatio mortis causâ* should be clear and satisfactory and the statute is explicit that, if the plaintiff relies upon his own testimony or that of his wife or both of them, to obtain a verdict, such testimony must be corroborated by some other material evidence. The argument at bar turned almost entirely upon the question whether or not there had been a gift of the special deposit receipt itself, or only of the amount of that receipt minus the interest, represented by the

(1) 15 Ch. D. 651.

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orders signed by the deceased. If there was a gift of the deposit receipt itself, and not of only a portion of it, then I think it is hardly doubted that, under the later and best authorities; *re Dillon* (1); *In re Beaumont* (2); it was under the circumstances a good *donatio mortis causâ.*

I have had no difficulty in reaching the conclusion that it was the deposit receipt itself and all it represented or stood for that the dying man intended to dispose of and did give, and that the orders or cheques related simply to the division of the moneys he had given and were signed by him at Daniel McDonald's request and as indicating the proportions in which he desired the division to be made. The facts are simple. Dr. McDonald being ill had gone from his residence in Sydney, Cape Breton, to Halifax for medical treatment. He was suffering from heart disease accompanied by dropsy and, on the fifth of October, wrote to his wife telling her he was going to the infirmary and instructing her to close up the house and join him in Halifax and, amongst other things, to "bring his bank-book and that cheque for $6,000." She did so and was with him at the infirmary during his last illness. On the 13th of October, she and her husband's brother, Daniel, being in the room together with the doctor, the alleged gift took place. The only witnesses present were the wife and the brother of the sick man, two of the beneficiaries. It is alleged that there are material differences between the evidence of these witnesses, but, while the evidence of one is somewhat fuller than that of the other, I do not find any contradiction between them. They both concur in the statement that the sick man asked his wife to get him the deposit receipt out of the trunk, that she did so and that, having obtained it, he handed it to his brother Daniel.

(1) 44 Ch. D. 76. (2) [1902] 1 Ch. 889.

According to the latter's evidence, the deceased told him when he handed it to him

to divide it equally between his wife, his sister Jane and the witness as he didn't wish the deposit receipt to have anything to do with his will.

The wife says that, after she gave her husband the deposit receipt

he handed it to his brother and asked him to make out three orders or cheques, one for his sister, one for Daniel and one for the witness and that he told his brother to get the money as he did not wish it to have anything to do with his will.

The orders for $2,000 each, payable on their face, "out of deposit receipt No. 2793, Sydney" were then signed and the deposit receipt handed to the wife by Daniel who says she "took charge of it" and replaced it in the trunk. According to Daniel's testimony the orders were signed at his suggestion after delivery of the deposit receipt to him so "as to show how much each was to get".

There is really no material conflict between the witnesses, but such differences in repeating the history of the transaction as might naturally be expected. Reading them both together I think they show the presence of every essential necessary to effect a valid *donatio mortis causâ*. The gift was made in view of the donor's death and, from the circumstances under which it was made, and what was said about his desire not to put it in his will, it may fairly be implied that it was only to take effect on the donor's then expected death. It was a conditional gift to take effect only upon the death of the donor who, in the meantime, had the power of revocation and might at any time resume the property and annul the gift. The main dispute, as I have said, was as to delivery. I think that was complete. The deposit receipt was brought from its place of safe-keeping by the wife, at her husband's request,

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placed in his hands and, by him, handed over to his brother with the concurrent request to "divide it equally" between the wife, sister and brother as the latter says, or "to draw three orders or cheques, one for the sister, one for the wife and one for the brother", as expressed in the wife's evidence. The receipt was then handed by Daniel to the wife who "took charge of it" and placed it in the trunk again. There was no attempt or intention to resume possession and dominion by the donor, Dr. McDonald, and no attempt or intention to revoke the gift. As to the place in which the wife placed the receipt, after she took charge of it, there was no evidence to show that her husband knew what became of it after he had handed it to his brother Daniel. It was the most natural place, under the circumstances, for her to have deposited it for safe-keeping. She was living with her husband at the infirmary and I gather in the same room, acting as his nurse. The trunk in which she placed it was open to her and, practically, looking at the then enfeebled condition of her husband, under her control.

On this special point the case of *In re Taylor* (1) is instructive. There the donee had by the directions of her father, the donor, placed the gift, a deposit receipt or note, for safe-keeping in his cash box, of which she had the key for the purpose of obtaining money for household purposes from time to time, and deposited the cash box in a drawer in the bed-room in which they both slept, she being, at the time, his nurse. Sterling J., in delivering judgment, says;

> It was a valuable piece of property and her father simply directed her to keep it where the other valuables were kept but I do not think that that amounted to a resumption of possession by the father.

Here, the deposit receipt was not, in my opinion, in the actual or constructive possession of Dr. McDonald

(1) 56 L. J. Ch. 597

after he had parted with it to his brother Daniel, though, doubtless, he could, at any time before his death, have revoked the gift and resumed possession of and dominion over the document. That right is necessarily incident to gifts of this nature. But he died a few days afterwards without having done so and, on his death, the gift became complete. In my opinion the gift was of the special deposit receipt and carried with it the $17 of accrued interest. The omission of Daniel to insert the word "interest" in the orders he drew when making the division, does not and cannot in any way affect the question. The interest passed along with the gift of the deposit receipt as much as the principal. *Harcourt* v. *Morgan* (1).

Of course, if the conclusion can be reached that it was only the cheques or orders for $2,000 each that the sick man was disposing of, there could be no question of any interest. But I have reached a different conclusion. I agree with the court below that it was the deposit receipt and all that it represented that he was making a gift of and that Daniel was as much a trustee to divide the interest as he was to divide the principal. If his attempted division was incomplete, that neither defeated the gift nor released him from his duty of making it complete. If the use of the name of the executors of the will is necessary to enable him to obtain the money from the bank, I think he is entitled to have that use.

As to the corroborative evidence, I think once a *donatio mortis causâ* of the deposit receipt is found, there is ample "corroboration by material evidence" of the testimony of the plaintiffs in the three orders signed by Dr. McDonald just after he made the gift.

The appeal should be dismissed with costs.

(1) 2 Keene 274.

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MILLS J.—McDonald, the deceased, was a physician who resided in the town of Sydney, Nova Scotia, and there practised his profession. He became ill of enlargement of the heart and dropsy and went to the infirmary at Halifax for treatment. He had made a will dealing with his property, but he desired that $6,000 which he had in the Union Bank at Halifax should be disposed of by himself in contemplation of death, and should not be a part of his estate which passed into the hands of his executors.

Shortly before his death he wrote to his wife at Sydney, requesting her to come to Halifax, directing her to make certain arrangements before leaving and to bring with her certain articles and papers, which she did. After his wife reached Halifax Dr. McDonald's brother came to the infirmary, where both he and his wife were to see him, and the doctor asked his wife to take from his trunk the deposit receipt for $6,000, which he said he wished to divide equally between his wife, his brother Daniel and his sister Jane, as he did not expect to recover, and did not wish that the money for which this deposit receipt was held should appear in his will as part of his estate. To carry out this purpose, he directed his brother Daniel to make out three orders for the division of the sum for which the deposit receipt was held between the three parties named, and these orders were signed by him, and were handed with the deposit receipt to his brother, who placed it in the hands of Dr. McDonald's wife, as custodian for the donees, for I think it is clear that the doctor intended, at that time, to part with the custody of the deposit receipt and did in fact do so and had no intention of regaining possession of it thereafter. The orders for the division of the sum represented by the deposit receipt are, to my mind, very strong corroborative evidence of the gift, and were made for the

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purpose of showing the amount that each of the donees was to receive. They testify to this intention under his own hand. It is admitted that if he gave the deposit receipt to the three persons mentioned and so as to divide the sum which it represented between them upon his death, that a good *donatio mortis causâ* was made, and this, I think, he did. But it was argued for the appellants that the deposit receipt was taken from the trunk of the deceased, by his direction, that it was returned to the trunk again, and, having been by that act restored to his possession, no matter what may have been his intention, the gift, if one was made, was thereby cancelled, and the possession of the deposit receipt remained in Dr. McDonald. *In re Beak's Estate* (1); *Hewitt* v. *Kaye* (2); and *In re Beaument* (3). I do not agree with this view. I do not regard it as consistent with the facts. I think that it was his declared intention to give the money represented by the deposit receipt to the beneficiaries named and to that end he gave the deposit receipt; that it went out of his possession into the possession of his brother who handed it to Dr. McDonald's wife, as one of the donees, to hold it for herself and the other two beneficiaries. Dr. McDonald intended this deposit receipt to be, and it was after the orders were given, in their possession and not in his, and to become their property absolutely upon his death.

Let us for a moment consider the facts. There can be no dispute of this, that he signed three orders for $2,000 each, to be paid to the parties out of the deposit receipt. Does this not disclose clearly an intention to divide the sum for which the deposit receipt was held equally between the three donees? Why should he then retain the deposit receipt? Was it not what one

(1) L. R. 13 Eq. 489. (2) L. R. 6 Eq. 198.
(3) [1902] 1 Ch. D. 889.

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might expect would be done? Is it not a disclosure of an intention to give the money for which the receipt was held and to give the orders to shew how that money was to be divided? He had, under the strictest construction of what he said and did, given orders to the total amount of the principal sum. Can it be supposed that the interest, which amounted to less than $18, was withheld by the donor, when it is so clear that he intended that each of the donees should receive one-third of the amount of the deposit receipt? It would require but little evidence to shew that he handed over the receipt itself to the beneficiaries. Looking at what he did over his own signature, I think it is more reasonable to hold that he gave to the parties named the whole sum for which the deposit was held, and that the orders which were given were intended to shew simply how the sum was to be divided. It is true that the anxiety which he expressed —that the money should be drawn and divided without delay—might seem to point to a gift *inter vivos*, but, after considering all that was said and done at the time, I have no doubt that a gift *mortis causâ* was intended, and I think that such a gift was effectually made. *Gardner* v. *Parker* (1).

It is important to look at the surrounding circumstances and to note what passed between the donor, his brother and his wife, and to see whether after the receipt of the deposit was handed to the deceased's brother with the orders, shewing the disposition he had made of it, in the event of his death, he did anything to show that he regarded it as still in his possession, and I think that what was done shows that it was handed by the brother to the sick man's wife, not to return it to the custody of the donor, and so defeat the object which he had expressed, but for safe-keeping

(1) 3 Madd. 102.

for herself and the other donees, and if she put it in his trunk, it was not for the purpose of restoring it to his possession again, but because she thought it was the safest and most convenient place which she had under her control.

The cases which hold that the dying man had not completed his gift but retained possession of his property were cases in which the property was put into some trunk or box by his direction the key of which was brought to him and of which he retained in his possession while he lived. Here the receipt of deposit was in the possession of the wife for herself and the two other beneficiaries and this is confirmed by the orders given upon it.

It is well to consider the nature of the gifts of this class; how they are created, and by what acts they may be destroyed.

A *donatio mortis causâ* is (says Story,) a sort of amphibious gift, between a gift *inter vivos* and a legacy; it is not properly cognizable by the ecclesiastical courts; neither does it fall regularly within an administration; nor does it require any act of the executor to constitute a title in the donee. It is properly a gift of personal property by a party who is in peril of death upon condition that it shall presently belong to the donee, in case the donor shall die, but not otherwise.

This, I think, is a good description of this kind of a gift. To be a valid donation the gift must be made with a view to the donor's death; it must be conditioned to take effect only on his death from the existing disorder; and there must be a delivery of the subject of the donation by the donor, or by his direction, to the donee, or to some one for his use; so that the possession of the thing will have passed from the donor to the donee to vest, upon the death of the donor, absolutely in the donee. In my opinion, these conditions were complied with here.

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In the case of *Lawson* v. *Lawson* (1) it was held that where a husband on his death bed delivered to his wife a hundred guineas and bade her apply it to her own use, that was a good *donatio mortis causâ*, and should not go to the executors or administrators of the husband if there was sufficient without it to pay his debts.

The Master of the Rolls was of opinion that the purse of gold was a good *donatio mortis causâ*. It was also said, in that case, that if the husband, being ill, draws a bill on his goldsmith to pay his wife a hundred pounds for a mourning outfit, it was but an authority and it was determined by the death of the husband. But the counsel for his wife replied that it was an authority coupled with an interest and, being given for mourning, it could not take effect but upon the testator's death, and, therefore, his death could not be a revocation. The Master of the Rolls doubted whether there could be a *donatio causâ mortis* without an actual delivery to such donee; at least it was a point not settled, and he reserved it for further consideration. Subsequently he delivered his opinion on both these points. He held a delivery of a purse could and must operate as a *donatio mortis causâ ut res magis valeat quam pereat*; because otherwise, one could not give to his own wife, and there being a delivery by a testator in his last illness and when he was so near his end and bidding his wife apply it to no other use than her own, made this part of the case plain; and he cited Swinburne, 18, where it appears there are three sorts of gifts *causâ mortis*, and said this was in the nature of a legacy to the wife.

2dly. As to the bill of one hundred pounds drawn upon his goldsmith, payable to his wife, to buy her mourning, and to maintain her until her life rent (viz. jointure), should come in, this the Master of the Rolls

(1) 1 P. Wms. 441.

held good, and to operate as an appointment; that, if the wife had received the bill in the husband's lifetime it would have been liable to some dispute, but that he apprehended this amounted to a directon to his executors that the one hundred pounds should be appropriated to his wife's use. It might operate like a direction given by a testator touching his funeral, which ought to be observed though not in his will; though the court ought to go as far as it could to assist the meaning of the party in this case. This case illustrates the doctrine as it prevails at present.

In the case of *Miller* v. *Miller et al.* (1), Miller had a wife and a son, an only child. Two days before his death, he made a will giving his wife one hundred and fifty pounds per annum during her widowhood, in long exchequer annuities. Later, during the same day, he made a codicil by which he gave his wife a further exchequer annuity, and five hundred pounds in money to be paid to her immediately after his death. Subsequently to this, and about an hour before his death, the testator having called his servant to reach his pocket-book, took thereout two bank notes for three hundred pounds each and another note for one hundred pounds (not being a cash note or payable to bearer), all of which notes he ordered his servant to deliver to his wife, who was present, adding that he had not done enough for her. The wife for some time declined to take these, having, as she said, enough already, and that it would injure her son, who was the residuary legatee of the will. Nevertheless, she was at length prevailed upon by her husband to accept of the three bank notes and also the other note, after which the testator, by word of mouth, gave her his coach and a pair of coach horses, bidding three witnesses who were present to take notice of it, and

(1) 3 P. Wms. 356.

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that he was in his senses, who accordingly made a memorandum thereof in writing. A bill was brought in the name of the infant son, by his *prochien amy* against the widow and the executors for an account of the testator's personal estate. The Master of the Rolls held that the gift of the six hundred pounds contained in the bank notes was a *donatio causâ mortis*, which operates as such though made to a wife, for it is in the nature of a legacy, but need not be proved in the spiritual court as a part of the testator's will. Neither are gifts of this kind good unless made by the party in his last sickness. And though in the principal case the sum be the same with the six hundred pounds given by the codicil, yet the manner of giving these notes, together with the expression then made use of by the husband, declaring that he had not sufficiently provided for his wife, manifestly showed them to be designed as additional. On the other hand the wife, declining at first to accept them, appears to have been no craving woman, but then, as to the note for one hundred pounds which was merely a chose in action, and must still be sued in the name of the executors, that cannot take effect as a *donatio mortis causâ*, inasmuch as no property therein could pass by delivery, much less can the widow be entitled to the coach and horses of which there was no delivery in the testator's lifetime. But the doctrine is now well established that not only negotiable notes and bills of exchange, but bills payable to bearer, or indorsed in blank, exchequer notes, and bank bills may be the subject of a *donatio mortis causâ*, because they may and do, in the ordinary course of business, pass by delivery.

In *Bouts* v. *Ellis* (1), a testator, upon his death bed, gave a cheque of one thousand pounds to his wife, and at his request, she changed it for a cheque of

(1) 21 Eng. Law & Eq. 337; 22 L J. Ch. 716.

another person for the same amount. The testator's cheque was paid in his lifetime, and after his decease the widow obtained the one thousand pounds upon another cheque given to her in exchange for that which she had received from her husband. It was held by the Master of the Rolls, and affirmed by the Lords Justices on the appeal, that the gift to the wife was complete and that the one thousand pounds did not form part of the husband's estate. The Master of the Rolls said:

My opinion is that this was a trust executed by the testator in his lifetime for the benefit of his wife.

In the case of *Moore* v. *Darton* (1), Miss Darton lent Moore five hundred pounds for which he gave a signed memorandum, saying it was to bear interest at four per cent, but not to be withdrawn at less than six months notice. In October, 1843, this acknowledgement was given. On the same day a second receipt was given:

Received by Miss Darton, for the use of Ann Dye, one hundred pounds, to be paid to her at Miss Darton's decease, but the interest at four per cent to be paid to Miss Darton. (Signed) William Moore.

Underneath these receipts was written, "I approve of the above. Betty Darton." In June, 1845, Miss Darton fell into a declining state of health, and on the 18th of June she was confined to her bed. She had a conversation at the time with Ann Dye as to the money she had lent to Mr. Moore. The evidence given by Ann Dye was:

I assisted Miss Darton from her bed, and she took from a drawer the two receipts, and placed them in my hands, and at the same time requested me to take care of them, and be sure and not let Mr. Thomas Harley Darton (who was her nephew and the executor named in her will), see them, and not let either of them go out of my possession until after her death, and she then directed me that immediately upon her death I was to give the two receipts or memorandums to William Moore. Her object or purpose in giving me such

(1) 7 Eng. Law. & Eq. 134; 20 L. J. Ch. 626.

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directions as aforesaid, as she told me, and as I believe, was that she wished that, at her death, the debt or sum of six hundred pounds, so due to her from the said William Moore, should be cancelled.

This case came before Knight Bruce V.C. He said the consequence is that Mr. Moore, having received this money (to the extent of one hundred pounds) became trustee of it for the use of Miss Darton for life, and subject to a life interest for the use of Ann Dye, whom he thought entitled accordingly.

The document now before me, the delivery of which is said to have operated as a *donatio causâ mortis*, delivered with the intention with which it is said to have been delivered, was placed in the hands, not of Mr. Moore, but of Ann Dye. I think, however, upon the evidence, that it was placed in the hands of Ann Dye sufficiently in the character of agent for Mr. Moore, to make it equivalent to a delivery to Mr. Moore; and I think that the intention was that which was sufficient to create a gift *mortis causâ*; and if, therefore, by law, an interest of this description is capable of being made the subject of a *donatio mortis causâ*, this was so.

The authorities have not gone so far as to recognise the donor's unpaid cheque as a valid gift *mortis causâ*, in the hands of his banker; *Hewitt* v. *Kaye* (1); nor the gift of a bank book as a gift *causa mortis*. *In Beak's Estate* (2).

In *Duffield* v. *Elwes* (3), it was held that the court of equity, when it carries into effect the interest that the donee has, assumes that the interest is completely vested by the gift, and that the donee has the right to ask for the aid of the court to compel the executor or administrator to carry into effect the donor's intention.

In *Ward* v. *Turner* (4) the court held that delivery is necessary to make a good *donatio mortis causâ*; that the delivery of certain receipts for stock did not effectuate the gift of the stock; that they might be of some avail to indentify the person coming to receive

(1) L. R. 6 Eq. 198.
(2) L. R. 13 Eq. 489.
(3) 1 Bligh N. R. 497 at p. 530.
(4) 2 Ves. Sr. 431.

the stock, but after that is over, they are nothing but waste paper.

In July, 1859, the question of how far an unindorsed promissory note, payable to the donor or order, may be the subject of a gift *causâ mortis* came before Sir John Romilly, M.R. in the case of *Veal* v. *Veal* (1) and he held that, according to the latest determination of English courts, such a gift is valid.

In *Reddell* v. *Dobre*, (2) the deceased being in declining health delivered to Charlotte Redell a locked cash box and told her to go at his death to his son for the key; that the box contained money for herself, and was entirely at her disposal after he was gone, but that he should want it every three months while he lived. The box was twice delivered to the deceased by his desire and he delivered it again to Charlotte Redell and it was in her possession at his death; the box was afterwards broken open and contained a cheque for five hundred pounds drawn by a third party in favour of the deceased and enclosed in a cover indorsed with the name of Charlotte Redell and the key which the son of the deceased had refused to deliver to her had a piece of bone attached to it with her name witten on it. Shadwell V. C. held that there was no *donatio mortis causâ*, for that there was nothing more than that to a certain extent the deceased had put Charlotte Redell in possession of the box but had retained to himself the absolute power over its contents.

All these cases make it clear that the possession of the property must pass to the donee or to some one who holds it for him. The possession cannot continue in the donor and here in the case before us, in my opinion, it did not. *Hawkins* v. *Blewitt* (3); *Bunn* v.

(1) L. R. 4 Eq. 115; 6 Jur N S 537 (2) 10 Sim. 244.
(3) 2 Esp. 662.

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Markham, (1); *Hassell* v. *Tynte* (2); *Duffield* v. *Elwes*, (3); *Ward* v. *Turner*, (4).

In re *Mead*; *Austin* v. *Mead*, (5) a testator who held a banker's deposit note for two thousand seven hundred pounds, two days before his death, proposed to give five hundred pounds of this amount to his wife. At his request a friend filled up a seven day's notice to the bank to withdraw the deposit which the testator signed. The friend took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500"; the note was then handed to his wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when the customer withdrew a part of the sum which he had placed on deposit, to give him a fresh note for the balance. Upon these facts Lord Justice Fry said:

> A gift of a banker's deposit note with a view of giving to the donee the whole of the sum secured by it has been held to be a good *donatio mortis causâ*. A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ*.

And this gift was held to be a cheque, for the deposit note was for a very much larger sum than the donation.

With regard to the bills of exchange which were given at the same time, that had not been indorsed, but which were payable to the donor or order, they were held to have been a valid *donatio mortis causâ*. In this respect, *Veal* v. *Veal* (6) was followed.

In *Clement* v. *Cheesman* (7) a cheque payable to the donor or order and without having been indorsed by the donor was given during his last illness to his son, and was held to stand upon the same footing as a pro-

(1) 7 Taunt. 224.
(2) Amb. 318.
(3) 1 Bligh N. R. 497.
(4) 2 Ves. Sr. 431.
(5) 15 Ch. D. 651.
(6) 27 Beav. 303.
(7) 27 Ch. D. 631.

missory note or bill of exchange. Chitty J. followed *Veal* v. *Veal* (1), and held it passed to the son by way of *donatio mortis causâ*. Here Mr. Justice Chitty pointed out that a cheque drawn by a donor upon his own banker cannot be the subject of a *donatio mortis causâ* because the death of the donor is a revocation of the banker's authority to pay. But, when the donor is dealing with the cheque of another man, it stands upon entirely the same footing as a bill of exchange or promissory note, and so it was held that the son held these cheques of third parties as a *donatio mortis causa.*

In *Re Dillon; Duffin* v. *Duffin* (2), a testator held a banker's depository note for five hundred and eighty pounds. Shortly before his death he filled out upon a stamp a form of cheque indorsed on the note, "Pay self or bearer £580." He handed the document to a relation who was attending him in his last illness, telling her that she was to give it back to him if he recovered, and, if not, she would be all right. It was held that there was a valid *donatio mortis causâ*, and that the gift was not defeated by the giving of the cheque along with the note. No more do I think did the giving of the orders against the deposit receipt in any way invalidate the gift. They merely show how the sum mentioned in the deposit receipt was to be divided between the parties. I therefore hold that a valid *donatio mortis causâ* was made of this deposit receipt for $6,000 with the accumulated interest.

I think that the testimony of Daniel McDonald and that of Eunice McDonald are in substantial accord; that the deposit receipt was given to them; that Daniel McDonald testifies truly when he says:

I told him he had better give orders to show how much each of us was to get. He then told me to write such orders and he would sign them. I wrote the orders on Union Bank cheques and he signed them.

(1) 27 Beav. 303. (2) 44 Ch. D. 76.

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I kept two of them, my own and my sister's, and handed the other to his wife with the deposit receipt.

The deposit receipt remained from that time until his death in the possession of Mrs. McDonald, his wife.

Eunice McDonald testified that the doctor asked her to take a deposit receipt out of his trunk, which she did and handed it to him. He handed it to his brother Daniel and asked him to make out three orders or cheques, one for his sister, one for himself and one for her. She thinks he told his brother to get the money as he did not wish it to have anything to do with his will. Daniel then gave the deposit receipt to her. She took charge of it and put it back in her trunk. She took charge of it, which means that it was, thereafter, in her custody. On cross-examination, she said that she did not understand that the money was to be got at once, but she understood that it was to be got and divided by means of cheques.

I hold that the deposit receipt was given to the respondents by the late Dr. McDonald and was a good *donatio mortis causâ.*

ARMOUR J. (dissenting.)—All the authorities are rightly to the effect that the donor's own cheque given and not acted upon by payment either actually or constructively made, will not constitute a valid *donatio mortis causâ.* Per Buckley J. *In re Beaumont* (1); citing *Hewitt* v. *Kaye* (2), and *In re Beak's Estate* (3), to which may be added *In re Mead* (4).

And the reason of this is that

speaking broadly the subjects of *donationes mortis causâ* must be things the title to which or the evidence of title to which passes by delivery. *Re Hughes* (5).

(1) 86 L. T. N. S. 410; [1902] 1 Ch. 889.
(2) L. R. 6 Eq. 198.
(3) L. R. 13 Eq. 489.
(4) 15 Ch. D. 651.
(5) 59 L. T. N. S. 586.

The authorities also shew that a cheque is not an equitable assignment of money in the hands of a banker. *Hopkinson* v. *Forster* (1); *Schroeder* v. *Central Bank of London* (2); *Shand* v. *Du Buisson* (3); *Re Beaumont* (4).

The cheques or orders, therefore, claimed in this suit are invalid either as *donationes mortis causâ* or as equitable assignments and the respondents must fail in their claim so far as they are concerned.

The authorities shew, however, that a deposit receipt such as that claimed by the respondents is the subject of a *donatio mortis causâ*.

The onus of proving such a *donatio mortis causâ* is upon the donee and "cases of this kind demand the strictest scrutiny," and

no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. *Cosnahan* v. *Grice* (5)

and

sound policy requires that the laws regulating gifts *causâ mortis* should not be extended and that the range of such gifts should not be enlarged. *Ridden* v. *Thrall* (6); *Duckworth* v. *Lee* (7).

There were only two witnesses who gave evidence in support of the *donatio* of the deposit receipt; Daniel McDonald, the brother of the deceased, and Eunice McDonald, the widow of the deceased, and their evidence, so far as material, was as follows:

Daniel McDonald said:

On the 13th October he asked his wife to take from his trunk, which was in the room at the time, a deposit receipt. She did so and handed it to him. It was a deposit receipt from the Union Bank. He then handed it to me and told me to divide it equally between his wife, his sister Jane and myself, as he did not wish this deposit

(1) L. R. 19 Eq. 74.
(2) 34 L. T. N. S. 735.
(3) L. R. 18 Eq. 283.
(4) 86 L. T. N. S. 410.
(5) 15 Moo. P. C. 215.
(6) 125 N. Y. 572.
(7) [1899] 1 Ir. Rep. 405.

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receipt to have anything to do with his will. * * * * I told him he had better give orders to shew how much each of us was to get. He told me to write such orders and he would sign them. I wrote the orders on Union Bank cheques and he signed them. I kept two of them, my own and my sister's, and handed the other to his wife with the deposit receipt. * * * * I do not know where Mrs. McDonald put the deposit receipt when I gave it to her. I thought she put it back into the trunk.

Eunice McDonald said:

The doctor (her husband) asked me to take a deposit receipt out of his trunk, which I did and handed it to him. He handed it to his brother Daniel, and asked him to make out three checks or orders, one for his sister, one for himself and one for me. I think he told his brother to get the money as he did not wish it to have anything to do with his will. Daniel then gave the deposit receipt to me. I took charge of it and put it back into the trunk * * A couple of days after my husband told his brother again to get the money out of the bank and divide it as he did not wish it to have anything to do with his will. I took the deposit receipt in the doctor's trunk to Sydney—(This was after the doctor's death.) * * I had another trunk * * I did not understand that the money was to got at once, but I understood it was to be got and divided by means of the cheques * * I brought two trunks with me from Sydney, mine and the doctor's.

These witnesses differ materially in their accounts of the transaction, Daniel McDonald saying that his brother handed him the deposit receipt telling him to divide it equally between his wife, his sister Jane and himself, and Mrs. McDonald making no mention of this important fact; and Daniel McDonald saying, it was at his suggestion that the cheques were made out, and Mrs. McDonald saying that it was by her husband's direction.

The learned trial judge, who saw these witnesses and heard their evidence given, was of the opinion that the evidence of Mrs. McDonald was the correct version of what took place, and his opinion, in this respect, is of great weight.

I am unable to see anything in the evidence of Mrs McDonald which would warrant the finding of a

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donatio of the deposit receipt; her husband used no words of gift with regard to it; he handed it to Daniel McDonald obviously for the purpose of enabling him to make out the orders or cheques, and asked him to make out three orders or cheques, one for his sister, one for himself and one for her, and she understood the money was to be got and divided by means of the cheques; all of which evidence points to the gift of the cheques or orders, but not to the gift of the deposit receipt.

Turning then to the evidence of Daniel McDonald, and assuming that when the deceased handed him the deposit receipt and told him to divide it equally between his wife, his sister Jane, and himself he intended to make a gift of the deposit receipt, that intention was abandoned by his accepting the suggestion of Daniel McDonald and giving the cheques or orders in substitution for it, and that they were given in substitution for it is manifest from the fact that, upon their being given, the deposit receipt was returned; and that they were accepted in substitution of the intended gift of the deposit receipt is also manifest from the fact that Daniel McDonald, to whom the gift was intended to be made, instead of keeping it, as he did his own and his sister's cheques, returned it.

This evidence also points to a gift of the cheques or orders but not to a gift of the deposit receipt.

I asked the respondents' counsel, in the course of the argument, to whom they contended the gift had been made and they answered, to Daniel McDonald, and the question therefore is: Was there a gift made by the deceased to Daniel McDonald of the deposit receipt? It is essential to such a gift that there should be an acceptance by the donee of the thing given, that there should be an actual delivery and a change of possession of the thing given from the donor to the donee, and

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that such change of possession should continue until the death of the donor.

The proposition is not—that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted that the ownership is not changed until a subsequent actual delivery. The proposition before the court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which, at once, complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept, then and there, such a giving without then and there receiving the thing given. Per Lord Esher M.R., in *Cochrane* v. *Moore* (1).

The delivery in a *donatio mortis causâ* must be such a delivery as to pass the thing out of the dominion of the dying person and put it into the dominion of the person to whom it was given. *Cant* v. *Gregory* (2).

And there must be a continuing possession of the donee after the delivery to the time of the donor's death. *Bunn* v. *Markham* (3).

But it (the common law) does require clear and unmistakable proof not only of an intention to give but of an actual gift, perfected by as complete a delivery as the nature of the property will admit of. It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain possession till the donor's death. Although the delivery may have been at the one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession the gift becomes nugatory. *Hatch* v. *Atkinson* (4); *Dunbar* v. *Dunbar* (5); *Basket* v. *Hassell* (6).

The alleged gift to Daniel McDonald was deficient in all these essentials. There was no acceptance by Daniel McDonald of a gift of the deposit receipt, for when the cheques were drawn and signed by the

(1) 25 Q. B. D. 57.
(2) 10 P. L. R. 564.
(3) 7 Taunt. 224.
(4) 56 Me. 324.
(5) 80 Me, 152.
(6) 107 U. S. R. 602.

deceased he returned it. If he had accepted it he would have taken it and kept it as he did his own and his sister's cheques and would not have returned it as he did.

There was no actual delivery and change of possession of the deposit receipt from the deceased to Daniel McDonald. There is no ground in the evidence for any contention that Daniel McDonald when, after the cheques were drawn, and signed, he handed the deposit receipt to Mrs. McDonald, he handed it to her in order that she might keep it for him, for nothing was said by him when he handed it to her. She, by her husband's directions, and as his agent, took the deposit receipt out of his trunk, and handed it to him and he handed it to Daniel McDonald and, after the cheques were drawn and signed, Daniel McDonald handed the deposit receipt to Mrs. McDonald who replaced it in her husband's trunk. The proper inference from this is, nothing having been said, that Daniel McDonald handed the deposit receipt to her and she received it in the same capacity in which she had taken it out of her husband's trunk, that is to say, as his agent, and her replacing it in her husband's trunk is consistent with this view and with no other What was done was precisely the same, in effect, and if the deceased had himself taken the deposit receipt out of the trunk and handed it to Daniel McDonald and the latter had, after the cheques were drawn and signed, handed it to the deceased who replaced it in his trunk. The possession of the deposit receipt by Daniel McDonald did not continue until the death of the deceased, for the deposit receipt was replaced by Mrs. McDonald in the deceased's trunk, and remained there until his death.

It was said in the court appealed from that the donor was not shewn to have been aware that it was

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put back in his trunk, if that would make any difference, which I do not think. But it was shewn that he was present during the whole transaction, and the fair inference is that he was aware of all that took place and nothing to the contrary was shewn. There was, therefore, no gift made by the deceased to Daniel McDonald of the deposit receipt as contended for by the respondents' counsel.

Re Taylor (1) does not help the respondent. In that case the donee kept the key of the box in which the subject of the gift was placed and Sterling J. said:

> She kept the key and had access to the box and from that it appears that there was a delivery of the note to her in one sense at all events.

But it was contended, in that case, that as the box was the donor's and where he kept his valuables, that his direction to the donee to place the subject of the gift in the box was a resumption of possession of such subject by the donor, although the donee kept the key, but it was held that it was not. If, however, the donor had obtained the key of the box from the donee after such subject was placed in the box, his doing so would doubtless have been held to have been a resumption by him of the possession of the subject of the gift. And that case belongs to a class of cases in which it has been held that the delivery and possession of the key of the depository in which the subject matter of the gift has been placed is an actual delivery and possession of the subject matter. I refer to *Jones* v. *Selby* (2), and to the comments thereon by Lord Hardwicke, as reported in *Ward* v. *Turner* (3), at page 443, and as reported in 1 Dickens, 170, at page 172. *In Re Mustapha* (4); *Walker* v. *Foster* (5); Pollock on Possession, 62.

(1) 56 L. J. Ch. 597.
(2) Finch Prec. Ch. 300.
(3) 2 Ves. Sr. 431 at p. 400.
(4) 8 Times L. R. 160.
(5) 30 Can. S. C. R. 299.

Two American cases were relied upon by the counsel for the respondents; *Corle* v. *Monkhouse* (1); and *Westerle* v. *Dewitt* (2). But the former was the case of a gift *inter vivos*, and is not pertinent to this case, and the latter was a decision of the Supreme Court reversing the decision of the Court of Appeal, in neither of which courts was there unanimity. And the decision is not in accord with the Engish authority nor with the weight of American authority, and the case was not, in its circumstances, like this case, and we should have to go much further than was gone in that case to find a gift of the deposit receipt in this.

I am unable in this case to find any evidence of a gift of the deposit receipt made by the deceased and, if there be any such evidence, having regard to the different accounts of the transaction given by the two witnesses and the finding by the learned trial judge that the account given by Mrs. McDonald was the correct one, I do not see how it can be held to be of the clearest and most unequivocal character.

The two witnesses Daniel McDonald and Eunice McDonald are, however, opposite and interested parties to this action within the meaning of the proviso in section 35 of chapter 163 of the Revised Statutes of Nova Scotia, 1900, to be read in accordance with sections 22 and 23 and subsection 33 of section 23 of the Revised Statutes of Nova Scotia, 1900, and cannot obtain judgment herein on their own testimony unless such testimony is corroborated by other material evidence. *Taylor* v. *Regis* (3).

Now, the claim, in this case, is of a gift made by the deceased of the deposit receipt, and it is the testimony, if any, of these two witnesses that such gift was made that must be corroborated by other material evidence,

(1) 50 N. J. Eq. 537. (2) 36 N. Y. 340.
(3) 26 O. R. 483.

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and such other material evidence must be evidence tending to prove that such gift was made by the deceased.

In *Re Finch* (1), Sir George Jessel said:

As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

And Lindley J. said:

Evidence which is consistent with two views does not seem to me to be corroborative of either. *Re Laws* (2); *Re Ross* (3); *Tucker* v. *McMahon* (4).

It is said in the court appealed from that

the letter sending for the deposit receipt, the illness and absence of hope of recovery on the part of the donor and the orders signed by the donor during this period constitute material evidence

Evidence of the fact that the deceased wrote from Halifax to his wife at Sydney on the fifth of October telling her, among other things, to come to Halifax, and saying "bring bank-book and that cheque for $6,000," does not tend to prove that on the fifteenth of October he made a gift either of the bank-book or of the cheque.

Evidence of the fact of the illness and of the absence of hope of recovery on the part of the donor does not tend to prove that during that period he made a giftof the deposit receipt, nor does his signing the orders during that period tend to prove it.

Nor do the orders, nor anything contained in them, tend to prove it. The orders were made payable "out of deposit receipt No. 2793, Sydney," and these words tend rather to negative a gift of the deposit receipt than to prove it, indicating as they do a retention of the deposit receipt and not a donation of it and the deposit receipt shows that these orders did not exhaust the

(1) 23 Ch. D. 267.
(2) 28 Gr. 382.
(3) 29 Gr. 385.
(4) 11 O. R. 718.

amount payable under it. *Re Mead* (1). If the claim had been that the deceased owed the payees named in the cheques or orders or intended to give them the amounts mentioned therein, the cheques or orders would have been corroborative evidence of such a claim, but they are not in any way corroborative of a gift of the deposit receipt.

The evidence referred to as corroborative of the testimony of these witnesses is the only suggested evidence as being corroborative of it, and it is clearly not so in the sense of the law, and after carefully examining all the evidence, I am unable to find in it any other material evidence such as the law requires, corroborating the testimony, if any, of these witnesses that a gift of the deposit receipt was made by the deceased.

There is nothing said in *Green* v. *McLeod* (2) which would at all justify a finding that such testimony was corroborated.

In my opinion, the respondents have failed to establish their claim of a gift by the deceased of the deposit receipt, and the appeal should be allowed with costs in this court and in the court appealed from and the judgment of the trial judge should be restored.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Gillies.*

Solicitor for the respondents Daniel, Jane and Eunice McDonald: *W. A. Henry.*

Solicitor for the respondent, Margaret Mooney: *F. W. Russell.*

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(1) 15 Ch. D. 651.

(2) 23 Ont. App. R. 676.

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*Feb. 17, 18.
*Mar. 26.

THE LIVERPOOL AND MILTON RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE TOWN OF LIVERPOOL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Tramway—Operation of railway—Use of streets—Regulations—Crossings—Powers—By-law or resolution—63 V. c. 176 (N.S.)—R. S. N. S. (1900) c. 71, ss. 263, 264—Construction of statute.

By the Nova Scotia statute, 63 Vict. ch. 176, the L. & M. Ry. Co. was granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property.

Held, reversing the judgment appealed from, Davies J. dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of section 264 of "The Towns Incorporation Act." (R. S. N. S. (1900) ch. 71.)

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (*per* Weatherbe and Graham JJ., Ritchie J. dissenting) reversing the decision of Meagher J. at the trial and declaring that the town council of the Town of Liverpool had full power and authority, without the approval of the Lieutenant-Governor-in-Council to make a regulation, by resolution to the effect and in the form following, viz.:

"That the Liverpool and Milton Railway Company, Limited, shall forthwith erect and maintain two gates, to be of the latest improved pattern of

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour JJ.

railway crossing gates, on and across Market Street, in this town, one north and the other south of the point where said company's track crosses said Market Street, and both said gates to be not more than twenty feet from said point or crossing. Said gates shall be closed within one minute before the passage of any of said company's engines, cars or trains across said Market Street, and shall be opened again immediately after the passage across said Market Street of such engines, cars or trains, and at all other times shall be kept open; and said company shall make due provision for such opening and closing of such gates." And further that the defendant was not entitled to operate its railways or tramway across Market Street, in the Town of Liverpool, without complying with the said regulation.

The questions at issue on this appeal are stated in the judgment of His Lordship Mr. Justice Armour.

Newcombe K.C. for the appellants. The regulation in question, not having been approved by the Governor-in-Council, is of no force or effect. The term "regulations" in sec. 1, ch. 176 of the Act of 1900, is synonymous with, and included in the term "by-laws and ordinances." Angel and Ames on Corporations, secs. 325 and 326; Dillon, Municipal Corporations, secs. 307, 308, 314; *Kepner* v. *The Commonwealth* (1); Wharton's Law Lexicon, p. 108; *The Commonwealth* v. *Turner* (2); *London Association of Shipowners and Brokers* v. *London & India Docks Joint Committee* (3).

W. B. A. Ritchie K.C. for the respondent. The regulation in question is not of a character which the court can declare *ultra vires* on the ground of unreasonableness. It is a reasonable and proper one. The subsection added to section 6 of the Company's Act of

(1) 40 Pa. St. 124.
(2) 1 Cush. (Mass.) 493.
(3) [1892] 3 Ch. 242.

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Incorporation, by the amending Act of 1900, expressly confers authority upon the town council to make such regulation. Before the passing of this subsection the company could not cross Market Street without the consent of the town. Now, with the consent of the town the company may use the streets, involving the necessary crossings, "subject, nevertheless, in all such cases, to such regulations, if any, as the said town council may, from time to time, if it sees fit, make, to secure the safety either of person or of property." See Dillon, Municipal Corporations (4 ed.) sec. 319, *note;* Biggar's Municipal Manual, p. 45; *Bailey* v. *Williamson* (1) *per* Cockburn C.J.; *Slattery* v. *Naylor* (2); *Kruse* v. *Johnson* (3), at page 99; *Walker* v. *Stretton* (4); *Colborne* v. *Town of Niagara Falls* (5).

The statute by giving a right to the company and declaring such right to be subject to such regulations as the town council may make is sufficient authority for the making of such regulations without the necessity of approval by the Lieutenant-Governor-in-Council, and to make such regulations by resolution merely.

The Towns Incorporation Act does not require all regulations to be made by by-law, and the general language of secs. 263, 264 does not take away the specific powers given by the Act of 1900. See remarks of Robinson C.J. in *Reg.* v. *Grand Trunk Railway Company* (6).

The town council having power to give consent, subject to conditions, the conditions so given, when acted upon by the company, became a binding contract, and the company cannot act upon the conditional consent and ignore the conditions. The com-

(1) L. R. 8 Q. B. 118.
(2) 13 App. Cas. 446.
(3) [1898] 2 Q. B. 91.
(4) 44 W. R. 525.
(5) 9 O. R. 168
(6) 15 U. C. Q. B. 121.

pany is "estopped" from repudiating a regulation made under power expressly reserved in the contract under which they constructed the crossing. *St. Louis, & Meramec River R. R. Co.* v. *City of Kirkwood* (1); *Pacific Railroad Co.* v. *Leavenworth City* (2); *Compagnie pour l'Eclairage au Gaz de St. Hyacinthe* v. *Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe* (3). The town had jurisdiction to require gates to be built at any street crossing; R. S. N. S. (5 ser.), ch. 53, s. 15, 9; Acts 1895, ch. 4, s. 78.

In Nova Scotia the absolute fee in the streets and not merely the area of user is vested. R. S. N. S. (1900) ch. 76, s. 32; *Koch* v. *Dauphinee* (4); *Dickson* v. *Kearney* (5); *Finchley Electric Light Co.* v. *Finchley Urban District Council* (6); *Borough of Stamford* v. *Stamford Horse R. R. Co.* (7), and *per* James L. J. in *Rolls* v. *Vestry of St. George* (8) at page 795.

The CHIEF JUSTICE and SEDGEWICK J concurred in the judgment allowing the appeal and dismissing the action for the reasons stated by His Lordship Mr. Justice Armour.

DAVIES J. (dissenting).—For the reasons given by Mr. Justice Graham in his able and elaborate judgment, to which I do not feel that I can usefully add anything, I am of the opinion that this appeal should be dismissed. I understand that all my brethren agree that none of the objections taken by the railway company to the plaintiffs' action are good, excepting the one that the "regulation" is invalid unless and until it is approved of as a by-law by the Lieut. Governor in Council. And on this point also I am in

(1) 159, Mo. 239.
(2) 1 Dillon (U.S.) 393.
(3) 25 Can. S. C. R. 168.
(4) 2 N. S. Rep. (James) 159.
(5) 14 Can. S. C. R. 743.
(6) [1902] 1 Ch. 866.
(7) 56 Conn. 381.
(8) 14 Ch. D. 785

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accord with the judgment appealed from. I do not think the word "regulations" was used in the statute amending the railway company's power to build the road through the Town of Liverpool in the sense of or as equivalent to the word "by-law." I agree with Mr. Justice Graham that it was used in its ordinary and proper sense as an act of regulating. The statute meant, in my opinion, that the town might give its consent to the railroad running along or crossing any of its streets subject to such "conditions" or "rules" or "provisions" as the town council might from time to time make or provide. If any of these words, which are in my view the equivalent of the word actually used, had been inserted in the section then it could hardly be contended that, to render them effective, a by-law to be approved by the Lieut. Governor in Council should be passed. The town council could withhold its consent altogether or couple with it a condition subject to which its consent alone could be operative. It adopted the latter course and when the company acted upon the conditional consent there was formed a statutory contract between the town and the railway company, which the former had a right to have enforced quite irrespective of the formalities required for the passing of a by-law.

MILLS J.—In my opinion the railway company were authorized by their act of incorporation to construct, maintain and operate a line of railway with all the necessary side tracks for the passage of their cars along the streets of Liverpool. The act of incorporation was subsequently amended, making it necessary to obtain the consent of the council of the Town of Liverpool to the crossing of the streets by any extension of the line of the Liverpool and Milton Railway.

The railway company desired to remove their track from the Main Street to the water front, and the solicitor of the company asked the town council of Liverpool to pass a resolution at their first meeting so as to expedite the removal of the track of the company from the Main Street to the one upon which they desired to locate it. The council complied with this request upon condition; 1, That the company should within six months remove its rails and sleepers from certain parts of Main Street and School Street, and should put these streets from which the track is removed in good repair.

2. That the company should only avail themselves of the liberty conceded upon the condition and understanding that they exercised their powers subject to such regulations as the council of the town should from time to time make, in respect to the crossing of the streets mentioned.

3. That the building and maintaining of the line across any of the said streets should be subject to the approval of the street committee of the council.

4. That suitable provision subject to the approval and direction of the committee, should be made by the railway company for the flagging of its trains at the street crossings.

5. That the traffic of the streets should not be interfered with by the trains of the railway company.

On the last day of May, 1901, the town council passed a resolution to maintain gates of the most approved pattern at places named by the council, and the council further resolved that if these resolutions were not complied with within forty days, the council would take proceedings to stop the railway company's engines or cars from running across Main Street.

The company have not obeyed these resolutions, and the council are seeking to enjoin them. It is not

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denied that the council may make the necessary by-laws, rules and regulations for the proper municipal government of the town; but could it control the appellant company by resolution in the way attempted? I do not think so. By the Revised Statutes of Nova Scotia, 1900, c. 71, s. 263, the municipal council are authorized to make by-laws for the safety of persons and property, and this they are not authorized to do by resolution. The council must follow the statute in the exercise of the enabling power conferred. What they are authorized to do by by-law they cannot do by resolution This has not been done, they have not exercised their power as the statute provides, and they have not sought and obtained the approval of the Lieut Governor in Council, as the statute requires. This approval is required to protect the company against the possibility of unreasonable or repressive demands being made upon them. My brother Armour has gone so fully into the discussion of the subject in which I so entirely concur, that I deem it unnecessary to discuss the subject further. I agree that the appeal must be allowed with costs, and the action dismissed with costs.

ARMOUR J. The appellant company was incorporated by the Act of the Province of Nova Scotia, 59 Vic. ch. 88, by section 6 of which it was provided that

the said company shall have the right of constructing, maintaining and operating a line or lines of single track railway or tramway with all the necessary side tracks, switches and turnouts, and other appliances for the passage of cars, carriages and other vehicles, upon and along the streets of the towns of Liverpool and Milton, and the highway extending from Liverpool to Milton, and thence by the west side of the Mersey River to the premises of the Milton Pulp Company, Limited, and thence across the river to the pulp mill, and through such other streets of the towns aforesaid as may hereafter be decided upon by the company, the consent of the municipal council having first been obtained.

By the Act of the Province of Nova Scotia, 63 Vic. ch. 176, section 6 of chapter 88 of 59 Vic. was amended by adding as a subsection thereto the following:

The said company may construct, operate and maintain a line of railway or tramway, from any point or points on its line across any of the streets of said town of Liverpool, and across and along the heads of docks, wharves and on the lands on the south side of the Liverpool river to a point on the western side of Liverpool harbour below Fort Point, and in addition to all rights by section 6 of said chapter 88 given to said company or now possessed by said company, but without restricting or affecting the generality or force of the foregoing provisions of this subsection, the said Liverpool & Milton Tramway Company Limited, (hereafter to be known as the Liverpool and Milton Railway Company, Limited), shall have the right of constructing, maintaining and operating a line or lines of single track railway or tramway, with all the necessary side-tracks, switches and turnouts, and other appliances for the passage of cars, carriages and other vehicles, upon and along the line or route recently surveyed, and upon several sections of which a track or stone roadway or filling for track is now or has within the last eight months previous to the passage hereof been in course of construction, to connect the present track of said company at or near Stephen West's shop near the parade in the town of Liverpool with the track of the said company on Water street in said town along or near the waterfront, and upon and along such other line or route within said town, and in, upon, across or through such lands, land covered with water, wharves, docks or bodies of water within said town, as the town council of said town may by resolution approve; subject nevertheless, in all such cases, to such regulations, if any, as the said town council may, from time to time, if it sees fit, makes to secure the safety either of persons or of property; provided, however, that where either public or private rights or property shall be taken or interfered with, or shall be proposed to be taken or interfered with under this section and no agreement can be arrived at with said town council in case of public rights or property, or with the owner or owners in case of private rights or property, as to compensation or damages, the company shall proceed as in section 25 (by this Act added to said chapter 88) provided, and the provisions of said section 25 shall apply; provided, however, that before any such line shall be built across, along or upon any other streets or thoroughfares of said town the consent of the town council shall have first been obtained.

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After the passing of the said last mentioned Act the appellant's solicitor wrote to the mayor and town council of the respondents as follows:

By section 1 of chapter 176 of the Acts of the Local Legistature passed in the year 1900 the Liverpool and Milton Railway Company, Limited, were given additional powers as follows—(setting out in its very words the subsection added by the said last mentioned Act to section 6 of 59 Vic. ch. 88, and proceeding thus): You will see by the last part of this section that the consent of the town council is necessary as to crossing streets. The only streets I believe the new line will touch are Bridge or Market street. Union street and street leading to Shipyard Point. The company are desirous of removing their track at as early a date as possible off the main street and placing same along Water front. Before the plans can be approved it is necessary to have a resolution from the town council as set out above. As solicitor of the company, I would respectfully request you to pass such resolution at your first meeting so as to expedite the removal of the track of the company from off the main street.

Thereupon, and on the 8th day of December 1900 the council of the respondents passed the following resolution:

Whereas, the Liverpool and Milton Railway Company, Limited, has requested the town council of the town of Liverpool to grant their consent, as required or provided by section 1 of Chapter 176 of the Acts of the Legislature of Nova Scotia, passed in the year 1900, amending section 6 of chapter 88 of the Acts of 1896: Therefore resolved, That the consent of this council be, and it is hereby given to said company, to build a line of single track railway across the streets known as Market street, Bridge street McPherson's lane, street leading from Inness' corner to the river, being continuation of Union street, and street leading to Shipyard Point; provided that said company shall only avail itself of the provisions of this resolution if, and this resolution is upon the condition that the company shall within six months from the passage of this resolution remove its track, rails and sleepers from Main street between the point where its new or proposed line leaves said streets near Stephen West's shop and John D. McClearn's corner, and from School street between McClearn's corner and the foot of said School Street, and put or provide for putting the said streets, where the company shall so take up or remove such track, in good and proper order to the satisfaction of the street committee of this council; and provided further, that the

company shall only avail itself of this resolution upon the condition and understanding that the rights or powers of the company under said section 1 of said chapter 176 shall be exercised subject to such regulations as this council may from time to time make, to secure the safety either of person or of property, and subject also to such regulations as this council may from time to time make as to crossing said mentioned streets;

Provided further, and this resolution is upon the further condition, and this council makes hereby this regulation: that the building and maintaining of said line across said, or any of said streets, shall be subject, as to the manner of building and maintaining such line or track, to the direction and approval of the street committee of this council, and that due and proper provision, subject to the direction and approval of such committee, shall be made by said company for the flagging of its trains at said or any of said crossings, and that traffic on any of said streets shall not be interfered with by the track or trains of the company, and when the company shall at any time place its track above the street level at any such crossing, the company shall raise the street level to correspond subject to the direction and approval of said street committee (and the expression "street" in this resolution shall include sidewalk.)

The appellants, thereupon, constructed their railway as authorized by the said resolution and afterwards on the 31st day of May, 1901, the council of the respondents passed the following resolution:

Resolved, and this council hereby makes the following regulation: That the Liverpool and Milton Railway Company, Limited, shall forthwith erect and hereafter maintain two gates, to be of the latest approved pattern of railway crossing gates, on and across Market Street in this town, one north and the other south of the point where said company's track crosses said Market Street, and both said gates to be not more than twenty feet from said point or crossing. Said gates shall be closed within one minute before the passage of any of said company's engines, cars or trains, across said Market Street, and shall be opened again immediately after the passage across said Market Street of such engines, cars or trains, and at all other times shall be kept open; and said company shall make due provision for such opening and closing of such gates;

Resolved further, that in the event of said Liverpool and Milton Railway Company, Limited, not complying with the foregoing regulations as to such gates, within forty days of its being notified of the making of said regulation, proceedings shall be taken by this council to stop

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the running of said company's engines, cars or trains, across said Market Street until compliance therewith.

The appellants having neglected to comply with this last resolution this action was brought for a declaration that the council of the respondents had full power and authority to make the said regulation and that the appellants were not entitled to operate their railway or tramway across Market Street without complying with said regulations, and for an injunction restraining them from operating their line of railway or tramway across Market Street without complying with said regulation.

At the time of the passing of the Act 63 Vict. ch. 176, the Towns Incorporation Act of 1895 was in force, section 296 of which provided that

> The town council in each incorporated town, in addition to all powers to make by-laws and ordinances, rules and regulations vested in them by the terms of this Act, shall have the sole power and authority, subject to the approval of the Governor-in-Council, to make by-laws for the good rule and government of the town, and for the better carrying out of the provisions in this Act contained, and from time to time revise, repeal, alter or amend any by-laws, ordinances, rules or regulations whatsoever by them made under the authority of this Act; and for the more particularly defining the power of the said town council, and the said town council shall have power to make by-laws for the several purposes following, * * * that is to say:
>
> (61). The providing for any other purpose, matter or thing, specially subjected to the control of the town council by law.

And at the time of the passing of the resolution by the council of the respondents of the 31st of May, 1901, chapter 71 of the Revised Statutes of Nova Scotia, 1900, was in force, by section 263 of which it was provided that:

> The town council in addition to any powers by this chapter conferred upon the council to make by-laws and ordinances, shall have power to make by-laws in respect to all matters coming within the following classes of subjects and may from time to time amend or repeal such by-laws, that is to say for * * * (74) providing for

any other purpose, matter or thing specially within the powers, duties or control of the town council.

And by section 264 it was provided that

the by-laws for the foregoing purposes or any of them shall not be inconsistent with any statute in force in this Province and when approved by the Governor in Council shall have the force of law.

The Legislature, as has been shown, in granting to the appellants by 63 Vict. ch 176, the right of constructing, operating and maintaining their line of railway or tramway across the streets of the respondents, made such grant subject to such regulations, if any, as the town council of the respondents might from time to time, if it saw fit, make to secure the safety either of persons or of property.

The contention of the appellants is that such regulations cannot be made by resolution, but must be made by by-law and if so made must, before having the force of law, be approved by the Governor in Council, and I am of the opinion that this contention is well founded.

The Act 63 Vic., ch. 176 does not prescribe the mode by which such regulations shall be made, but on turning to "The Towns Incorporation Act of 1895," as it stood when the Act 63 Vic., ch. 176 was passed and as it was revised when the resolution of the council of the respondents of the 31st May 1901 was passed, we find that power was given to the council of the respondents to pass by-laws for

the providing for any other purpose, matter or thing specially subjected to the control of the town council by law.

Or as revised for

providing for any other purpose, matter or thing specially within the powers, duties or control of the town council.

It is plain that The Towns Incorporation Act of 1895 conferred upon the council of the respondents the

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power to pass by-laws for making such regulations as are referred to in 63 Vic. ch. 176, and such power so conferred *impliedly excluded the power to make such regulations otherwise than by by-law*, and this is the mode of making such regulations that should have been adopted by the council of the respondents.

It was essential, therefore, to the validity of the regulations set forth in the resolution of the council of the respondents of the 31st May, 1901, that they should have been made by by-law and that such by-law should have been approved by the Governor in Council.

The resolution, therefore, of the council of the respondents of the 31st May, 1901, had no legal validity and even if it could be treated as a by-law, as was suggested, had not the force of law, not having been approved by the Governor in Council and the appellants were not bound to conform to it.

The appeal must, therefore, be allowed with costs and the action dismissed with costs.

I refer to *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, (1).

Appeal allowed with costs.

Solicitor for the appellant: *L. Q. Lovett.*

Solicitor for the respondent: *Jason M. Mack.*

(1) (1892) 3 Ch. 242.

FREDERIC W. GREEN (DEFENDANT)....APPELLANT; 1903

AND

OLIVER S. MILLER (PLAINTIFF).....RESPONDENT. *Feb. 19, 20, 23. *Mar. 26.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.

G. local manager for Nova Scotia of the Confederation Life Assoc. of which M. had been a local agent wrote to Mrs. Freeman, a policy-holder, the following letter. "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency, As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the prasent time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the Company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course ; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you

*PRESENT :—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour JJ.

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have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?" In an action for libel it was shown that he had not been dismissed from the agency but wanted larger commissions in continuing which were refused, and that he was not a defaulter but was dilatory in making his returns, On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money.

Held, that such evidence was improperly received and there was a miscarriage of justice by its admission.

The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away."

Held, that this was misdirection; that the question for the jury was not the truth or falsity of the statements but whether or not, if false, the defendant honesty believed them to be true, so that it was misdirection on a vital point.

The majority of the Court were of opinion, Girouard and Davies JJ. *contra*, that as defendant had asked for a new trial only in the Court below this Court could not order judgment to be entered for him and a new trial was granted.

Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial in favour of the plaintiff.

This case had already been tried three times when the present appeal was taken. A former appeal to this court from an order for the third new trial was dismissed (2), and such trial resulted in a verdict for the plaintiff which was sustained by the full court.

The grounds upon which the present appeal are founded are sufficiently stated in the above head note and fully elaborated in the several opinions published herewith.

(1) 35 N. S. Rep. 117.

(2) 31 Can. S. C. R. 177.

W. B. A. Ritchie K.C. for the appellant. There is no doubt that the defendant's letter was privileged, *Jenoure* v. *Delmage* (1); *Nevill* v. *Fine Arts and General Ins. Co.* (2); and therefore the plaintiff must prove actual malice; *Spill* v. *Maule* (3); *English* v. *Lamb* (4); *Dewe* v. *Waterbury* (5).

The meaning of the letter is clear and unambiguous and the evidence of Mrs. Freeman as to her understanding of it should not have been received. *Daines* v. *Hartley* (6); *Simmons* v. *Mitchell* (7).

The counsel then argued the several grounds of misdirection and contended that the damages were excessive.

Roscoe K.C., for the respondent. The misdirection complained of is in isolated portions of the change but the whole should be read together. *Wells* v. *Lindop* (8); *Clark* v. *Molyneux* (9); *Caldwell* v. *New Jersey Steamboat Co* (10).

It is not sufficient to show that the jury may have been confused. *Strickland* v. *Strickland* (11).

It is not ground for a new trial that the judge has expressed an opinion on matters for the jury to decide. *Taylor* v. *Ashton* (12); *Darby* v. *Ouseley* (13); *Hawkins* v. *Snow* (14).

The statement in the letter that plaintiff was dismissed was false to defendant's knowledge as was also the charge that he did not return moneys. This was evidence of malice. *Smith* v. *Crocker* (15); *Gallagher* v. *Murton* (16); *Royal Aquarium etc. Soc.* v. *Parkinson* (17).

(1) [1891] A. C. 73.
(2) [1895] 2 Q. B. 156; [1897] A. C. 68.
(3) L. R. 4 Ex. 232.
(4) 32 O. R. 73.
(5) 6 Can. S. C. R. 143.
(6) 3 Ex. 200.
(7) 6 App. Cas. 156.
(8) 15 Ont. App. R. 695.
(9) 3 Q. B. D. 237.
(10) 47 N. Y. 282.
(11) 8 C. B. 724 at p. 743.
(12) 11 M. & W. 401 at p. 417.
(13) 1 H & N. 1.
(14) 29 N. S. Rep. 444.
(15) 5 Times L. R. 441.
(16) 4 Times L. R. 304.
(17) [1892] 1 Q. B. 431.

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The evidence of Mrs. Freeman was admissible. *Capital & Counties Bank* v. *Henty & Sons* (1).

The damages were not excessive. Plaintiff was injured as a solicitor by the libel. *Jones* v. *Littler* (2).

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Armour.

GIROUARD J.—We have decided on a former occasion that the letter of the appellant complained of by the respondent is capable of a libellous construction, and that, although written on a privileged occasion, the appellant should be responsible in damages if, upon the evidence, it is found that it was malicious, and finally, as there was misdirection to the jury by the trial judge, we affirmed the judgment ordering a new trial (3).

This court, however, never held that every part of the letter was libellous and that every part must be true. At the very beginning it contains a statement that the respondent had been relieved of the local agency and it cannot be contended that that statement in itself and independently of the words following is libellous; it was in fact conceded by the respondent's counsel that it was not. Now it seems to me that what follows the above statement alone is capable of libellous construction, namely, that he did not attend properly to the business of the company, and that he had collected money which they had been unable to get him to report.

The libel consisted in these charges. The evidence in this case clearly shows that these charges were substantially true, and in this essential particular this case is very different from the former one. The plain-

(1) 7 App. Cas. 741 at p. 791. (2) 7 M. & W. 423.
(3) 31 Can. S. C. R. 177.

tiff had not made the admission to be found in this case, and the court *in banco* had found that the charges as to his default to remit or account regularly had not been proved (1).

Without referring to what Mr. Green says, the evidence of the respondent himself is precise enough. He says:

There was then due the company $151.03. I said I had not the money here but would give him a cheque the next morning. He found fault because it was not there. * * * I was irregular in sending in monthly reports. I received directions to send in the reports on the fifth of each month but I did not attend to them.

And in answer to the interrogatories:

6. Did you receive any and what directions or instructions from the said association or its manager or other officer as to the dates or times at which you were required to make reports or returns or to send in accounts or to make remittances to the said association, or to its said manager at Halifax, or otherwise, and what were the dates or times at which you were so required to make reports or returns, or to send in accounts, and to whom and when were you to make such reports or returns or to send in such accounts?

Answer. I received directions from the defendant as manager of the said association requiring me to make my report and send in my remittance to the defendant, as such manager, as aforesaid, at Halifax, on or before the fifth day of each and every month.

Interrogatory 11. Did you between the said 9th day of March, 1897, and the 27th day of April, 1897, collect or receive any and what money or premiums of the said association, as agent of the said association or otherwise, for said association? Answer fully and particularly.

Answer. I collected between the said ninth day of March, 1897, and the twenty-seventh day of April, 1897, as agent thereof for the said association, money or premiums of the said association, but I have no record thereof, and I do not remember the particulars thereof, and am unable to say what moneys I so collected.

Interrogatory 12. Did you pay over or remit to the said association or its manager previous to the 28th day of April, 1897, any of the said moneys so collected by you subsequently to the said ninth day of March, 1897; if so, state when and in what manner and to whom you

(1) 33 N. S. Rep. 517 at p. 528.

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so paid over or remitted in each instance? Answer fully and particularly.

Answer. I did not pay over or remit to the said association or to its manager, previously to the 28th day of April, 1897, any of the said moneys so collected by me subsequently to the 9th day of March, 1897.

Notwithstanding this confession the jury found for the respondent. The respondent contends that there was no misdirection on the part of the judge; but whether there was or was not, it cannot seriously be denied that the charges complained of were substantially true. In the face of the evidence, and especially of the admissions of the respondent, it is useless to send again the case to trial. Already three trials have taken place and no evidence can possibly be adduced to establish the falsity and malice of the above charges. I think it is in the interest of justice that the action should be dismissed and not sent back for a new trial. Although the appellant did not urge this before the court *in banc*, I believe that the court could have done so *ex proprio motû*, and this court can likewise order, under rule 38, order 38, of the Nova Scotia Judicature rules:

Upon a motion for judgment, or upon an application for a new trial, the court may draw all inferences of fact, not inconsistent with the findings of the jury, and if satisfied that it has before it all the material necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly * * *

It is urged that this is a mere point of practice. Whether it is or is not, it is evident that it will operate to the injury of both parties by incurring the costs of a useless trial.

The appeal should therefore be allowed and the action dismissed, but without costs. As the majority of the court is, however, of opinion that a new trial should be granted, as a matter of practice, I will not dissent.

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DAVIES J.—This is an appeal from a majority judgment of the Supreme Court of Nova Scotia refusing to grant a new trial to the defendant in an action for libel. The application for the new trial was based mainly upon the grounds of misdirection by the trial judge and improper reception of evidence.

The plaintiff was a barrister-at-law, apple speculator and insurance agent residing at Bridgetown, N.S., and the defendant was the general manager of the Confederation Life Association for the Maritime Provinces, residing at Halifax, N.S.

The action has been three times tried before a jury, the plaintiff obtaining a verdict twice and the defendant once. This is the second time it has come before this court by way of appeal. The alleged libel is contained in the following letter, written by the defendant to Mrs. Freeman, wife of Dr. Freeman, of Bridgetown:

CONFEDERATION LIFE ASSOCIATION.
Maritime Provinces Branch; F. W. Green, Manager;
Augustus Allison, Secretary.

HALIFAX, July 7th, 1897.

DEAR MRS. FREEMAN,—I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you, without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which, up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all that he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settle-

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ment for the premium with Mr. Miller your policy will, of course, be maintained in force and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so, I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?

Yours truly,
F. W. GREEN,
Manager.

The substantial defences to the action were:

1. That the statements contained in the letter were true; and

2. That the letter was a privileged communication.

The plaintiff was formerly agent of the Confederation Life Association at Bridgetown and Mrs Freeman was a person insured by the association. The letter which constitutes the alleged libel was written to her by the defendant as and being manager of the said association, to ascertain whether or not the premium on her policy had been paid in time to keep it in force, and if not, to endeavour to secure its renewal.

The defendant had the oversight and management of about sixty local agents of the Confederation Life Association and the plaintiff had been such local agent at Bridgetown since prior to the appointment of the defendant as manager of the association at Halifax in 1888. Early in 1895, the Confederation Life Association established new rates for the remuneration of its local agents and, by formal notice in June, 1895, determined the plaintiff's agency under his original agreement with them. He, however, continued to act as agent for the company until July, 1897, when he was, as defendant expressed it, "relieved" of his agency. No new agreement had been entered into between the

plaintiff and the company as to the terms of his employment after 1895. Miller insisted that he should receive a higher rate of commission than the company was willing to allow and. as a consequence of that, and of his inattention to the business of the company, the manager made a change of agents. It is not disputed by the plaintiff that he failed while agent to properly perform his duties as such. He had had written notice to send in to the general manager on the fifth of each month his reports. He himself, in giving his evidence at the trial says :

I was irregular in sending the monthly reports. I received directions to send in the reports on the fifth of each month, but I did not attend to them.

And, in answer to interrogatories administered to him and which were put in evidence at the trial, he said :

I received directions from the defendant as manager of the said association, requiring me to make my report and send in my remittance to the defendant, as such manager as aforesaid, at Halifax, on or before the fifth day of each and every month.

I collected between the said ninth day of March, 1897, and the 27th day of April, 1897, money or premiums of the said association as agent thereof for the said association, but I have no record thereof, and I do not remember the particulars thereof, and am unable to say what moneys I so collected.

I did not pay over or remit to the said association, or to its manager previously to the 28th day of April, 1897, any of the said moneys so collected by me subsequently to the 9th day of March, 1897.

On the 27th of April the defendant, having failed, after repeated written applications, to obtain the plaintiff's report or any remittance of premiums collected which should have been forwarded on the fifth of the month, went to Bridgetown, saw the plaintiff and assisted him in making up his report. The plaintiff had not the money balance in his hands at the time, a fact which he admitted the defendant then complained of, but procured the same the next morning and paid

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it over to the defendant as general manager. There is some discrepancy between the evidence given by the parties as to what took place on this occasion of the defendant's visit to Bridgetown. The plaintiff says:

> There was then due the company $151.03. I said I had not the money here, but would give him a cheque the next morning. He found fault because it was not there. I got the money and paid him the next morning. After we got the report made up he asked me if I would continue to act as agent. I said no, not at the remuneration they offered. He said the new agreement was better than the old. I said it would not pay me. He said he would have to try and get some one else. I suggested Harry Crowe and others whom I thought would accept the agency.

The defendant's version of what took place is as follows:

> He said our company did not pay an agent enough to make it worth his while to look after the business well. He asked me to sit down and said he was glad I had come, that he was just about sick of the business anyway and would be glad to get rid of it. I said that would please us just as well, that it was quite clear he had not time and inclination to look after our business and we did not want him. We then talked about the reduction of the commissions. He said he had not understood it so, and that if I liked to leave the agency with him he would retain it. I said no, that it would be better for both of us that we should be separated for a while, that we had not understood each other, and that if after a time we had not got a good local agent we might give the agency back. He assented to it, and it was understood that he would give up the agency. Two days after I got a message that he wanted to see me. I went. He said that if I had not yet arranged about a new agent he would like to have it. I said I had already arranged with Mr. Weare to take the agency. We had no other interview about his continuing as our agent.

When recalled and re-examined the plaintiff, while categorically denying some of the statements made by the defendant, Green, as to the conversation on the first day the latter went to Bridgetown, made no denial whatever of the statement that two days afterwards he had sent for Green and expressed a wish to have the agency and that Green had told him "he had

already arranged with Mr. Weare to take it." But there is no doubt that on this appeal we are bound to accept the plaintiff's statement as the correct one and to prefer it to that of Green in so far as it differs from or contradicts the latter. I have already pointed out, however, that there is no contradiction of plaintiff having expressed a desire on the second day to retain the agency and of the defendant having told him that arrangements had then been made with another agent.

The motion made by the defendant in the court below was for a new trial only on the grounds of misdirection and improper reception of evidence. The learned counsel for the plaintiff, respondent, while admitting on this appeal that the language of the learned trial judge, in the passages cited by the appellant, could not be defended, contended that they must be read in connection with the charge generally and that, if the general scope of the charge was correct, and presented a correct view of the law to the jury, the court would not seize upon isolated passages which, in themselves, were not accurate statements of the law unless satisfied clearly that the jury were or might have been misled by them.

This is no doubt true, but looking at the clear and specific character of the language used by the learned judge, I think it is impossible to say that the jury might not have been influenced and misled by it. At the close of his charge to the jury the learned judge addressed the observations more especially complained of to them with respect to the defendant's evidence and defendant's explanation of his meaning was treated as being a crucial matter in the case. The learned judge, after telling the jury that he "did not think he could assist them any more," went on to say:

You have the letter and you have Mr. Green's explanation of it which you may take. He says "I meant by this sentence, 'I think

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that you know that at the time of my recent visit to Bridgetown, I relieved Mr. O. S. Miller of our local agency, etc.', that I thought she understood that I changed the agency from Mr. Miller's hands, and, if she did not, I wanted to tell her." I don't see the connection myself exactly, but, if you can see it, there is the explanation of it. Do you think that he meant only to tell her what he says he meant, or do you think he meant to insinuate something else? That is *that he dismissed Miller because he could not get him to attend to the business? If you come to that conclusion the privilege is taken away and you must find for the plaintiff.*

It is possible and I think most probable, in view of previous parts of the same charge, that the language which the learned judge used did not correctly express the idea which he was endeavouring to convey to the jury. But whatever he had in mind, he clearly told the jury that if the letter bore a meaning which was plainly expressed on its face and was entirely consistent with the absence of malice they must, nevertheless, find for the plaintiff. In effect, the concluding portion of the quotation I have above made from the charge, practically amounted to this, that the jury were not to take into consideration the privileged occasion on which the letter was written.

The learned judge further directed the jury as follows on the law applicable to the letter of the defendant which was the subject matter of the alleged libel.

If he (defendant) makes a statement which he knows to be false, then it is malicious. If the meaning of the first part of the letter is that he dismissed the plaintiff and you decide that he did not dismiss the plaintiff and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and its protection is taken away.

Now, with great respect, I do not think that is a correct statement of the law governing privileged communications such as the defendant's letter and I think it was calculated to mislead the jury.

The learned judge overlooked the important fact that the defendant might honestly have believed that the plaintiff had been "relieved" of his agency, while the jury might come to the conclusion that he had resigned and had not been dismissed. But, if the defendant honestly believed that the effect of what took place between himself and the plaintiff amounted to a relieving or dismissal of the latter from the agency, the defendant's privilege would not be taken away even though the jury should come to a different conclusion on the facts.

The real question for the jury to determine was whether or not the defendant honestly believed what he stated in respect to the plaintiff's dismissal to be true, or, on the other hand, whether, knowing it to be untrue, he took advantage of the privileged occasion to malign and injure the plaintiff by misrepresenting the facts.

Apart from all questions of misdirection, I think the evidence of Mrs. Freeman, as to what she understood from the letter, was clearly inadmissible. She stated:

> I understood from the letter he had collected money and had not paid it over and had been dismissed by the company.

The test of the admissibility of such evidence is whether the words used and complained of were of plain and obvious meaning or were ambiguous or equivocal. If they were of plain and obvious meaning, evidence was not admissible as to how a witness understood them until it was first shown that they were used in some other sense than their ordinary sense and had some meaning different from their ordinary meaning. *Daines* v. *Hartley* (1).

No such showing was attempted or made here and, in its absence, I do not think the evidence of Mrs.

(1) 3 Ex. 200.

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Freeman, as to what was her understanding of the letter, was admissible.

The learned judge's reference to this evidence in his charge to the jury invested it with an importance which, in my judgment, precludes the possibility of successful argument that it might not necessarily have affected the verdict.

While, however, I am of opinion that in any event there must be a new trial, I am also of opinion that the defendant is entitled to have the judgment entered for him on the evidence and notwithstanding the verdict. I think that the alleged libellous letter having been written on a privileged occasion, the onus lay upon the plaintiff of showing actual malice on the writer's part, which onus has not been satisfied by him.

It was strongly contended by Mr. Roscoe that this court has not the power to order judgment to be entered for the defendant, or having the power should not exercise it, because the defendant made no motion for a nonsuit at the trial, and his application to the Supreme Court of Nova Scotia was for a new trial only. But the appellant distinctly took the point in his factum on this appeal and supported it with an able and voluminous argument.

The respondent is, therefore, in no way prejudiced if, having the power to direct such judgment to be entered, we think this a proper appeal to exercise it in on proper terms.

Section 60 of the Supreme and Exchequer Courts Act provides as follows:

> The Supreme Court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

Now, what is the judgment which the Supreme Court of Nova Scotia should have given if no actual

malice was proved, or evidence given from which it could be properly inferred? Clearly a judgment for the defendant.

The Nova Scotia Judicature Rules, order 38, rule 10, which is nearly the same as order 40, rule 10 of the Rules of the Supreme Court, 1883, of England, reads as follows:

> Upon a motion for judgment or upon an application for a new trial, the court may draw all inferences of fact not inconsistent with the finding of the jury and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them or for awarding any relief sought, give judgment accordingly.

The difference between the two rules lies in the limitation imposed by the Nova Scotia rule preventing the court drawing inferences of fact inconsistent with the jury's finding. But, in my judgment, no such inferences are necessary to be drawn here.

It seems to me plain that under this rule in all cases where there is no question of fact to leave to the jury, where the evidence to sustain the onus lying upon the plaintiff is insufficient and it, therefore, becomes the duty of the trial judge to nonsuit, in all such cases the Supreme Court of Nova Scotia has the power, provided it has before it all the materials necessary for finally determining the questions in dispute, and has not to draw any inferences of fact inconsistent with the jury's findings, to give judgment accordingly. Of course, judgment will not and cannot be given under this rule where there is evidence to go to the jury; *Brewster* v. *Durrand*, (1); and so doubts might be raised as to the power of the court to enter judgment under the rule notwithstanding the verdict, if it was simply a question, not of there being any evidence, but of the weight of testimony. See remarks of Lord Esher, M. R. in *Millar* v. *Toulmin*. (2) The cases are all collected

(1) W. N. ['80] 27.

(2) 17 Q. B. D. 603.

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in the notes to order 40, rule 10, of the rules of the Supreme Court, 1883, of England in the annual practice, 1903, p. 546.

I am of the opinion that in this case there was no evidence to go to the jury at all and no questions of fact proper for their consideration. If it was a question of the credibility of the witnesses or the finding of any fact in support of which there was some evidence, then the case could not be taken away from the jury, nor *a fortiori*, could judgment be entered contrary to the finding. But, in the absence of this necessary evidence to make out a case to go to the jury, we have, under the rules, the fullest power to determine the question in dispute.

In *Clark* v. *Molyneux*, (1) which was an action for libel, the Court of Appeal, while granting a new trial, did not think it proper under the rule to enter judgment for the defendant because they thought that in a new trial further evidence of malice might be adduced. But, in the case before us, no suggestion is made that any further evidence is procurable and the case has already been tried three times.

In the later case of *The Capital and Counties Bank* v. *Henty & Sons*, (2) the House of Lords in sustaining the judgment of the Court of Appeal, after the case had been tried before a jury which failed to agree on a verdict, granted a motion to enter judgment for the defendant on the grounds that in their natural meaning the words complained of were not libellous; that the evidence consisting of the publication and of the circumstances attending the publication failed to show that the circular complained of had a libellous tendency and that there was no case to go to the jury.

I am of the same opinion with respect to the libel here complained of and the mere fact that the judge

(1) 3 Q. B. D. 237. (2) 7 App. Cas. 741.

left the case to the jury, who improperly found for the plaintiff, can make no difference in respect to our power to direct judgment to be entered for the defendant or to the exercise of our discretion under that power.

In the still later case of *Nevill* v. *The Fine Art and General Insurance Co.* (1), which was also an action for libel, the jury had found a verdict for the plaintiff, that the statement was a libel, that it was untrue and that the defendants had exceeded the privilege, but did not find actual malice, and the House of Lords on appeal directed a verdict to be entered, notwithstanding the verdict for the plaintiff.

The only question is whether this is such a case as calls for such an exercise of our discretion. As I have already said, the case has already been tried three times with varying results, and has been already before this court on appeal (2), and it is not suggested that any new evidence can be obtained. In that appeal the late Mr. Justice King, in delivering the judgment of the court remitting the case back for a new trial, determined that the letter in question was "clearly capable of a libellous construction," and that "it could not be denied that the occasion was privileged." Accepting these two statements as correct law, what was the onus which lay upon the plaintiff when he went to trial? Clearly, the letter being a privileged communication, he was bound to prove actual malice. The contention here is that he has satisfied that onus by proving that the statements in the letter were not true. But I do not think that the evidence shows anything of the kind. The statements on which he relies as libellous are: first, that which says he was "relieved" of the agency, and secondly, that

we have tried for a considerable time past to get Mr. Miller to attend

(1) [1897] A. C. 68 at p. 75. (2) 31 Can. S. C. R. 177.

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properly to our business and it was only because it was clearly necessary that the change was made.

And the subsequent sentence:

I find that he has collected money which, up to the present time, we have been unable to get him to report.

Now, no evidence of any kind was, as far as I can ascertain, offered to show the existence of any actual malice, spite or ill-feeling on the defendant's part in writing the above statements. The plaintiff relied upon his contention that they were not strictly and literally true. But I cannot agree with that contention. I think that the statements were substantially correct. The uncontradicted portion of the defendant's evidence as to what took place on the twenty-ninth of April, on his visit to Bridgetown, when the plaintiff requested him to let him have the agency again together with the correspondence put in evidence, establish, I think, quite clearly that the plaintiff was relieved of the agency for the reasons given by the defendant. The plaintiff's own evidence is conclusive as to neglect and disobedience of his orders, and it does appear to me impossible to argue successfully that between the date of his being relieved of his agency and the writing of the letter in question he had duly reported or remitted the small premiums which had been left with him for collection.

But suppose the language of the letter did not strictly and literally describe the facts, would that have been sufficient evidence of malice?

Not certainly, unless to use Chief Justice Cockburn's language in *Spill* v. *Maule* (1), at page 236, 237, it was "utterly beyond and disproportionate to the facts."

Here, I think, it was not an unfair statement of the facts as the defendant understood or had means of knowing them. The language of a privileged com-

(1) L. R. 4 Ex. 232.

munication is not to be scrutinized too strictly, as was observed in *Laughton* v. *The Bishop of Sodor and Man* (1). Once the letter is shown to have been privileged, the burden of proof is shifted. It is not then for the defendant to prove that he was acting from a sense of duty but for the plaintiff to show that the defendant was acting from some other and improper motive. "The proper meaning of a privileged communication," observes Parke B. in *Wright* v. *Woodgate* (2), adopted by Lord Blackburn in delivering the judgment of the Privy Council in *Jenoure* v. *Delmege* (3), at page 78,

> is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the charecter of the plaintiff and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made.

No such evidence, nor in fact any evidence, of malice or personal spite or ill-will outside of the alleged inaccuracy of the letter was given here.

Now I think the language of the Lord Chancellor on this point of the truth or untruth of the statements complained of, in *Nevill* v. *The Fine Art and General Ins. Co.* (4), very appropriate to this case. He says:

> But suppose it was not true; suppose it was not accurate in the sense in which people would have understood it; I am obliged to suppose a person of a very extraordinary mind looking at this document, such as it is, for him to have misunderstod it; but, suppose he did. Suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though, in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that that would be evidence of malice which, under the circumstances, it would be obviously necessary for the plaintiff to prove in order to recover. I

(1) L. R. 4 P. C. 495, 508.
(2) 2 C. M. & R. 573.
(3) [1891] A. C. 73.
(4) [1897] A. C. 68 at p. 75.

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say obviously, for this reason : I do not think any one has contended before your lordships that the occasion was not privileged. What has been contended is that the occasion was abused. If what I have stated is true, there is no ground for saying that there was any attempt to do anything else than to make a business communication to persons who had a right to receive these communications, the secretary, on the one side, and the insurers on the other, having a common interest in respect of which it was right that these communications should be made.

I am, therefore, strongly of the opinion that the plaintiff has not satisfied the onus which the law cast upon him of proving actual malice by the defendant, and that, having so failed, it became the duty of the judge at the trial either to nonsuit the plaintiff or to enter a judgment for the defendant. This not having been done, this court may, under the rules I have already cited, give the judgment which the court whose judgment is appealed from should have given, which, in my opinion, would be to order judgment to be entered for the defendant. *Dewe* v. *Waterbury* (1).

As however, several of my learned brethren entertain doubts of our power under the rule above cited to enter judgment for the defendant after verdict found for the plaintiff and no motion for nonsuit or judgment made at the trial by defendant's counsel, I will not dissent from but, in deference to their opinion, concur in the judgment allowing the appeal and granting a new trial.

MILLS J.—In this case I do not think the respondent succeeded in showing that the letter complained of was libellous. I do not think that it was an unreasonable or improper communication to write under the circumstances. In my opinion, the facts established show that the respondent failed in his duty as an agent under the appellant, and that what was charged as a libel was substantially true. I think the prosecution for

(1) 6 Can. S. C. R. 143.

libel was a vexatious proceeding and one which ought to have been dismissed, but as the matter now stands, I do not see that it is open to us to do otherwise than to send the case back for a new trial, if the respondent is so ill-advised as to venture upon trying it again.

ARMOUR J. The plaintiff, in his statement of claim, alleged (1) that he was, at the time of the publication of the letter hereinafter set out, a barrister and solicitor of the Supreme Court of Nova Scotia, an insurance broker and agent, and also carried on business of a real estate conveyancer and a lender of money entrusted to him for that purpose by a large number of people and had an extensive practice and business in the County of Annapolis and elsewhere in the Province of Nova Scotia, and was also a buyer and shipper of apples in large quantities for the English market and was (2) previously to the publication of the said letter, engaged by the defendant, who was general manager of the Confederation Life Association for the Maritime Provinces and Newfoundland, to solicit life insurances for the said association, and to collect premiums due to the said association from various policy holders in the said association and (3) that the defendant, well knowing the premises, but contriving to injure the plaintiff in his said businesses and professions, and to cause it to be believed and suspected that the plaintiff had acted improperly and dishonestly in said businesses and professions and to cause it to be suspected and to be believed that the plaintiff was lacking in integrity and ability to carry on and conduct his said businesses and professions in a proper manner, on or about the seventh day of July, A.D. 1897, in the form of a letter addressed to Mrs. Freeman, c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby,

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Anna Freeman, wife of Ingram B. Freeman, M.D., of Bridgetown, N.S.), falsely and maliciously wrote and published of and concerning the plaintiff in relation to his businesses and professions and the carrying on and conducting thereof by the plaintiff, the words following that is to say:

DEAR MRS. FREEMAN, (meaning thereby the said Anna Freeman).—I think you know that at the time of my recent visit to Bridgetown. I relieved Mr. O. S. Miller (meaning thereby the plaintiff), of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you, without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention on certain matters in Mr. Miller's (meaning thereby the plaintiff) hands, on the understanding that he (meaning the plaintiff), would attend to them and remit to me as our representative. I, (meaning the defendant), now find that he (meaning the plaintiff) has collected money which, up to the present time, we (meaning the defendant and the said association), have been unable to get him (meaning the plaintiff), to report, and I am told that he (meaning the plaintiff), is doing and saying all that he can against myself and the company. The receipt for your premium fell due May 30th, days of grace, June 30th. If you have made settlement of the premium with Mr. Miller, your policy will, of course, be maintained in force, and we shall look to him for the returns in due course, but I have thought that it would be part of the plan Mr. Miller at one time declared to me he would follow, in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?

Yours truly,

F. W. GREEN,

Manager.

Meaning thereby that the plaintiff had collected money due the said association and had refused to report

to the defendant the amounts so collected, and had converted the said sums of money to his, the plaintiff's own use, and meaning thereby that the plaintiff was lacking in integrity and in ability to carry on and conduct his said businesses and professions, and meaning thereby that the plaintiff would allow the life insurance policy of the said Anna Freeman to lapse through inattention on the part of the plaintiff and that the plaintiff was trying to injure as much as possible the business of the said association and the business reputation of the defendant.

And, by a second paragraph of his statement of claim, after repeating the first and second clauses thereof, the plaintiff alleged that the defendant, well knowing the premises, falsely and maliciously wrote and published of and concerning the plaintiff in his said business of a solicitor of the Supreme Court of Nova Scotia and insurance broker and agent on or about the seventh day of July, 1897, in the form of a letter addressed to Mrs. Freeman, c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby Anna Freeman, wife of Ingram B. Freeman of Bridgetown, N.S., physician), the words following, that is to say (setting out the said letter as above), meaning thereby that the plaintiff had received money as and for premiums due the said association on terms requiring him to account for and pay the same to the defendant and had fraudulently omitted to account for or pay the same to the defendant.

And, by a third paragraph in his statement of claim, after repeating the first and second clauses thereof, the plaintiff alleged that the defendant, well knowing the premises, falsely and maliciously wrote and published of and concerning the plaintiff in his said business as a solicitor of the Supreme Court of Nova Scotia and insurance broker and agent, on or about the seventh day of

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July, 1897, in the form of a letter addressed to Mrs Freeman c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby Anna Freeman, wife of Ingram B. Freeman, of Bridgetown, N.S., Physician,) the words following that is say, (setting out the letter as above,) meaning thereby that the plaintiff had received premiums collected by him as such solicitor of the Supreme Court, and as such solicitor of life insurance for the said association, and had improperly and in violation of his duties as such solicitor of the Supreme Court and and as such solicitor for life insurance for the said association, improperly neglected and refused to inform the defendant as such general manager of such collection of premiums of insurance, and improperly neglected and refused to advise the defendant as such general manager that moneys had been paid to him for and on account of the said association, and that the plaintiff was lacking in integrity and in honour in the conduct of his said business as solicitor of the Supreme Court and that the plaintiff was lacking in integrity and honour in the conduct of the said business of an insurance broker and agent.

The defendant, by his statement of defence, denied all the allegations of the plaintiff and the meanings ascribed by him to the said letter, and that it contained any libel, and alleged that it was written upon a privileged occasion and was true in substance and in fact.

The cause was tried in October, 1901, before Mr. Justice Ritchie with a jury who found a verdict for the plaintiff and $100 damages.

This verdict was moved against in the court appealed from on the grounds of the reception of improper evidence and of misdirection of the learned judge who tried the cause, and the motion was dismissed by the majority of the judges who heard it and the defendant has appealed to this court.

I do not see how it is possible to avoid allowing the appeal on both grounds.

The evidence of Mrs. Freeman as to what she understood by the letter was inadmissible, for the language of the letter was plain and unambiguous and there was no evidence that the words used in it were used otherwise than in their natural and primary sense. *Daines* v. *Hartley*, (1) *Simmons* v. *Mitchell*. (2) And it cannot be said that no substantial wrong or miscarriage was occasioned in the trial by reason of the improper reception of this evidence when we find the trial judge telling the jury :—

> You have got the sense in which Mrs. Freeman understood it. She says she understood from the libel that Miller had collected money and did not pay it over and had been dismissed from the company. Do you think that is such a meaning that a reasonable person would put on that letter, reading it or hearing it? That is one question for you to decide ;

and twice subsequently in his charge referring to what Mrs. Freeman said she understood by the letter.

The letter was undoubtedly written on a privileged occasion, and the onus was, therefore, upon the plaintiff of proving express malice, and it was plainly, in the circumstances of this case, misdirection of the learned judge to tell the jury

> if the meaning of the first part of the letter is that he dismissed the plaintiff and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious, and his protection is taken away.

But the question for the jury in determining whether or not there was express malice was not whether the statements in the letter were true or false, but whether, if false, the defendant honestly believed them to be true.

(1) 3 Ex. 200. (2) 6 App. Cas. 156.

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And it cannot be said that no substantial wrong or miscarriage was occasioned in the trial by reason of the misdirection on so vital a point of the case.

There was no evidence whatever of any extrinsic malice; the evidence of malice, if any, was intrinsic, derivable solely from the language of the letter.

The letter was plain and unambiguous and meant exactly what it said, neither more nor less, and could not reasonably be taken to mean anything but what the words in their ordinary and natural meaning and according to their primary signification expressed. It did not impute any dishonesty or want of integrity or ability to the plaintiff, and was incapable of the meanings ascribed to it in the inuendoes, namely, that

> the plaintiff had collected money due to the said association and had converted the said sums of money to his the plaintiff's own use; * * (that) the plaintiff was lacking in integrity and in ability to carry on and conduct the said businesses and professions; * * (that) the plaintiff had received money as and for premiums due the said association on terms requiring him to account for and pay the same to the defendant and had fraudulently omitted to account for or pay the same to the defendant; (and that) the plaintiff was lacking in integrity and honour in the conduct of his said business as solicitor of the Supreme Court, and that the plaintiff was lacking in integrity and honour in the conduct of the said business of an insurance broker and agent.

What the letter did impute to the plaintiff was inattention and neglect of duty as agent of the association.

Two statements contained in the letter were relied on at the trial as being untrue and thus affording evidence of express malice, the statement "I relieved Mr. O. S. Miller of our local agency," and "I now find that he has collected money which, up to the present time, we have been unable to get him to report."

The plaintiff became the local agent of the association under an agreement bearing date the 12th of September, 1890, which provided for his duties and remu-

neration and that it might be terminated at any time by mutual consent or by either party giving to the other one month's notice in writing.

On the 29th of April, 1895, the association gave notice in writing terminating the agreement from the 31st of May following and requiring their agents thereafter to come under an agreement for a different rate of remuneration which the plaintiff contended was too low, but for which he continued to act as agent continually complaining of the remuneration, saying in different communications to the defendant from time to time "I do not think I can act as your agent under those terms". "I do not think you properly remunerate your local agents". "It has been my custom in the collections of premium notes to help parties out, but I cannot do this now with only 2½". "Other companies are offering as much again". "Other companies pay their local agents to my certain knowledge, three times as much as the C. L. A. does". "I regret very much that the C. L. A. cannot pay. I have become quite attached to it, I have talked the merits so long that it seems like an old friend. I realize, however, that the time has come when I have got to do one thing or the other. I will defer my resignation until I have got your statement and the business of the company with me is fairly closed up." "The Confederation Life wants cheap men that have no business of their own." "Properly paid I know I can do some work for a company, but when a man feels that he will not be paid for his work, he can have little heart for his business." "I regret the result of our communications, and I believe it would be in the interests of C. L. A. to pay better, as it is they, the agents, of course that will do work that pays; but I have promised to help our applicants through with the payment of premiums and, consequently, cannot, in justice to them,

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refuse to act as local agent unless you discharge me." "I do wish your company would pay better for services rendered. I would delight to spend more time in this work, but it does not pay. I am going to let things go a little longer in hopes they will see the error in their ways."

This last communication was on the 29th of March, 1897. The plaintiff had been guilty of inattention and neglect of duty as local agent of the association to such an extent as would have justified his being relieved of his agency and, on the 13th of April, 1897, the plaintiff wrote to the defendant:

I have been away from home and have a new clerk in my office and I find that he has mislaid your report. I missed it some little time ago, but thought sure it would turn up all right, but I find now that it is lost. I am very sorry to trouble you, but accidents will happen in the best regulated families. I hope, however, that it will not put you to any serious inconvenience.

On the 14th of April, 1897, the defendant wrote to the plaintiff:

Yours of the 13th to hand, in response to which we inclose herewith a new copy of agent's report which we shall be glad to have returned to us at your earliest convenience.

Not having received this report the defendant went to see the plaintiff and the following is the plaintiff's account of what took place:

In April, 1897, Green came to my office. He introduced himself. We got the report, discussed it and fixed it up. I had lost the first form of report I received and got another. This we then filled up. I claimed $60. bonus. Green disputed it, and said it was not so much under the new agreement. It was finally settled at $26 for that time and I said I would look into it afterwards. There was then due the company $151.03. I said I had not the money here, but would give him a cheque the next morning. He found fault because it was not there. I got the money and paid him the next morning. After we got the report made up he asked me if I would continue to act as agent. I said no, not at the remuneration they offered. He said the new agreement was better than the old. I said it would not pay

me. He said he would have to try and get some one else. I suggested Harry Crowe and others who I thought would accept the agency. He suggested going to Mrs. Freeman to adjust her policy and we went and stayed there some time. He called attention to a policy of Rice, and I told him that Rice had decided not to continue the policy and I had paid the premiums out of money of Rice that came into my hands from apples and could not give the date. I don't remember any conversation the next morning when I paid him the money. A day or two afterwards I sent for Green and asked if he had got an agent, and he said he had got Mr. Weare. At none of these interviews was I dismissed, nor was there anything said indicating that he did not want my services.

Under these circumstances, it cannot be properly said that the statement "I relieved Mr. O. S. Miller of our local agency" was false to the knowledge of the defendant; the most that can be said of it is that it was an incorrect deduction from what took place between the plaintiff and him on the occasion of his visit to the plaintiff. If an incorrect statement, it was an incorrect statement of a matter not of the gist of the libel according to the meaning ascribed by the inuendoes to the libel, and I do not think that such an incorrect statement afforded any evidence of express malice.

In *Nevill* v. *The Fine Arts and General Insurance Co* (1), the action was brought for an alleged libel in a circular issued by the defendant to their policy holders stating that

the agency of Lord William Nevill, at 27 Charles street, St. James' Square, has been closed by the directors.

Alternatively, the statement of claim complained of that statement as meaning that the plaintiff had been dismissed by the defendants from his employment as their agent for some reason discreditable to him. The trial judge ruled that the alleged libel was published on a privileged occasion and left to the jury the following questions;

(1) [1895] 2 Q. B. 156; [1897] A. C. 68.

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(1.) Whether the circular was a libel?

(2.) Whether it was published falsely and maliciously?

(3.) Whether the words meant that the plaintiff was dismissed from the defendants' employment for some reason discreditable to himself?

The jury answered the first question in the affirmative and assessed the damages at one hundred pounds, but they were unable to agree as to the second and third questions and, therefore, did not answer them. The learned judge, thereupon, put to the jury the further questions;

(1.) Whether the statement in the circular that the plantiff's agency was closed by the directors was true?

(2.) Whether the defendants in making that statement had exceeded the privileged occasion which entitled the defendants to give a notice that the agency was at an end?

The jury answered the first of those questions in the negative, and the second in the affirmative. The learned trial judge entered judgment for the plaintiff, but the Court of Appeal directed judgment to be entered for the defendants on the ground that there was no evidence of malice which could reasonably be left to the jury and the House of Lords affirmed their judgment.

The jury had found that the statement in the circular that the plaintiff's agency was closed by the directors, which was the very gist of the libel, was not true. "But," said Lord Halsbury,

suppose it was not true, suppose it was not accurate in the sense in which people would have understood it. I am obliged to suppose a person of very extraordinary mind looking at this document such as it is, for him to have misunderstood it. But suppose he did; suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though, in the mind of some other person, it should be inaccurate in form, it seems to me impossible to contend that that would be evidence of malice which, under the circumstance, it would be obviously necessary for the plaintiff to prove in order to recover.

I am of opinion, however, that the deduction was correct. Looking at the correspondence which pre-

ceded the visit of the defendant to the plaintiff, and at what took place upon the occasion of that visit, I do not think it can well be said that the plaintiff terminated the agency. He was throughout the correspondence complaining of the remuneration and asking for an increase of it, and he does not, on the occasion of the defendant's visit to him, say definitely that he will not continue to act as agent, but only that he will not continue to act "at the remuneration they offered," leaving it to be inferred that he would continue to act as agent if they offered an increased remuneration. The following day the defendant appointed another agent, thereby relieving the plaintiff of and terminating the agency. The fact that a day or two after the plaintiff sent for the defendant and asked him if he had got an agent leads to the inference that he did so to ascertain if he had been relieved of the agency. I think, therefore, that the statement was substantially true and, in any view of it, was quite consistent with an honest belief on the defendant's part that it was true and, therefore, afforded no evidence of malice. *Spill* v. *Maule* (1).

Lord Tenderden said that, if the evidence was such that the jury could conjecture only, but not judge, it ought to go to the jury; that the onus was on the party offering the evidence, and that he, if he offered evidence only consistent with either supposition of fact, was not entitled to have it put to the jury. *Avery* v. *Bowdon* (2).

What I have said with respect to this statement is equally applicable to the statement which followed it, that he was compelled to take this action and that it was only because it was clearly necessary that the change was made, the fact being that the plaintiff had been guilty of inattention and of neglect of duty as

(1) L. R. 4 Ex. 232.
(2) 6 El. & B. 953 at p. 972.

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an agent of the association, and that they had been unable to get him to attend promptly to their business.

Then as to the statement:

I now find that he has collected money which up to the present time, we have been unable to get him to report.

The defendant on the occasion of his visit to the plaintiff left with the plaintiff certain renewal receipts and took from the plaintiff the following letter signed by the plaintiff:

You have left in my hands for collection and report in due course. the following renewal receipts:

36,723, Mackenzie, May 1st	$ 21 50
37,578, Longley (R.S.) April 25th	17 80
36,732, Weare, April 30th	47 80
Paid, 37,730, Elderkin, April 30th	46 70
Note for first premium, 38,194, Morse, May 15th.	23 00
	$156 80

Afterwards the defendant sent to the plaintiff a renewal receipt for Mrs. Freeman.

On the 25th of each month the association supplied, through the defendant, to the plaintiff (as well as to other agents), a blank form of report which it was the plaintiff's duty to fill up and return on the fifth of the following month with remittances. The important part of this report was a statement of the payments received and of the dates when they were so received, and it is obvious that the making of such reports and punctuality in making them were essential to the proper carrying on of the business of the association.

Up to the time of the writing of the letter complained of, the plaintiff never made any report to the defendant as he had undertaken by his letter to do, although he had been supplied with blank forms for that purpose and although a reminder in the following form,

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your monthly report which should have been returned by you on the fifth instant has not yet come to hand. Will you kindly give the matter immediate attention? Report should be returned punctually whether collections have been completed or not,

was sent to him on the 7th, 8th, 9th, 10th and 15th, June, 1897.

It is true that on the 30th May, 1897, the plaintiff wrote to the defendant a letter which contained the following:

I received your returns and will forward soon as I have received my $17.80 on account and am holding same for your corrected statements between us.

In a letter of the fourth of June, 1897, from the defendant to the plaintiff, the following appears:

As this explains fully the point you have raised, we trust you will send in your returns for the current month as promptly as we have given attention to this.

In a letter of the 19th of June, 1897, from the defendant to the plaintiff the following appears, after a proposition to submit the matter in dispute between them to arbitration:

On this understanding, I trust you will see your way to send us in immediately all remittances of whatever collections you have made up to the present time and full report on other items.

On the 25th of June, 1897, the plaintiff wrote to the defendant:

I cannot accept your proposal for an arbitration in this matter.

And, on the 2nd of July, 1897, the defendant wrote to the plaintiff:

Yours of the 25th to hand in which you say that you cannot accept our proposal for an arbitration. In view of this, I think the least you can do is to send us remittances for the premiums you have collected. I think you will remember that it was upon this understanding that I left these different premium matters with you for attention.

On the 13th of July, 1897, the plaintiff made a report and settled with the defendant, according to the defendant's contention, as follows:

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To total premiums, first year, as per column..... $17.80

Cr.

By commission on first year premiums.....$ 1.78
Postage..... 1.60
Draft marked cheque P. O. Order to balance. 14.42
$17.80

The Longley premium of $17.80 was paid about the 25th of May, 1897, and the defendant supposed that the $17.80 mentioned in the plaintiff's letter of 30th May, 1897, was the Longley premium, although the letter did not say so. But this letter could not be treated as a report and the plaintiff did not consider that it was, for, in the same letter, he says "I received your returns and will forward soon," and he had not remitted the $17.80 when the letter complained of was written.

The statement that

I now find that he has collected money which, up to the present time, we have been unable to get him to report,

was, therefore, substantially true and afforded no evidence of malice.

On considering the evidence in this case we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are consistent with the presence of malice as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice in shown in evidence; so that to say that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say that the jury might find malice in any case in which it was not disproved, which would be inconsistent with the admitted rule that in cases of privileged communications malice must be proved and, therefore, its absence must be presumed until such proof is given. It is certainly not necessary in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed or that it should be inconsistent with the non-existence of malice, but it is necessary that the evidence should raise a probability of malice and be more

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consistent with its existence than with its non-existence. *Sommerville* v. *Hawkins* (1); *Taylor* v. *Hawkins* (2).

The malice that will deprive a communication of this sort of excuse arising out of the occasion of the speaking of the words must be such as to induce the court or any reasonable person to conclude that the occasion has been taken advantage of to give utterance to an ungrounded charge. *Manby* v. *Witt* (3).

The occasion here was privileged and then the words, however hasty or untrue, if spoken *bonâ fide* in an honest belief of their truth are within the protection of the law. The rule as to this privilege would be altogether illusory if the judge were to leave to the jury every slight circumstance which could be suggested by the ingenuity of counsel as establishing an actual active spite. It is the duty of the judge when the communication is *primâ facie* privileged, to be satisfied that some substantial circumstance is proved to show that the defendant has spoken maliciously. *Caulfield* v. *Whitworth* (4).

Carefully considering the whole case and that the letter complained of was written on a privileged occasion, I am of the opinion that there was no evidence which could reasonably be left to the jury, and that the only course open to us is to allow the appeal, for we cannot, as I had hoped, make a final disposition of the case, for order 57, rule 5, of the Nova Scotia Judicature Act, applies only to cases tried by a judge without a jury, and order 38, rule 10, to cases tried with a jury.

See order 37, rule 1, and order 57, rule 1.

The appeal should, therefore, in my opinion, be allowed with costs here and in the court appealed from and a new trial had between the parties.

Appeal allowed with costs.

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

Solicitor for the respondent: *F. L. Milner.*

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(1) 10 C. B. 583.
(2) 16 Q. B. 308.
(3) 18 C. B. 544.
(4) 16 W. R. 936.

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*Mar. 2.
*Mar. 26.

ALBERT VICTOR DREW.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. arts. 5551, 5561—*Criminal Code, sec.* 145.

The hearing of a charge by a magistrate, assuming to act as a Justice of the Peace having authority to hear it, is a judicial proceeding within the meaning of section 145 of the Criminal Code and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that of magistrate had no jurisdiction over the subject matter of the complaint.

Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), on a criminal case reserved affirming the conviction of the appellant for perjury, and the sentence pronounced against him upon such conviction in the Court of King's Bench, Crown side, for the District of Beauharnois.

The offence of perjury of which the appellant was convicted was committed upon the hearing of and information for trespass under article 5551 of the Revised Statutes of Quebec, upon lands situate in the County of Huntingdon, in the District of Beauharnois. The information was laid and the case heard and decided before the Recorder of Valleyfield, who was *ex officio* a Justice of the Peace in and for the whole of the

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

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District of Beauharnois, but did not reside in the County of Huntingdon where the offence was charged to have been committed and was, therefore, without jurisdiction over the subject matter of the complaint in consequence of the provisions of article 5561 of the Revised Statutes of Quebec limiting the jurisdiction in such matters to one or more Justices of the Peace residing in the county in which the offence has been committed.

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

Wilson for the appellant.

Duncan McCormick K.C. for the Crown.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the Court of King's Bench at Montreal reported in volume 11, at page 477 of the Rapports Judiciaires de Québec. I would allow it and quash the conviction in question for the reasons given by Würtéle and Blanchet JJ., *loc. cit.*, which to my mind are irrefutable.

It could not but be conceded, as it has been unanimously by the judges in the court *â quo*, and by the respondent (private prosecutor) at bar, that the Recorder had no jurisdiction over the case wherein the appellant is alleged to have committed perjury. Secs. 24 and 26 of the Quebec Interpretation Act, declaratory of the common law, enact that :

When anything is ordered to be done by or before a judge, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing is to be done ; and

Whenever an oath is ordered to be taken or received, such oath is received by any judge or magistrate authorized to that effect having jurisdiction in the place where the oath is taken.

Then art. 5561 of the Revised Statutes expressly deprives the recorder of any jurisdiction in the case in question.

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The proceedings before him were not judicial proceedings, because he was not a judge or magistrate, *quoad* the case. He was not, it is admitted, a magistrate *de jure*. Neither could he have been at Valleyfield, not being a resident of the County of Huntingdon, a magistrate *de facto*, any more than if he had been sitting at Toronto or at Vancouver. A *de facto* officer's jurisdiction cannot be territorially more extensive than the *de jure* one whose functions he assumes. Where the statute expressly enacts that only the magistrates residing in the County of Huntington have jurisdiction over the case, there cannot have been, outside of that county, whether in the same district or a thousand miles from it, a *de facto* magistrate having any reasonable pretence to jurisdiction. The respondent's contention that a magistrate *de facto* can exercise jurisdiction in any case at a place where the statute expressly decrees that there can be no magistrate *de jure* in that case is untenable. A magistrate *de facto* cannot have more powers than a magistrate *de jure*. The proceedings before the Recorder at Valleyfield were not only voidable, but were void of a nullity of *non esse*. As is said in the civil law, *defectus potestatis, nullitas nullitatum*. No plea of *autrefois acquit* or *autrefois convict* could be based on his decision. No appeal was necessary to set it aside; *Attorney General* v. *Hotham* (1); and a writ of certiorari to have it quashed could have been granted though taken away by the statute (sec. 5579) if he had had jurisdiction. Had he committed any one for contempt for not answering his summons as a witness or for refusing to answer his questions, his warrant would not have been worth the paper it would have been written upon, besides rendering him liable in damages. Nay, under sec. 153 of the Code, he was perhaps guilty of an indictable offence for having illegally received

(1) Turn. & Russ. 209 at p. 219.

the appellant's oath. There was, in law, no oath taken before him, for he had not the power in that case to receive any. And if there was no oath, no judicial oath, how can there have been perjury? The respondent's contention that section 145 of the Act bears the construction that there may be perjury where there is no judicial oath is irrational and untenable. Such an incongruity cannot have been intended by Parliament.

In fact that section, as I read it, plainly says that it is only when the false oath is received by a competent tribunal, or in other words by a person duly authorized to hold the judicial proceeding in which it is taken, that it is indictable for perjury. The words upon which the court below rely to hold the contrary are those of the last part of that sec. 145 which read as follows:

Or before any *person* acting as a court, justice or tribunal, *having power to hold such judicial proceeding*, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.

Now, if the words "having power to hold such judicial proceeding" are read immediately after the word "person," as by the punctuation they must be, they qualify the rest of the section and the oath must have been received, in any case, by one having the power to hold the judicial proceeding. And that they must be so read is rendered free from doubt by referring to the French version, which is the law just as much as the English version, though not brought to the attention of the court below nor of this court.

That reads as follows:

Ou devant une *personne* agissant comme cour, juge ou tribunal, *autorisée* à faire cette procédure judiciaire, qu'il soit légalement constitué ou non, et que la procédure ait été regulièrement instituée ou non devant cette cour ou personne de manière à l'autoriser à faire la

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procédure, et lors même que la procédure aurait eu lieu dans une localité où elle n'aurait pas dû avoir lieu, ou qu'elle fût invalide sous d'autres rapports.

There is no ambiguity in these words. It is undoubtedly to an oath taken before any person having power to hold the judicial proceeding wherein that oath was taken that the rest of the section exclusively applies, and of two possible constructions in one of the versions, that one which reconciles the two must be followed. So that the words "*having power to hold such judicial proceeding*" in the English version must be read as applied to the word *person* therein, as the corresponding words in the French version unquestionably must be. Here, it is conceded, the Recorder had no more power to hold the judicial proceeding in question than a citizen of the United States or of China would have had, or than he, himself, would have had if he had held his court in New York or Pekin.

It is, therefore, still the law that

> no oath whatsoever taken before persons * * * who are legally authorized to administer some kind of oaths, but not those which happen to be taken before them * * * can ever amount to perjury in the eye of the law, because they are of no manner of force, but are altogether idle. 1 Hawk. P. C. Bk. 1, c. 69, s. 4.

Section 145 of the Code must be restricted to voidable, not to void, proceedings, to judicial, not to extra-judicial oaths as this one was. And an oath administered at a place without his territorial jurisdiction by an officer authorized to administer oaths is absolutely void.

The court *a quo* in its formal judgment seems to rely upon the fact that the appellant's oath in question was taken before a tribunal of his own selection. I fail to see how that can affect the question of the Recorder's jurisdiction, and why the appellant could be convicted of perjury if any other witness in the

case could not have been. For the appellant could not either impliedly or expressly confer upon that magistrate a jurisdiction which the statute exclusively vests in the magistrates of the County of Huntingdon. When it is the jurisdiction of the person that is deficient, a party who invokes the jurisdiction of a court is not thereafter as a general rule allowed to question it, but that is not so when the court has no jurisdiction over the subject matter, or has no lawful power to act by reason of the fact that, as in this case, such power is expressly withheld by the statute, which expressly decrees (sec. 5561 R. S. Q.) that no other magistrates than those residing in the county where the trespass was committed, have jurisdiction over it, thereby in unambiguous terms taking away from this recorder any jurisdiction that he might perhaps otherwise have had over the case.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal for the reasons given by his Lordship Mr. Justice Armour.

MILLS J (dissenting).—My conclusions in this case are so entirely in accord with those of Mr. Justice Wurtèle in the court below, that I might have contented myself with concurring in his opinions, and in the reasoning by which he has supported them. I accept his views of the law applicable to this case, as he has expressed them; but, as I find that some of my brethren in this court concur in the judgment of the majority of the court below, I feel it my duty to state with some degree of fulness the opinions which I entertain upon the subject.

The principles of the common law in respect to perjury have long been well settled; but some of the decisions in relation to this offence lie very close to the

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border line which separates those cases which have been held to be wilful and corrupt perjury, from another class which may be punished as contempts of court, or as misdemeanors, but which cannot be reached under the law relating to perjury.

Some of the cases in which the parties accused have been convicted of false swearing have been sometimes questioned, because it was doubted whether the principles of the law of perjury were strictly applicable, because, when analysed, some of the elements which go to make up the crime of perjury seemed to be wanting. There were, nevertheless, cases in which the parties had sworn falsely, and for which the presiding judge felt very strongly that the offender, in the interest of society, deserved punishment; and so a construction was given to the law, in order that the offender might be reached, which seemed to go beyond the principles which had been before accepted and acted upon, and its applicability to these cases was sometimes thought open to question. So, when it was proposed here to codify the Criminal Law, a section was inserted to embody the law of these cases, and to remove any doubt, if doubt previously existed, that they lay within the borders of the crime of perjury, and the law was made clear, where before it might have been regarded, by a thoughtful student of its principles, as doubtful, by including them within the definition. It only requires an examination of these cases, and the provisions of section 145 of the Code, to see that the framers of the section aimed at making the definition of perjury cover the whole ground embraced within the decisions of the courts upon the subject.

I think it is only necessary to consider the system of jurisprudence as the common law made it, and as those cases extended it, in order to obtain a clear view,

and to form a right appreciation of the interpretation of section 145 of the Code. We have to consider, in this case, a question of perjury committed before a tribunal that had no right whatever to try the cause then before it; that had no more power to adjudicate upon the question of trespass where it was laid, than a judge of Quebec would have to try a cause in the Province of Ontario; and it would require a very clear declaration in the statute to satisfy me that it was the intention of Parliament to clothe a self-constituted tribunal, that had no existence in law, with the dignity, and surround it with the protection, which attaches to the proceedings of one properly created under the authority of the State, for the purpose of discharging important public duties. We have here a magistrate acting as such in one county, clothed by the law with the necessary power to act in such matters only in another county, and we have a witness before him in this illegal and void proceeding, which he had no right to institute, charged with perjury, and put upon his trial for that offence, and convicted, for testimony given before one who was wholly without judicial authority, sitting as a court which, in law, had no legal existence. All the importance, and all the protection, which it is the policy of the law to bestow on the proceedings of a judicial tribunal, clothed with legal authority, has, by the proceeding in this case, been extended to one that has neither in fact, nor in law, any jurisdiction.

Where a limited tribunal, whether that limitation is due to the fact that the power has been generally withheld, or whether it is due to the fact that it is sitting outside of the territorial limits of its jurisdiction, takes upon itself to exercise judicial functions which do not belong to it, its decision amounts to nothing, its proceedings are void, there can be no appeal from

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its judgment, and the false testimony given before it does not constitute the offence of perjury. (1) Yet, in this case, it has been held that a false oath taken before one who has assumed judicial functions which he did not possess, instead of being regarded as an absolutely void proceeding is, nevertheless, valid so far as to subject the witness to punishment for perjury. Such a recognition is altogether at variance with the settled principles of the criminal law, for it gives to the proceedings of an illegal body the same degree of protection and dignity that it bestows upon a legal tribunal engaged in the discharge of its public duties.

No appellate court could, in a civil action, recognize such a tribunal by entertaining an appeal from its judgment, and no more should any appellate tribunal recognise the proceedings had before a magistrate sitting as a judge outside of his territorial jurisdiction, and having no authority in law to investigate and decide the question in respect to which he has ignorantly usurped judicial authority. (2)

There are some cases of false swearing which the common law regards as perjury; there are some cases of false swearing which cannot be tried and punished as such. The distinction rests upon well settled principles of jurisprudence which, in this regard, embody the underlying principles of the system. What is, and what is not, perjury at common law can be easily traced, and clearly ascertained by its students. But at every step we observe the line of distinction between law and ethics. Law, as Lord Stowell has well observed, has embodied and adopted

(1) *Attorney Gen.* v. *Hotham*, McLean, 113; *Rex* v. *Foster*, Turn. & Russ. 209. Russ & Ry. 459; *Pegram* v. *Styron*, 1 S.C. (L.R.) 595; *Reg.* v. *Ewington*, Car. & Mar. 319.

(2) *United States* v. *Babcock*, 4

the principles of ethics to a limited extent: it travels with them only a certain distance, and stops there. You are not at liberty to go further and say the general speculation would support you in a further progress. It is upon this rule that the law has defined and limited the crime of perjury; and if we were to extend it, so as to go beyond the requirements of the State, we might convert a salutary provision, into a means of vexatious persecution. Care must be taken not to sacrifice restrictions, justified by experience, to what may be regarded as a commendable desire to restrain falsehood, outside of those matters that are being judicially investigated. Neither the courts of law nor the bar desire to break down the distinction recognised, between falsehood sworn to in the course of justice, in a case which is being legally investigated and tried, and falsehood in every other circumstance. The distinction is one made by the law and founded upon reason and experience, and which has given to the common law, to some extent, its symmetrical features, and makes it capable of being expounded on principles of right reason, which were said by its votaries to be the perfection of the law, and I am not prepared to so interpret an Act of Parliament as to mar those features, without any adequate reason.

The criminal law never undertook to embrace within its boundaries the whole field of human conduct and to punish every wrong which one person might do to another as a crime. A large number of offences have been left with each individual, within the limits of the law, to redress for himself. He may decline to deal with a cheat, or to have any intercourse with a man who has wronged him. The law does not undertake to regulate these matters, because each person has adequate means of punishing the wrongdoer without recourse to the law at all. And so there may be many

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moral offences which the law does not punish, because the best interests of society would not be advanced by meddling with them as public offences.

The courts have undertaken, by their decisions, to draw the line in respect of false swearing, and to determine what false oaths should be punished as perjury, and what kind of false swearing should not fall within the limits of that offence.

Perjury (as defined by Hawkins), is a wilful false oath, by one who being lawfully required to depose to the truth in any proceeding in the course of justice swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not (1).

Mr. Bishop, in his work on Criminal Law defines perjury to be

the wilful giving under oath, in a judicial proceeding, or course of justice, of false testimony material to the issue, or point of inquiry (2).

We have to consider the tribunal before which an oath is taken; the question of materiality of the evidence to the issue; the testimony as being false; the intent of the witness and other matters. The common law required that the oath should be administered in some judicial proceeding, or course of justice, which must be taken in the way directed by the law, and before an officer who is legally authorised to administer it. I do not think that section 145 of our Code has made any alteration in the law of perjury in this particular. It is generally admitted that where a statute sets out a form of oath required that the statute is directory, and will be sufficiently complied with when followed in substance; so that, if what is sworn to is not true, it will not exempt the person taking it from being convicted for perjury. But if the words of the statute are wholly disregarded no perjury can be assigned, though the oath should be false. The first thing to be noted is, that the oath must be one required in the

(1) 1 Hawk. P. C. 429.

(2) 2 Bishop, Criminal Law [8 ed.] § 1015.

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course of justice, or in some judicial proceeding, and must be taken substantially as directed by the law. before an officer authorised to administer it. If a party in a cause becomes a witness for himself, under circumstances in which his testimony is not by the law receivable, it has been held that he may, nevertheless, commit perjury, and this seems to be an extension of his responsibility beyond the limits which a strict adherence to the principle upon which perjury rests would warrant; and so, where one is not a legal and competent witness in a case, but is nevertheless admitted as a witness by the court, and testifies wilfully and corruptly to what is false, he commits perjury (1). In the United States courts, where the principles of the common law, in respect to crime, have been followed, it has been held that where one swears falsely as to his residence, in an application for naturalisation, it is not perjury, because the Act of Congress expressly provides that the oath of the applicant shall, in no case, be allowed to prove his residence, and so his own testimony can not, under the authority of the law, be a legal part of the proceeding (2).

The same principle prevails in the English decisions. In the case of the *Reg.* v. *Stone* (3) it was held that where a Master in Chancery had no authority to administer oaths to witnesses before the Court of Admiralty, the conviction for perjury in an affidavit used in the Court of Admiralty, but sworn to before a Master in Chancery, could not be supported.

Pollock C. B. said:

The conviction must be quashed. The affidavit upon which perjury is assigned is sworn before a Master Extraordinary in Chancery, who has no authority by virtue of his commission to administer an oath before the Court of Admiralty, nor does the practice of the

(1) *Chamberlain* v. *The People*, 23 N. Y. 85.

(2) *Silver* v. *The State*, 17 Ohio, 365.

(3) 22 Eng. L. & Eq., 593.

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Court of Admiralty, in an action upon an affidavit so sworn, convey any authority.

And Parke B. said:

The authority of a Master in Chancery has relation entirely to matters before the Court of Chancery. Although the Court of Chancery may have a certain jurisdiction over the Court of Admiralty, yet the latter court, acting as a Court of Admiralty, is independent of the Court of Chancery, and a Master Extraordinary is not a person having authority to administer oaths in the Admiralty Court. If a man knowing the practice of the court uses an affidavit sworn in this manner, knowing it to be false, he is guilty of contempt of court, but it is not perjury.

In the case of *The Queen* v. *Tyson* (1) the question of the materiality of the evidence came before the Court for Crown Cases Reserved. One Sullivan was tried for robbery. Tyson swore that Sullivan had lived in a certain house for the last two years, and that he had never been absent from it more than two nights during that time. The Warden at the House of Correction at Wandsworth was called as a witness in the case, and testified that the prisoner Sullivan was in the prison at Wandsworth during twelve months of the time that Tyson had sworn that he was elsewhere. Kelly C. B. said:

The real question is whether these statements were *material*. We all agree that they were, as they tended to render more probable the truth of the first allegation,

Bramwell B. said:

The witness was asked his reason for remembering, and thereupon he proceeded to state those circumstances which made him competent to swear to the cardinal matter. One of these circumstances is untrue; why is that not perjury?

Lush J. said:

I was embarrassed at first; but now I am quite satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material.

(1) 1 C. C. R. 107.

In this case the materiality of what is sworn to does not depend on its intrinsic importance in respect to the facts of the case. but upon the purpose for which it was sworn to. (1)

In the case of the *Queen* v. *Smith*, (2) reported in the same volume as *The Queen* v. *Tyson* (3) the prisoner was convicted for perjury alleged to have been committed on the hearing of an information before two Justices of the Peace, on an application for an order of affiliation. The prisoner was tried before Cockburn C. J. at the Leicester Assizes for perjury, which was alleged to have been committed upon the hearing of an application for an order as stated. The information laid by the mother was duly proved; and it was shown that the putative father appeared before the Justices, and evidence was given on both sides. The court held that the father having appeared, and not having made any objections to the summons, it was not necessary to refer to it, or give any evidence of its existence on the trial for perjury. It was proved that Mee appeared before the Justices, and that upon the hearing of the information, the evidence, which was the subject matter of the indictment, was given by Smith, who was called as a witness by Mee; but the summons was not produced on the trial of Smith, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on Mee. Kelly C. B. delivered the judgment of the court. He said:

In this case, though there was no summons produced, the information was put in and proved, and it was shown that, upon the hearing of the information before the justices, evidence on both sides was given, and that the prisoner gave the evidence which was the subject matter of the indictment for perjury. Was there any necessity to produce the summons? The original object of the summons was to bring Mee into court. He did appear and no objection was then

(1) *Rex* v. *Greep*, Holt, 535. (2) 1 C. C. R. 110.
(3) 1 C. C. R. 107.

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made to the summons. There was no necessity at the trial for perjury to refer to it and, therefore, it was unnecessary to give any evidence of it.

In the same volume the case of the *Queen* v. *Fletcher* (1) is reported. Here Jane Beswick made a deposition upon oath, and the question was whether, in order to give the magistrate jurisdiction in the case, there should be a deposition in writing upon oath. The case had been tried at the Assizes in the county of Derby, before Cleasby B. In the judgment of the Court of Crown Cases Reserved, Boville C. J. said:

> The objection now taken is that the summons was irregularly issued, because there was no sufficient deposition on oath before it was issued. It has been suggested that under the section in question (7 & 8 Vict. c. 101, s. 3), there must be a written statement on oath—in fact an affidavit—by the woman; but I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient. Jervis' Act, being later in time, can not apply here, but certainly more than that Act prescribes cannot be required. The second Act referred to (8 Vict. c. 10, s. 1), does not affect the case. That Act only says that proceedings according to the forms in the schedule, or to the like tenor and effect, shall be valid and sufficient; it does not say that these forms must be used. Then, if all that the Act requires be that the magistrates shall make a record of the evidence orally given, the summons itself seems to me very like a writing to the same tenor and effect, with a form of deposition in the schedule of the second Act.

The Chief Justice after referring to the case of the *Queen* v. *Berry*, (2) goes on to say:

> The case was therefore precisely the same as the present; and all the judges composing the court, except my brother Martin, after taking time to consider, held that the conviction ought to be affirmed on the ground that the defendant by appearing and not objecting, had waived any irregularity in the issue of the summons.

And Blackburn J. said, after discussing certain features of the case:

> If either of these things be omitted, it is an irregularity for which the magistrate or his clerk is blameable, but it does not oust the jurisdiction. I think if these things were left out altogether the proceeding on the summons would none the less be good. But however this

(1) 1 C. C. R. 320. (2) Bell C. C. 46.

may be, the irregularity may be and was waived by the defendant's appearing and not objecting.

In the case of the *Queen* v. *Johnson* (1), the perjury alleged was committed by false oaths taken before one Thomas Deane, who held an inquest as deputy coroner touching the death of one Owen O'Hanlon. By 6 & 7 Vict. c. 83, s. 1, it is made lawful for any coroner of any county, city, riding, liberty or division, and he is thereby directed, by writing under his hand and seal, to nominate and appoint, from time to time, a fit and proper person, such appointment being subject to the approval of the Lord High Chancellor, Lord Keeper, or Lord Commissioners of the Great Seal, to act for him as his deputy in the holding of inquests; and all inquests taken and other acts performed by any such deputy coroner, under or by virtue of any such appointment, shall be deemed, and taken to all intents and purposes whatsoever to be, the acts and deeds of the coroner by whom such appointment was made. Provided also that no such deputy shall act for any such coroner as aforesaid, except it were through the illness of the said coroner, or during his absence from any lawful and reasonable cause. In this case it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Deane was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath, to prove affirmatively that there was lawful and reasonable cause for the absence of the coroner, and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury, and not for the judge. The counsel for the Crown argued that even if the facts proved were insufficient to show that there was lawful or

(1) 2 C. C. R. 15.

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reasonable cause, still, inasmuch as by section 2 of the same Act it is provided that the inquisitions are not to be quashed by reason of their having been taken by deputy, the oath on which perjury was assigned being an oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and, therefore, one on which perjury could be legally assigned. The first question of law reserved for the opinion of the court was, whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If not the conviction would stand.

The second question reserved was whether it was for the judge or jury to decide the question of reasonable cause. If for the jury the conviction must be quashed, unless the first question was decided in the negative. If for the judge, then the third question reserved was, whether there was evidence upon which the learned judge might properly decide as he did. If so, the conviction would stand. If not it must be quashed, unless the first question was decided in the negative. The court were of opinion that the conviction should be affirmed. They held that it was clearly for the judge to determine the question of the existence of reasonable and lawful cause for the coroner's absence.

In *Caudle* v. *Seymour* (1), a warrant issued by justices was held bad which did not show any information upon oath upon which it had been issued. Coleridge J. said, during the argument:

> A man has no right, because he is a magistrate, to order another to be taken for an offence over which he has jurisdiction without a charge regularly made.

(1) 1 Q. B. 889.

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In the case of *Turner* v. *The Postmaster General* (1), parties were apprehended and brought before a magistrate charged with setting fire to the letters in the pillar box. On their appearance at the Petty Sessions to answer the charges after witnesses had been examined, and cross-examined, they were, at the application of a prosecutor, remanded on bail for a week. At the adjourned sessions the attorney for the prosecution stated that he should proceed against the appellants under the statute 24 & 25 Vict. ch. 97, s. 52, and asked their attorneys whether they would plead guilty to such a charge, or whether further evidence should be offered and supported; they answered that he must go on, and prove his case. He called witnesses, and when the case for the prosecution was closed the appellants' counsel objected that no information on oath had been taken, as the statute required, and the appellants were not found committing the offence, and were not legally in custody, and therefore the justices had no jurisdiction to convict them for the offence then charged. The offence with which the appellants were first charged was a felony; the offence of which they were convicted was punishable on summary conviction. The court held that the want of information and smmmons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge under section 52, and, therefore, the justices had jurisdection to convict them. But on both occasions of their appearance before the justices the facts alleged against them were the same, and though they were brought up to discharge their bail, other circumstances show that they appeared voluntarily on this charge; the magistrates were, there-

(1) 5 B. & S. 756.

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fore, justified in convicting them on the charge which had been so made and heard. Cockburn C. J. said:

All that they could have asked for was, that in point of strict form the evidence should have been taken again on the first charge, and that evidence in support of that charge only should be received. Practically, that was done. They were irregularly brought before the magistrate. In strictness, they were entitled to insist that there should be information and summons, but they waived that, and cross-examined the witnesses and exercised all their rights as defendants on the first charge; after that, they can not object that the justice had no jurisdiction to convict them summarily.

In the cases where there has been a waiver of some *irregularity* in the mode of summoning which was used, (it is perhaps hardly correct to use the expression waiver), a justice can only proceed lawfully where he has jurisdiction, and the jurisdiction may be given by the appearance of the party, before the judge, to answer the charge. The jurisdiction may not depend upon the warrant; this may be improperly issued, but if the accused party appears before the magistrate without objection, he can hardly after a regular inquiry, and after an order for his commitment, take objection to the fact by complaining that he has not been brought regularly before the justices. In the case of the *Queen* v. *Hughes* (1), the charge was made orally that Hughes had sworn falsely and corruptly. The warrant is not the charge, it is a means of procuring the attendance of Hughes to answer it. And the want of an information on summons might be cured by the appearance of Hughes. It is the duty of the magistrate to take all charges, of whatsoever nature, kind or connection they may be, in writing, and this, Lord Mansfield says, is an indispensable duty.

In the case of the *Queen* v. *Hughes* (1), Lopes J. thought the warrant was a mere process for bringing the party complained of before the justices, and had

(1) 4 Q. B. D. 614.

nothing to do with the question of their jurisdiction. Hawkins J. said:

I have assumed as a fact, from the case taken, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of its illegality executed it, were liable for an action for false imprisonment. He was brought into the presence of a magistrate to answer a charge which, up to that moment, had never been legally preferred against him. Before those magistrates, and in his presence, the charge was made, over which, if duly made, they had jurisdiction. Upon that charge and in support of it it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely * * * They convicted him of an offence with which he had never legally been charged. In this, I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed.

It would be contrary to the settled rule, recognised in the interpretation of statutes, to make any alteration in the Common Law further or otherwise than the Act under consideration expressly declares (1), and I do not think that section 145 of the Criminal Code has made so radical a departure in the common law rule, as to make a false oath in a judicial proceeding, before one having no authority, wilful and corrupt perjury. This section begins with a definition of perjury, and it then states the circumstances under which it may be committed.

By section 145, perjury is defined to be

an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding, as a part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit, or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding.

(1) Hardcastle's Construction and Effect of Statutory Law, pp. 138, 139; *Metropolitan Asylum, District* v. *Hill*, 6 App. Cas. 193 at p. 203; *R.* v. *Morris* L.R. 1, C.C.R. 90.

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Evidence in this section includes evidence given on the *voir dire*, and evidence given before a Grand Jury. This is the first part of the section. It is necessary that the witness be a witness in a judicial proceeding. There are two departures from the common law rule; the first is that one may be convicted of perjury on immaterial evidence, and the second relates to the *voir dire*; the old rule was that an untrue statement which was not material could not subject the one who gave it to conviction of perjury, and one who is examined on the *voir dire* could not be contradicted, as the question of competence was a collateral question. Subsection 2 of section 145 reads:

> That every person is a witness within the meaning of this section who actually gives his evidence, whether he is competent to be a witness or not, and whether his evidence was admissible or not.

This subsection does not enlarge the boundaries of the common law jurisdiction, but is in strict accordance with the precedents which embrace the principle here laid down.

Subsection 3 is as follows:

> Every proceeding is judicial within the meaning of this section which is held in or under the authority of any Court of Justice, or before a Grand Jury, or before either the Senate or House of Commons in Canada, or any Committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly, or House of Assembly, or any Committee thereof empowered by law to administer an oath, or before any Justice of the Peace, or any Arbitrator or Umpire or any person or body of persons, authorised by law, or by any statute in force for the time being, to make an inquiry, and take evidence therein on oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a Court, Justice, or Tribunal, having power to hold such judicial proceeding, whether duly competent or not, or whether the proceeding is duly instituted or not, before such Courts or person, so as to authorise it or him to hold a proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.

I omit from consideration the provisions of this subsection relating to perjury committed before any of

the legislative bodies or committees thereof, empowered to take evidence upon oath, and look solely at those provisions relating to perjury committed in respect to evidence taken before the other parties described in this subsection. Now it will be seen that, leaving out legislative bodies with their committees, the section deals only with evidence taken in judicial proceedings, before persons legally competent to hold them, for the purpose for which the proceeding is had. A definition is given of what a judicial proceeding is within the meaning of this section; it is a Justice of the Peace, Arbitrator, Umpire, or any person or body of persons, authorised by law, or by any statute in force for the time being, to make inquiry and to take evidence therein upon oath. In other words, any of the parties mentioned must be authorised by law to exercise jurisdiction over the subject matter of the inquiry, and to take the evidence of witnesses upon oath. The proceeding must be a legal proceeding, having the sanction of the law behind it; but beside these, the proceeding may be before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding. If he has such power, then any irregularity in the constitution of the court, or any irregularity in the proceedings of the court, as in the common law cases to which I have referred, will not exempt one who has been duly sworn and has given false testimony from being convicted of perjury, but there is nothing in any part of this section which would surround with like protection the proceedings of one who is not a Justice of the Peace, or one who is not clothed with judicial authority, and who is not authorised to make an inquiry with the sanctions which attach to the proceedings of a legally constituted court.

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I, therefore, hold that the decision of the court below should be reversed, and that Drew should be discharged, as not legally guilty of the crime of perjury for which he stands convicted.

The judgment of the majority of the court was delivered by

ARMOUR J.—The defendant charged one Benjamin J. Rowe before L. J. Papineau, the recorder of the Town of Salaberry, of Valleyfield, with having entered upon his land without his permission contrary to the provision of article 5551 of the Revised Statutes of Quebec.

This charge was, by article 5561 of the said statutes, made cognizable before one or more justices of the peace, but such justices should only have jurisdiction when they resided in the county in which the offence had been committed.

The offence charged was committed in the County of Huntingdon, and the recorder, although *ex officio* a justice of the peace in and for the district of Beauharnois, in which district the County of Huntingdon was situate, did not reside in the County of Huntingdon, but in the County of Beauharnois.

The defendant was convicted of perjury committed by him upon the hearing of the said charge and the question is whether or not he was rightly convicted, the recorder not having jurisdiction over the offence charged.

And this question is determinable by determining whether or no the hearing of this charge by the recorder was a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, which provides that every proceeding is judicial within the meaning of that section which is held

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before any person acting as a court, justice or tribunal having power to hold such judicial proceeding whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorise it or him to hold the proceeding and although such proceeding was held in a wrong place or was otherwise invalid.

The recorder was a justice, but in hearing the said charge he was not a justice having power to hold such judicial proceeding, but he was acting as a justice having power to hold such judicial proceeding and his hearing the said charge was, therefore, a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, and the defendant was rightly convicted.

The provision above quoted was taken from section 119 of the draft code prepared by the Royal Commissioners appointed to consider the law relating to indictable offences, and with respect to such section the commissioners said, in their report, that

in framing section 119 we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can show some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves.

And the recorder was, in hearing the said charge, a tribunal *de facto* exercising judicial functions.

Appeal dismissed.

Solicitor for the appellant: *D. McAvoy.*

Solicitor for the respondent: *The Attorney-General for Quebec.*

THE HAMBURG AMERICAN PACKET CO. *et al.* v. THE KING.

1902

*May 29
*Oct. 7.

Public work—Negligence—Navigable rivers—Repair of channel.

JUDGMENT APPEALED FROM (7 Ex. C. R. 150) AFFIRMED.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing the Petition of Right with costs.

The action was to recover damages for injuries to the SS. "Arabia" sustained through grounding upon an obstruction in the ship channel of the River St. Lawrence, near Cap à la Roche, between Montreal and Quebec. The channel had been deepened under the direction of the Department of Public Works and, after the work of deepening was finished and the plant removed, it was swept once. The contention of the suppliants was that the Crown was obliged thereafter to keep it clear of obstructions. This contention was not favoured by the Exchequer Court which held that the channel was not a public work after deepening was done and, if it was, there was no negligence proved to make the Crown liable under sec. 16, sub-sec. *c*, of the Exchequer Court Act. The Petition of Right was therefore dismissed and the suppliants appealed to the Supreme Court of Canada.

After hearing counsel for the parties the court reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

C. Robinson K.C. and *Leighton McCarthy* for the appellants.

The Honourable The Minister of Justice and *Newcombe K.C.* for the respondent.

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Davies and Mills JJ.

(1) 7 Ex. C. R. 150.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION v. FOWLIE.

1902

*Dec. 4, 5.

*Dec. 12.

Accident insurance—Proof of loss—Waiver—Finding of jury—Verdict.

Judgment appealed from (4 Ont. L. R. 146) affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of the trial court and ordering a new trial of the action.

The evidence shewed that the proofs of loss were furnished within the time limited by the policy without objection being taken as to their sufficiency, but payment of the claim was refused on the ground that the circumstances surrounding the death of the person insured brought the case within a clause of the policy providing against liability where death occurred through suicide, duelling, etc., or from natural causes. Objection to the sufficiency of the proofs was taken for the first time in the statement of defence delivered a couple of years afterwards. The judgment appealed from held that the proofs furnished were sufficient and that the right to take objection to them had been waived.

The body of the insured was found on a railway track, having been run over by a train; it was seen by the engineer lying on the track before it was struck by the train; shots had been heard shortly before this and a pistol was found near by; two holes, which might have been caused by pistol bullets, were found in the cap of deceased. By the policy death was

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

(1) 4 Ont. L. R. 146.

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required to be by accidental bodily injury caused by violent external means; while the Insurance Act, R. S. O., 1897, ch. 203, sec. 152, which is to be read with the policy, defines "accident" as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The jury found that there was no evidence to satisfy them that deceased came to his death by his own hand, but that he came to his death by external injury unknown to them. The judgment appealed from held that the finding was too vague to be construed as a finding of accidental death, set aside the judgment entered at the trial and ordered a new trial, such new trial to be confined to the question as to whether or not the deceased died in consequence of an accident within the meaning of the policy on which the claim was founded and ordering further that the costs should abide the event of the new trial. The defendants appealed.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs for the reasons given in the judgment appealed from.

Appeal dismissed with costs.

Hamilton Cassels K.C. for the appellants.

Staunton K.C. and *Stephens* for the respondent.

JOSEPH GOSSELIN.....APPELLANT; 1903

AND *April 14.
*April 20.

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Canada Evidence Act, 1893—*Husband and wife—Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.*

Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills J. dissenting.

Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills J. dissenting.

Per Girouard J. (dissenting).—The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo*, *de facto* or *de corpore*. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.

Per Mills J. (dissenting).—Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.

Per Taschereau C.J.—The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute.

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

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GOSSELIN v. THE KING.

APPEAL from the judgment of the Court of King's Bench, appeal side, on a criminal case reserved affirming the conviction of the appellant for murder in the Court of King's Bench, Crown Side, sitting in the District of Montmagny, Province of Quebec.

The trial court judge (H. C. Pelletier J.) stated the reserved case as follows:

"Le 9 décembre 1902, les grands jurés ont trouvé que l'accusation portée contre Joseph Gosselin d'avoir tué malicieusement et illégalement la femme Vitaline Marquis, épouse d'Octave Trahan, était fondée, et le procès ayant eu lieu, les petits jurés ont, le 18 du même mois, rapporté contre l'accusé un verdict de *coupable de meurtre.*

"J'ai présidé cette Cour Criminelle. A la demande du procureur du prisonnier, j'ai suspendu le prononcé de la sentence en attendant la sentence de la cour du banc du roi, siégeant en appel, en la Cité de Québec, sur les cas réservés et sur l'exposé des faits suivants:

I.

"Lors de l'enquête faite devant le coroner pour s'enquérir des circonstances de la mort de Vitaline Marquis, en mai dernier, Célestine Labonté, épouse de Joseph Gosselin, l'inculpé, a comparu comme témoin et a rendu témoignage.

"A l'enquête préliminaire devant le magistrat du district, M. Panet Angers, qui a eu lieu en juin 1902, à Montmagny, alors que l'inculpé était sous arrestation, accusé d'avoir tué Vitaline Marquis, Célestine Labonté a été appelée comme témoin, deux fois, pour rendre témoignage et elle a refusé de témoigner.

"Le 6 décembre 1902, M. L. J. Cannon, assistant-procureur-général qui, avec M. Lachance, avocat, a conduit cette cause devant la cour du banc du roi, de la part de la Couronne, a envoyé le sergent McCarthy,

chef de la police provinciale de Québec, à Saint-Damien, en le Comté de Bellechasse, quérir Célestine Labonté avec son père, Pierre Labonté chez qui elle demeure depuis que son mari est en prison, et tous deux ont été conduits à Québec.

" Le 7 décembre M. Cannon a eu, à Québec, une entrevue avec Pierre Labonté et sa fille Célestine Labonté qui lui ont raconté ce qu'ils avaient à dire en cette affaire s'ils étaient appelés comme témoins. Au cours de cet entretien, Célestine Labonté a dit que son curé, son confesseur, lui avait conseillé de parler si elle était appelée à témoigner devant la cour.

" Célestine Labonté est restée volontairement sous la protection et la surveillance du sergent McCarthy tout le temps et jusqu'à ce qu'elle ait rendu son témoignage devant cette cour à Montmagny.

" Il n'a pas été prouvé qu'aucune contrainte ait été exercée soit de la part de M. Cannon, soit de la part du sergent McCarthy, sur la femme Célestine Labonté pour l'induire à rendre témoignage, et cette femme ne s'est pas plaint non plus de ce qu'on l'a contrainte en aucune façon.

" M. Ernest Roy, le procureur du prisonnier, affirme que le 8 décembre, il a voulu voir Célestine Labonté et lui parler, mais qu'il en a été empêché par le sergent McCarthy.

" Le 9 décembre 1902, l'avocat du prisonnier a demandé à la Cour que des ordres furent donnés afin qu'il pût communiquer *verbalement*, avec la femme Célestine Labonté, alors à Montmagny, et sous la surveillance du dit sergent McCarthy. Cette demande n'étant appuyée d'aucune raison valable, suivant moi, et ne faisant pas voir en quoi les fins de la justice seraient mieux atteintes si l'avocat de l'accusé communiquait à cette heure *verbalement* avec un des témoins que la couronne voulait faire entendre, j'ai refusé de donner

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de tels ordres, car je considérais qu'à cet étage de la cause la couronne ne faisait que son devoir: servir les fins de la justice, en mettant la dite Célestine Labonté sous sa protection et à l'abri de toute atteinte pour l'empêcher de rendre témoignage, si elle était décidée à être entendue comme témoin suivant les conseils de son aviseur spirituel, et que la dite Célestine Labonté n'avait pas perdu sa liberté à la connaissance de la cour. Ensuite cette femme a été appelée par la couronne devant la cour comme témoin, et elle a déclaré devant la cour, avant de rendre témoignage, qu'elle consentait à être entendue comme témoin de la part de la couronne et elle a témoigné.

" Cette femme n'a jamais été assignée de la part de la couronne sous l'autorité d'un bref de subpœna.

" Premier cas réservé.—Sous les circonstances ci-dessus relatées, la femme Célestine Labonté était-elle en état de rendre librement et volontairement son témoignage ? Sinon, son témoignage doit-il être mis de côté ? "

II.

" La dite Célestine Labonté a été appelée comme témoin par la couronne. Elle a d'abord été examinée sur le voir dire et j'ai déclaré qu'elle était un témoin compétent, excepté quant aux communications privilégiées entre époux, entr'elle et son mari, qu'elle ne pouvait pas révéler, et je l'ai instruite de ce fait aussitôt que l'occasion s'en est présentée.

" Etant assermentée comme témoin et avant que Célestine Labonté ne commença à rendre son témoignage l'avocat du prisonnier a demandé au président de la cour de l'instruire sur le droit qu'elle avait de ne pas rendre témoignage si elle le voulait, et que si elle refusait de rendre témoignage elle n'encourrait aucune peine. Sur cette application de la part de

l'avocat du prisonnier j'ai refusé de donner aucune instruction au témoin *quant à présent*, c'est-à-dire avant que le témoin ne réclamât elle-même son privilège, si elle en avait un. Alors la couronne a demandé au témoin si elle consentait à rendre témoignage et elle a répondu que oui et elle a témoigné. Dans le cours des transquestions, la femme Célestine Labonté a déclaré qu'elle avait peur de son mari et a ajouté que si la cour lui avait dit qu'elle avait le droit de refuser de rendre témoignage et qu'en refusant il ne lui serait arrivé aucun mal elle n'aurait pas rendu témoignage. Cependant elle a continué encore à rendre témoignage sans invoquer son privilège. Dans le ré-examen elle a dit que lorsqu'elle avait refusé de rendre témoignage à l'enquête préliminaire devant le magistrat M. P. Angers, elle avait reçu de son confesseur des conseils lui disant de rendre témoignage si on l'appelait comme témoin, et que le même jour qu'elle descendait de St-Charles à Montmagny, sur les chars, que l'avocat du prisonnier, M. Roy, lui avait parlé et qu'elle a refusé de rendre témoignage devant le dit magistrat.

" L'avocat du prisonnier a fait motion pour que ce témoignage de Célestine Labonté fût mis de côté. J'ai décidé que ce témoignage devait rester devant la cour et les jurés ; que c'était au témoin à invoquer son privilège et que ne l'ayant pas invoqué le prisonnier ne pouvait pas s'en plaindre. Pour plus amples informations je réfère les honorables juges de la cour d'appel au jugement que j'ai rendu au cours du procès, sur ce point, et qui est annexé au présent exposé de faits et marqué pièce " A ".

" Second point réservé.—Célestine Labonté, épouse du prisonnier, Joseph Gosselin, était-elle un témoin compétent contre son mari ?

" La cour devait-elle la renseigner et lui dire qu'elle n'était pas obligée de rendre témoignage, sur la demande de l'avocat du prisonnier ?

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" La cour en disant au jury de considérer ce témoignage l'a-t-elle mal guidé ? "

III.

" Au cours de son témoignage, Célestine Labonté a dit qu'elle avait lavé les hardes et le linge du prisonnier pour faire disparaître les tâches de sang qui étaient dessus et cela à la demande de l'avocat du prisonnier qui lui a dit de les laver au plus vite. La défense a objecté à cette preuve comme tendant à révéler des communications privilégiées, vu que la femme parlait à l'avocat de son mari.

" J'ai décidé que vu la nature des faits et des circonstances qu'il ne pouvait pas s'agir de communications privilégiées et j'ai permis cette preuve.

" Troisième cas réservé.—Y a-t-il là lieu d'invoquer le privilège des communications privilégiées et la preuve faite en pareil cas est-elle illégale ? "

IV.

" Les taches de sang sur les habits du prisonnier constituent en cette cause une preuve de circonstances très convainquantes. Ici, il s'agissait pour l'inculpé d'expliquer les taches de sang que l'on avait vues sur ses caleçons. Le prisonnier en rendant son témoignage a déclaré qu'il avait mis les caleçons sur lesquels on avait trouvé des taches de sang le lundi matin, 26 mai, alors qu'ils venaient d'être lavés et qu'ils étaient parfaitement nets. Son avocat lui a posé la question suivante :

" Comment pouvez-vous expliquer qu'il y avait du sang sur la fourche de vos caleçons,—comment pouvez-vous expliquer cela ?

" R. Je l'expliquerai bien si on m'en donne la permission.

" (Objecté à cette preuve par la Couronne).

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" Q. (Par le juge). Expliquez ça ?

" R. Dans l'avant-midi du lundi, j'ai eu des rapports avec ma femme et elle n'était pas bien.

" Q. (Par le juge). C'est la seule explication que vous avez à donner ?

" R. — — — — — — .

" Pour contredire cette preuve faite par le prisonnier la couronne a fait entendre Célestine Labonté, la femme du prisonnier et on lui a posé la question suivante :

" Q. Maintenant, votre mari a aussi déclaré, hier, dans la boîte aux témoins, que le 26 mai durant la matinée, c'est-à-dire le lendemain du jour où il est allé chez la femme Vitaline Marquis, il a eu des relations charnelles avec vous ? "

" (Il a été objecté à cette question de la part du prisonnier comme tendant à contredire une preuve qui ne peut être faite et comme permettant l'admission d'une preuve illégale concernant les communications privilégières entre mari et femme.)

" Sur cette objection, la cour a dit, que le prisonnier ayant déjà déclaré qu'il expliquait la présence du sang sur ses caleçons par le fait qu'il avait eu des relations charnelles avec sa femme le lundi dans l'avant-midi, et ce fait étant important, vu qu'il a été mis en la possession des jurés, qu'il devait être permis à la couronne de contredire ce fait dans sa contre-preuve, sans déclarer toutefois s'il s'agissait d'une communication privilégiée entre mari et femme, visée par la loi sur la preuve de 1893. Sur ce, le procureur de la défense a excipé de ce jugement et a déclaré en faire une demande pour un cas réservé. Cette preuve étant permise la femme a dit qu'elle ne se rappelait pas, que cependant elle le croyait, qu'elle avait eu des rapports sexuels avec son mari, le lundi matin

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dans l'avant-midi, mais que, ce jour-là, elle n'avait pas de sang sur elle.

"J'ai dit aux jurés qu'ils devaient considérer cette preuve faite par la femme aussi bien que celle faite par le mari, relativement à ces taches de sang.

"Quatrième cas réservé.—Cette preuve est-elle illégale, et le juge en disant aux jurés de la considérer aussi bien que celle faite par le prisonnier les a-t-il mal guidés?"

"Je dois ajouter que lorsque la femme Célestine Labonté a été appelée par la couronne comme témoin dans la contre-preuve et quand elle a rendu son témoignage, que le procureur du prisonnier s'ait objecté à ce qu'elle fût entendue avant que la cour l'eût mise au courant de ses droits qu'elle a en vertu de la loi de refuser de rendre témoignage contre son mari en cette cause sans s'exposer à aucune punition ou peine quelconque.

"Sur cette objection la cour a dit qu'elle avait déjà décidé que c'était au témoin à invoquer son privilège et que si le témoin l'invoquait elle l'instruirait. Alors le procureur de l'accusé a excipé de ce jugement et a déclaré en faire le sujet d'une demande pour un cas réservé.

"La femme Célestine Labonté étant alors assermentée, son interrogatoire a commencé comme suit:

"Q. (Par la cour) Consentez-vous à rendre témoignage?

"R. J'aimerais mieux ne pas rendre témoignage.

"Q. (Par la cour). Consentez-vous à rendre témoignage?

"R. S'il le faut.

"Q. Qu'est-ce que vous voulez dire par "s'il le faut?" Vous avez déjà été entendue comme témoin, madame, et vous avez déclaré que vous consentiez à rendre

témoignage, et vous avez rendu témoignage en cette cause ?

" R. Oui.

" Q. A présent consentez-vous à rendre témoignage ?

" R. S'il le faut.

" La cour vous informe, madame, que vous n'êtes pas obligée de rendre témoignage si vous ne voulez pas le rendre, mais que, si vous voulez le rendre la loi vous permet de rendre témoignage. (Maintenant, madame, voulez-vous, oui ou non, continuer à rendre témoignage ?)

" R. Oui, monsieur.

" Et ensuite la femme a rendu témoignage.

" En résumé les cas réservés ci-dessus se résument à savoir :

" 1° Si la femme Célestine Labonté était en état de rendre librement et volontairement son témoignage.

" 2° Si elle était un témoin compétent appelé par la Couronne pour rendre témoignage contre son mari.

" 3° Si les deux témoignages rendus par elle ont été légalement rendus sous les circonstances sus relatées."

" Montmagny, 9 jan. 1903."

(Signé) " H. C. PELLETIER "

J. C. S.

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

Gibsone and *E. Roy* for the appellant.

Cannon K. C., Assistant-Attorney-General for Quebec, for the respondent.

THE CHIEF JUSTICE.—I entirely concur in my brother Davies' reasoning and conclusions upon the merit of the question involved on this appeal, and I have nothing further to add to his opinion which I have had an opportunity to peruse. I deem it expe-

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dient, however, to say a few words upon the question raised during the argument of the reference by counsel to the debates in Parliament for the purpose of construing any statute. Such a reference has always been refused by my predecessors in this court and, when counsel in this case began to read from the Canadian Hansard the remarks made in Parliament when the Canada Evidence Act in question was under discussion, I did not feel justified in departing from the rule so laid down, though, personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful. The same rule is observed in England. Alderson B. says, *In re Gorham* (1):

> We do not construe Acts of Parliament by reference to history.

And, in *Barbat* v. *Allen* (2), Pollock C. B. says:

> I must at the same time state that the history of a clause in a statute is certainly no ground for its interpretation in a court of law and I would guard myself against being considered as resorting to any such means.

See also *Philips* v. *Rees* (3); *Reg.* v. *Bishop of London* (4), per Lord Esher, at page 224; and *Robinson* v. *The Canadian Pacific Railway Company* (5).

In the case of *The Queen* v. *The Bishop of Oxford* (6), it is true, a reference to a speech of the Lord Chancellor in the House of Lords, relating to a certain statute, was allowed by the Court of Appeal, but the remarks of the learned judges upon that point, if I read them correctly, are far from justifying the contention raised in some quarters that they intended to alter the general rule on that point.

Bramwell L.J. said:

> Both my learned brothers have discussed our admission of the opinion given by the Lord Chancellor to the House of Lords, on the

(1) 5 Ex. 667.
(2) 7 Ex. 616.
(3) 24 Q. B. D. 17.
(4) 24 Q. B. D. 213.
(5) [1892] A. C. 481.
(6) 4 Q. B. D. 525.

occasion of the Public Worship Regulation Act, 1874. I really do not know that there is any definite rule as to what may or may not be cited and acted on as authority. No doubt, we must act on general principles, and *I suppose they would exclude what is said in debate in either House of Parliament*. But to reject the opinion of the head of the law as to what is the law, given to advise the highest court of judicature in the country, sitting indeed in its legislative capacity, and at the same time admit the *obiter dictum* of a judge at *nisi prius*, either in our own or an American court, seems somewhat strange, more especially as it is certain that, if it ought to be excluded, any judge knowing of it and excluding it, would as soon as he left the court consult the Hansard he had before rejected. I cannot think it was wrong to admit it.

Baggallay L.J. said:

Before leaving the subject of judicial authority as bearing upon the question of the construction of that section, I desire to refer to the circumstances of our having allowed the counsel for the appellants to quote to us a passage from the speech of the Lord Chancellor in the House of Lords, when moving the third reading of the Public Worship Regulation Act in 1874; the counsel for the appellants, whilst admitting that he could not refer to the passage in question or any other passage in that or any other speech for the purpose of construing the Public Worship Regulation Act, insisted that it was perfectly open to him to refer to it as representing the opinion of the Lord Chancellor as to the then state of the law relating to proceedings in respect of offences against the laws ecclesiastical, which laws it was proposed to some extent to affect by the bill before the House. After hearing the objections of the counsel for the respondent we allowed the passage to be read and, though I have since entertained some doubts whether we were right in our decision, which doubts have not been wholly removed, I am, upon the whole, of opinion that there was no objection to the course that we allowed the appellants' counsel to take. The question with reference to which we allowed it to be cited was, whether at the time of the passing of the Public Worship Regulation Act, there was a general concurrence of judicial opinion as to the true effect of a provision in an Act of Parliament passed thirty-four years previously. The courts have been in the habit of allowing reference to be made to text-books, the authors of which are living judges, and I am unable to distinguish, in principle, an expression of opinion by the Lord Chancellor as to the state of the law upon a particular subject, with which he is inviting the House of Lords to deal, from an expression of opinion upon the same subject by another judge in a treatise published

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by him. The weight to be attached to the opinion, whether expressed in the one form or the other, must, of course, depend upon the surrounding circumstances.

The doubts I have entertained as to the propriety of our allowing reference to be made to the speech of the Lord Chancellor, have arisen from a consideration of the difficulties which, in some cases, may arise, though they do not exist in the present, in the way of strictly limiting the purposes for which reference may be made to such expressions of judicial opinion.

Thesiger L.J. said:

I would only say, that among the authorities upon which I rely I do not count the speech of the Lord Chancellor in the House of Lords. I was a party to the decision under which it was allowed to be quoted to us, and the ground upon which I thought it admissible was that it had, in the occasion upon which it was spoken and the position of the speaker, at least as great a sanction as the text-books of living judges which have upon many occasions been admitted as authorities.

But, upon further consideration of the matter, I have been led to doubt very much whether the principle upon which such text-books have been treated as authorities is a sound one; and, even if it were a sound one, I cannot but think the extension of it to speeches in a House of Parliament, sitting in its legislative capacity, however eminent may be the speakers, however solemn the occasion on which they speak, inexpedient in a very high degree. It is true that in many instances, and perhaps this particular one is a conspicuous example, the speech, looking to the circumstances under which it was made, the previous consideration which the speaker has given to the subject, and the character in which he speaks, may be entitled to far more weight than the hasty utterances of a judge at *nisi prius* or even the *obiter dicta* of a judge *in banco*; but the judge, in the latter cases, has the safeguard of a judicial proceeding cast around him; his mind is not likely to be influenced by any considerations beyond those which the law enforces upon him; while, when the scene is removed to the area of Parliament, political considerations may enter, as they have before now entered, into the opinions of lawyers upon legal subjects, and may insensibly affect the judgments of even the greatest and wisest of our judges. The sanction and safeguard of judicial procedure are removed, and even the conditions which give the text-book its weight, the exclusive devotion to the legal subject of which it treats, and the calmness with which it is necessarily prepared may, in many instances, not exist.

That case is, however, no authority upon the question, for when in the House of Lords, *sub nomine*, *Julius* v. *Oxford* (1),

In the course of the arguments strong disapprobation was expressed by the Lord Chancellor, (Earl Cairns) and Lord Selborne of the course taken by the Court of Appeal in allowing to be cited a speech made by the Lord Chancellor in the House of Lords.

In *South-Eastern Railway Company* v. *The Railway Commissioners and the Mayor, etc., of Hastings* (2), Cockburn C.J. had also referred to a speech in the House of Lords, but in that same case (4), upon counsel saying "The Act cannot be construed by reference to a debate in Parliament," Selborne, Lord Chancellor, said:

That is so. It has been regretted in the House of Lords that the Court of Appeal had allowed such a reference to be made in *The Queen* v. *The Bishop of Oxford*. (*Ubi supra.*)

In the United States the rule seems to be the same.

But in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute,

says Story J. in 2 Story's Reports, 654?

Peckam J., in the United States Supreme Court, said:

There is a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative Act is from the language used in the Act and, upon occasion, by a resort to the history of the times when it was passed. *United States* v. *Freight Association* (4);

(1) 49 L. J. Q. B. 578.
(2) 49 L. J. Q. B. 273, 291.
(3) 50 L. J. Q. B. 203.
(4) 166 U. S. R. at pages 290 to 318 [1896].

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see also *United States* v. *Oregon &c. Railroad Co.* (1); though the public history of the times in which a statute was passed may be referred to, according to what Taney C. J. says in *Aldridge* v. *Williams* (2) or what Davis J. says in *United States* v. *The Union Pacific Railroad Co.*, (3) and Peckam J., *Ubi supra.*

In Lefroy's valuable book, (The Law of Legislative Power in Canada,) pages 1 and 21, are collected the judicial opinions wherein the general rule has been more or less disregarded in the construction of the British North America Act. The reports of the codifiers of the Civil Code of Lower Canada are also often referred to in Quebec and in this court, as also in the Privy Council, (*see* for instance, *Symes* v. *Cuvillier*, (4)) but these cannot be put upon the same footing in regard to this rule as are the debates in Parliament upon a bill.

SEDGEWICK J. concurred with His Lordship Mr. Justice Davies.

GIROUARD J. (dissenting.)—I dissent from the majority of the court only as to the meaning of the word "communication" in section four of "The Canada Evidence Act, 1893"

At the trial of the appellant for murder, the wife of the accused was examined and the following incident transpired, as stated by the trial judge in the reserved case.

His counsel then asked him (the accused) the following question:

Q. How can you explain the blood that was found on the fork of these drawers. How can you explain this?

A. I will explain it if I am allowed to do so.

Q. (By the court.) Explain this?

(1) 57 Fed. Rep. 426.
(2) 3 How. 24.
(3) 91 U. S. R. 79.
(4) 5 App. Cas. 138, 158.

A. Monday, I had intercourse with my wife and she was unwell.

Q. (By the court.) Is that the only explanation you wish to give?

A. * * * *

To contradict this evidence by the prisoner, the Crown brought up Celestine Labonté, his wife, in rebuttal, and asked her the following question:

Q. Now your husband also declared, yesterday, in the witness-box, that on the twenty-sixth of May in the course of the morning, *i.e.*, the day after he had gone to Vitaline Marquis's house, he had sexual intercourse with you?

This question was objected to on behalf of the accused as tending to contradict evidence which was illegal and allowing evidence of privileged communications between husband and wife. Upon this objection the court decided that, the prisoner having declared that he explained the presence of blood upon his drawers by the fact that he had sexual intercourse with his wife in the course of the Monday morning, and this fact being an important one which had gone to the jury, the Crown should be allowed to contradict it in rebuttal, but the court did not decide that such a fact was a privileged communication between husband and wife mentioned in the Canada Evidence Act of 1893. The counsel for the accused then took exception to this judgment and asked for a reserved case upon this point.

This evidence being allowed, the wife answered that she did not remember exactly but, nevertheless, believed that she had had sexual intercourse with her husband upon this Monday morning, but that she had no blood upon her at that time.

I told the jury that they should weigh the evidence given by the wife as well as the evidence given by the husband as to the blood stains.

The Chief Justice Lacoste and Mr. Justice Ouimet formed the dissenting minority of the Court of Appeal and held that the witness was not competent to be examined in any manner or form on behalf and at the request of the Crown.

I am not prepared to go to that extent, but I have no hesitation in saying that she was not competent to give the above evidence. As I read the fourth section of the "Canada Evidence Act, 1893," a wife or husband is a competent witness in any criminal case and may possibly be compelled to give evidence, but

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no husband shall be competent to disclose any communication made to him by his wife during their marriage and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

What is the meaning of the word "communication"?

Webster defines it

the act or fact of communicating, intercourse by words, letters or messages, connection, intercourse.

Why depart from this definition in the interpretation of clause four of the Evidence Act? For what reason limit it to words of mouth, messages, conversations, letters or gestures? Thus limited, the statute would not protect the whole situation contemplated. I do not believe that the legislature ever intended such a result. It does not say so, and I am not inclined to add to or take from the ordinary meaning of the expression used. I think the word "communication" is large enough to comprehend all kinds of relations between husband and wife, whether *de verbo*, *de facto* or *de corpore*. Are the sexual relations between husband and wife to be less sacred than a mere conversation or message? It was more than a matter of privilege, which may be waived, it was illegal to admit the evidence of the wife. The prisoner objected to it, but even the formal consent of all parties could not cover such an illegality, which is of public order. The wife was not competent to contradict the evidence of her husband as to his explanation of the blood stains upon his clothes. For the same reason, the learned judge should have ruled out the answer given by the prisoner, whether offered by him or not. He was not, therefore, legally tried and should have a new trial, not in consequence of his own evidence, which caused him no possible injury, but by reason of the evidence of the wife which was the occasion of a substantial wrong to him. See section 746 of the Criminal Code.

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Not only was the trial illegal, it was not even fair. The wife, whose assistance the prisoner was entitled to, was kept under close surveillance in the private house of the Chief of Provincial Police, at the request of the Crown, and when his counsel endeavoured to see her on his behalf he was refused. The trial judge sanctioned this course.

The Crown Attorney can take all necessary measures to secure the attendance of witnesses, but his refusal to allow the accused or his counsel to see her and obtain her lawful assistance, if any was available, was unwarrantable. He was not an outlaw and might even be acquitted, and, if he had been, what would be the life of the unfortunate couple?

It is in a case like this that the language of Taylor, quoted by my brother Davies, should receive its application. Indeed the peace of families is at stake It is no doubt of great moment to the community that criminals should be convicted and punished, but it is more important that criminal justice should be properly and legally administered.

I would, therefore, allow the appeal and grant a new trial.

DAVIES J.—The questions raised on this appeal depend for their solution upon the construction to be given to the fourth and fifth sections of the Canada Evidence Act, 1893.

The appellant was tried on an indictment for murder and the questions arose out of his wife being tendered and giving her evidence as a witness for the Crown. The trial judge, while being of the opinion that she was under the statute a competent witness, also thought that it was a matter of privilege or volition on her part whether she should testify or not, and during the progress of her examination he so instructed her.

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It was contended for the prisoner that the statute did not permit the wife to give evidence for the Crown at all; and that, at any rate, *before* she gave any evidence she should be instructed by the court as to her rights and given to understand that if she declined to give evidence she would not incur any penalty. The learned judge, however, left the question of giving or declining to give evidence to the determination of the wife herself, but reserved the point raised.

Questions were also raised by the prisoner's counsel as to the admissibility of certain evidence given by the wife in contradiction of a statement made in his evidence by the prisoner when, in explanation of certain blood spots found upon his drawers after the murder, he stated that on the Monday he had had carnal connection with his wife, who at the time was unwell; and also another statement made by the wife as to instructions or advice given to her by the prisoner's counsel as to the washing out of these blood stains. The learned judge, in both cases, admitted the evidence and reserved the point.

On the reserved case being argued before the Court of King's Bench for the Province of Quebec, the learned Chief Justice and Mr. Justice Ouimet delivered dissenting judgments to the effect that, under a true construction of the statute, the wife of the accused was not a competent witness for the prosecution, *but for the defence only*.

They based their conclusion partly upon the proposition that to admit the wife of the accused as a witness for the prosecution was opposed to public policy and order and was inconsistent with the subsection of section four, which, while preventing comments being made by the judge or counsel for the prosecution for the failure of the accused or of the wife or the husband of the accused to give evidence, was silent as to

such comments being made by the counsel for the prisoner.

I am quite unable to concur either in these conclusions or to follow the reasoning which led the learned judges to adopt them. Our duty is simply to construe the language of the statute as we find it. Where that language is plain and unambiguous we are not to speculate as to what was or might have been the intention of Parliament, or as to the consequences which we may think impolitic or undesirable which follow from adherence to the plain language of the statute.

The section under consideration does not say that the wife or the husband of the accused shall be a competent witness *for the defence*. Such a limitation is found in the Imperial statute passed subsequently to that of Canada, but it is conspicuously absent from the latter. The section under review makes these parties, the accused and the husband or wife of the accused, competent witnesses, but with a definite and specified exception relating to communications made to each other during marriage. With regard to these latter the incompetency of the witnesses remains. In all other respects it has been removed, and they stand on the same plane as other competent witnesses and liable to answer, when called, all legal questions asked them. To interpolate the words "for the defence" is, in my judgment, to do violence to the language of the section. With reference to the argument derived from the omission of any reference to the counsel for the accused in this section, forbidding comment in case of failure of the accused or of the husband or wife of the accused to give evidence, I am unable to appreciate the supposed inconsistency of the omission. It certainly would be an extreme case which would call for comment on the part of counsel for the accused that the

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Crown had failed to call him or her, or his or her wife or husband, as the case might be, to give evidence. What Parliament was evidently providing for was the protection of the prisoner from damaging comments either by the court or prosecuting counsel if, not having been called by the Crown, the prisoner or his wife or her husband, as the case might be, did not tender himself nor call his consort for the defence. But in any event, such an omission should not avail to alter the plain construction of a statute or justify us in imputing to Parliament an intention which its language in the main section does not bear.

The judgment of the majority of the Court of King's Bench, which was delivered by Mr. Justice Hall, follows that of the trial judge, and limits the competency of the accused or of the wife or husband of the accused, as the case may be, to give evidence, to those cases in which they may voluntarily elect to do so. As appears from what I have already said, I take a wider view of the sections under consideration than is taken in the judgment appealed from. Apart altogether from communications made by husband and wife to each other during their marriage, I hold that their competency as witnesses is by the statute made unrestricted. If Parliament intended to vest in the accused or in the husband or wife of the accused, the privilege simply of giving evidence and not the duty, surely it would have said so and provided, as was done in the Imperial statute of 1898, that the accused

> should not be called as a witnesses except upon his own application, (and that) the wife or husband of the person charged (should not be so called) except upon the application of the person so charged.

Before the passing of the Canada Evidence Act, 1893, some few special exceptions had been made to the common law prohibiting an accused party and the wife or husband, as the case might be, of the accused

party from giving evidence, either for or against each other. Secs. 216 and 217 of ch. 174, of the Revised Statutes of Canada, permitted the accused and his or her wife or husband to give evidence for the prosecution or in his or her own behalf in actions for common assault or assault and battery. These sections were repealed by the Criminal Code on the same day as the Canada Evidence Act came into force. Being made by the latter Act "competent witnesses" on the trial of one or the other for any offence, their incompetency, which existed under the common law, was removed. No distinction was attempted to be drawn between their competency for the prosecution or for the defence. No limitation upon this competency was inserted beyond that of prohibiting the disclosure of marital communications. These were not left to the whim, election or caprice of the parties. Their incompetency on these matters was retained. On all others it was removed. Henceforth, except with respect to martial communications, they stood in the same position as other witnesses and could not refuse to answer any legal question put to them. Questions of privilege at no time existed. It was and is solely a question of competency. By the fifth section of the statute it is declared that:

> No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him etc.

and this applies equally to the accused and to his or her wife or husband when giving evidence, as to any other witnesses.

I fully agree with the Court of King's Bench in failing to appreciate any grave distinction between calling the accused or his wife or husband to give evidence for the prosecution or for the defence. In either case the witness is bound to tell the truth. The whole

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object of the trial is or should be to reach the truth, and it doubtless was because Parliament believed this object could best be achieved by removing the incompetency to give evidence under which the parties had theretofore laboured that the section was passed. The proviso retaining the sacredness of all marital communications was properly inserted as a matter of public policy and to preserve, as Mr. Taylor in his book on Evidence says:

> that unlimited confidence between husband and wife upon which the happiness of the married state and the peace of families depends.

Some argument was advanced at bar on the inference to be derived from the absence in the statute of the word compellable; and it was said that being made a competent witness only and not expressly a compellable one, left in the witness a complete election to testify or not as he or she pleased and as to such matters as he or she should elect. I cannot yield to such an argument.

It is true that the word compellable was coupled with the word competent in Lord Denman's Civil Evidence Act, when introduced in England. But, as was pointed out by Lord Chancellor Herschell, in giving the judgment of the Judicial Committee of the Privy Council in the case of *Kops* v. *The Queen*, (1) "compellable" there means "compellable by process of law."

In several of the later statutes amending the law of criminal evidence in England, the wife and husband of the accused are admitted under prescribed conditions to give evidence. It had been held, under one of these statutes, by Mr. Justice Wills, (see Phipson on Evidence, 3 ed. p. 415) that a wife where declared competent is also compellable not only against her husband but also against her own wish. The authority cited (2)

(1) [1894] A. C. 650. (2) 34 L. J. 646.

is, of course, not an authorised report, and, on referring to it, I find the learned judge while so holding would, if the prisoner had been convicted, have reserved a case upon that point,

These conclusions which I have stated determine most of the questions raised on this appeal. With regard to the others I agree with the majority judgment of the Court of King's Bench, that the rulings of the learned trial judge were correct. The wife being a competent witness it was not open to her, in my opinion, to refuse to give evidence or to select the points upon which she should testify; only as to the disclosure of marital communications was she incompetent to testify.

The communication between the prisoner's wife and the prisoner's counsel was not a privileged communication in the sense of being a communication from her husband. No evidence was offered that he knew of or authorised. The only point reserved, as I understand the case, is with respect to what the solicitor told her. This statement was certainly not within his duty and, being calculated to further or conceal a criminal act, does not come within the solicitor's privilege. That privilege cannot be invoked to protect communications which are in themselves parts of a criminal or unlawful proceeding; *Bullivant* v. *The Attorney-General for Victoria* (1); *The Queen* v. *Cox* (2).

Nor do I think that the evidence given by the prisoner's wife came in any way within the statute which retains her incompetency to disclose any communication made to her by her husband during marriage. The facts to which she testified were independent facts gained by her own observation and knowledge and not from any communication from her husband. She saw the blood on the clothes after her

(1) [1901] A. C. 201. (2) 14 Q. B. D. 153.

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husband had left the house to deliver himself up. She washed them after that in order to obliterate the blood stains as the solicitor told her to do, and she contradicted her husband as to her being unwell at the time he swore he had carnal connection with her.

I fully agree with the trial judge and with the Court of King's Bench that none of this evidence comes within the rule invoked.

As a majority of my colleagues concur in this judgment, the appeal is dismissed.

MILLS J. (dissenting.) — In this case Gosselin is charged with having murdered a woman, and when he was put upon his trial his wife was called by the Crown as a witness to testify against him. She had been induced by those who were obtaining evidence on behalf of the Crown to leave her home, to go to the city of Quebec, and to take up her residence there with the Chief of Police. All this may have been a most legitimate proceeding, for the purpose of being able to produce her so far as she might be legally called upon to give testimony when her husband was put upon his trial. The counsel who was retained on behalf of her husband was not permitted to see her, and so was not able to discuss the charges which were made against her husband with her, and to ascertain from her the facts which he desired to know in respect to the crime for which her husband was about to be tried.

It was contended by the counsel for the prisoner before us, that under the Canada Evidence Act, when the husband or wife is accused of crime, unless in the case of a crime committed by one against the other, neither is permitted to testify against the other in respect to any matter which springs out of the marital relations. The law in respect to the husband and wife giving evidence in a criminal trial other than

the case of an offence committed by one against the other depends upon the provisions of the Canada Evidence Act, 1893, secs. 3, 4 and 5. He maintained that the wife of accused was not a competent witness for the prosecution, that she was not a compellable though a competent witness for the prisoner, and that the extent to which she might testify, was limited by the Act because of her marital relations to the accused. He maintained that she was not before the court as a voluntary witness and that, being very ignorant as to her rights in this regard and being generally ill-informed, she was under the impression that she was liable to be committed to prison unless she appeared as a witness in the case. The Chief of the Provincial Police at Quebec came to her father's house where she was residing after her husband had been committed to prison, and while there she was kept under constant surveillance, and was especially warned not to speak to her husband's counsel.

The prisoner's counsel endeavoured to see her but was not allowed to do so. He then applied to the court for an order, but this was refused him. Before the witness was heard Mr. Roy, her husband's counsel, asked the court to instruct her as to her privileges, but she was ordered out of court before the application was heard, and so kept in ignorance of her right. I think it is much to be regretted that such a course was adopted, for I cannot think that it was not a most proper proceeding on the part of the counsel for the prisoner that he should endeavour to consult with the prisoner's wife, and I think what she said, notwithstanding the instructions given by the judge in the witness box, did not make her a voluntary witness against her husband on the trial, and that while the law made her competent to a limited extent, it also made her a voluntary witness if a witness at all. I

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infer from what she said that she did not rightly apprehend her privilege, and that she was in ignorance of it notwithstanding what the trial judge said to her.

Under the common law the husband and wife are incompetent to give evidence for or against each other. By ch. 174, secs. 216, 217 of the Revised Statutes of Canada on a summary trial for common assault, or assault and battery, the defendant is made a competent witness for the prosecution, or for himself, and on such a trial the wife or husband of the defendant shall be a competent witness for the defendant. If another crime is charged, and in the opinion of the court, it does not amount to more than common assault or assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf, or if the defendant is a woman she shall be a competent witness in respect to the charge of common assault or assault and battery. By the following section, no person charged with an indictable offence shall be a competent or compellable witness to give evidence for himself, or tending to criminate himself nor, except as stated above, did the Act render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband. These sections were repealed at the same time that the Canada Evidence Act came into force. This Act extended the competency of the husband and wife as witnesses with regard to each other and, in so far as this was done, the common law rule was restricted but was not wholly superseded. It is well from this point of view to consider sections 3, 4 and 5 of the Evidence Act 1893 as amended by 61 Vict. ch. 53 and 1 Edw. VII. ch. 36. Section 3 provides that a person shall not be incompetent to give evidence by reason of interest or crime.

4. Every person charged with an offence, and the wife or husband as the case may be, of the person so charged shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution in addressing the jury.

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section, the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used nor received in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

2. The proviso to s.-s. 1 of this section shall in like manner apply to the answer of a witness to any question which, pursuant to any action of the legislature of the province, such witness is compelled to answer, after having objected so to do upon any ground mentioned in the said subsection, and which but for that enactment, he would upon such ground have been excused from answering.

These are the provisions of the law which are thought doubtful in their meaning, the Crown holding that when the husband or wife is made competent he or she is also made compellable. The court below proceeded upon the assumption that though the husband or wife is competent, they are not compellable, to testify, while the counsel for the prisoner contended before us that they are only competent to testify for but not against each other. Mr. Justice Hall in his judgment upon this case in the Court of King's Bench of Quebec, says:

The text of the statute makes no distinction between the accused and the husband or wife of the accused, if offered as a witness for the

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prosecution, and the strongest argument against the evidence of the wife as a witness for the prosecution in such a case is that whatever rule be adopted as to her must be applied to the husband, and that it cannot be contended that Parliament intended by its Act of 1893 to violate all precedent statutory law, and universal practice, and authorise the precedure by which the accused could appear as a witness against himself. Our prejudice against such an interpretation arises from the designation which we improperly make of a witness, as being for the prosecution or for the defence. A witness, by whichever side produced, is not sworn to render evidence for the prosecution, or for the defence, but only to tell the truth, and he is called or tendered as a witness by one side or the other in expectation that his evidence will support the contentions of that side.

But whatever may be the duty of the witness when he is called, he is called for the purpose of supporting the one side or the other, and in this case the statute itself assumes that he is not called by the prosecution or for the purpose of supporting the prosecution, and so the failure to testify shall not be made the subject of comment by the judge or by the counsel for the prosecution. The statute puts the husband and the wife upon exactly the same footing. If either appears in the witness box, it can only be as a witness not for the Crown, but for the one which may be accused, and the failure of either to avail himself or herself of the privilege which the law gives by making them competent witnesses shall not be made subject of comment either by the judge or by the counsel for the prosecution. It makes it very clear that the law of evidence in this regard was being extended in favour of the prisoner only. Both husband and wife are by section 4 put upon the same footing; both are made competent witnesses for the defence. The law was intended to make either an available witness for the other; it is a provision in the interest of the accused party, and was not intended to break down that public policy which has long protected the marital relations. When we look at the proviso of section 4, we find that the pri-

vacy of that relation is protected; the barrier which has preserved the confidence which exists by reason of it is still allowed to stand; the confidence which is still essential to the peace of the family and to the unrestrained confidence which the well-being of society calls for, is protected; it is declared that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage. In England, no husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband. This does not simply mean that she may not tell anything which he has told her, but she is not at liberty to disclose anything which she has learned from him as the result of their marital relations. It is not simply what she has learned by words spoken to her. This is the view in *Doker* v. *Hasler* (1). In this case a widow was not permitted to disclose conversations between herself and her late husband in a case in which it was said that an execution was fraudulently taken out to protect the goods of the debtor against his assignees, but the Chief Justice, Best, who was presiding would not permit her to testify as to conversations between herself and her late husband, and he said:

I remember that in that case (*Munroe* v. *Twisleton* (2), in which I was counsel, Lord Alvanley refused to allow a woman after her divorce to speak to conversations which had passed between herself and her husband during the existence of the marriage. I am satisfied with the propriety of that decision, and I think that the happiness of the marriage state requires that the confidence between man and wife should be kept forever inviolate.

In *Aveson* v. *Kinaird* (3) in an action by the husband upon a policy of insurance on the life of his wife made

(1) R. & M. 198. (2) Peake Add. Cas. 219.
(3) 6 East 192.

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by her when lying in bed, apparently ill, stating the bad state of her health at a period of her going to Manchester (whither she went a few days before in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to making an insurance) down to that time, and her apprehension that she could not live ten days longer, by which time the policy was to be returned, are admitted in evidence to show her opinion, who best knew the fact of the ill state of her health, at the time of making the policy, which was on a day intervening between the time of her going to Manchester and the day on which such declarations were made; and particularly after the plaintiff had called the surgeon as a witness, to prove that she was in good state of health when examined by him at Manchester; his judgment being formed in part from the satisfactory answers being given by her to his inquiries. Lord Ellenborough, in referring to the evidence, said:

> The admission of the evidence is free from any imputations of breaking in upon the confidence existing between man and wife. The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unawares before she could provide any answer for her own advantage, and that of her husband; and therefore falling within the principle of the case in Skinner, which I have alluded to.

Grose J. said:

> The first question put to the witness was: In what situation she found Mrs. Aveson when she called? The answer was, in bed. To that there could be no objection. The next question was: Why was she in bed? Now who could possibly give so good an account of that as the party herself? It is not only good evidence but the best evidence which the nature of the case afforded.

And similar views were expressed by Lawrence J. In this case testimony was given, not of what passed between the husband and wife, but of what passed between the wife and several other parties who dis-

cussed with her the state of her health at the time that she went to Manchester to obtain the doctor's certificate.

In *The Queen* v. *Pamenter* (1), Kelly C.B. rejected a letter from the prisoner to his wife entrusted to a constable, but which had been opened by him. And in *Scott* v. *The Commonwealth* (2), a similar letter voluntarily surrendered by a wife from a husband was excluded on the ground that its disclosure was a violation of those confidential relations between husband and wife which the law protected.

In *The King* v. *Smithies* (3), it was held that observations made by a wife to her husband on a subject which afterwards was a matter of criminal charge against him, may be opened to the jury by the counsel for the prosecution. Here, the prisoner was indicted for the murder of Ellen Twamley by setting fire to his own house. Mr. Adolphus, in opening for the prosecution, was about to state some observations made to the prisoner by his wife, on the subject of the fire, to whom he made an evasive reply. Clarkson, who appeared for the prisoner, stated that he was informed that if the wife, who was in court, could be examined she would contradict the proposed statement, and he submitted under these circumstances, it was doubtful whether the evidence would be received, and the statement ought not therefore to be made. But Mr. Justice Gaselee and Mr. Justice Parke were both of opinion that the statement might be made to a jury; and that the circumstance of the observations being stated to be made by the wife who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject matter of the charge, to which he made no direct answer, was

(1) 12 Cox 177.
(2) 42 Am. St. Rep. 371.
(3) 5 C. & P. 332.

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receivable as evidence of an implied admission on his part. But this was not any disclosure by the testimony of the wife, but only of what she had said to her husband in the hearing of another party.

In the case of *The King* v. *Simons* (1) A. was a witness for the prosecution of B. on a charge of arson, but was first examined by a magistate before any specific charge was made against any person, and his deposition had been reduced to writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this, B. was charged with the offence, and A. was examined as a witness when A's statement at that time was taken down. B. being then in custody, the court held that all these statements of A. ought to have been returned to the judge and not merely the statement made when A. was committed. What a prisoner is overheard to say to his wife, or what a prisoner is overheard to say to himself, is receivable in evidence against him on a charge of felony. In this case, two witnesses who overheard the prisoner did not understand him alike, and Alderson B. who was presiding said one of these expressions was widely different from the other. It shows how little reliance ought to placed on such evidence.

In the case of *The King* v. *Bartlett* (2), which was tried before Baron Bolland, the prisoner was indicted for the murder of Mary Lewis. While he was in custody his wife came into the room. Greaves, who was acting for the prosecution, was about to ask what she said in his presence, when Alexander, acting for the prisoner, submitted that it was not receivable, as the wife could not be examined on oath against the prisoner, and so what she said cannot be used in evidence against him. Mr. Greaves however, main-

(1) 6 C. & P. 540.

(2) 7 C. & P. 832.

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tained that what the wife said to the prisoner was receivable in evidence although the prisoner might not reply to it, but here the prisoner did. Bolland B. said the evidence was admissible, and it was proved that the wife said to her husband "Oh, Bartlett, how could you do it?" He looked steadfastly at her and said, "Ah, what, you accuse me of the murder, too?" She replied "I do, Bartlett; you are the man who shot my mother." The prisoner did not make any reply. She then turned to the witness and said, "This was done for money." The judge said, "The examination must be read." It was then put in and read. The witness here heard what his wife said to the prisoner, and so was permitted to testify. The confidential relation existing between the husband and wife does not prevent a stranger from testifying to what he heard one of them say to the other.

A witness cannot be compelled to answer a question or produce a document, the tendency of which is to expose him or his wife, or if the witness should be the wife, to expose her or her husband, to any criminal charge or prosecution. The privilege is based upon the confidential relations which exist between husband and wife, and which the well-being of society requires should be carefully guarded. In the case of *The Queen* v. *Thompson, Danzey and Hide* (1), who were indicted and tried together, it was held that the wife of one of them was not a competent witness for either of the others. In this case Thompson and Danzey were defended by the same counsel, Hyde was defended by another. They were indicted and tried for stealing 56 pounds of onions. The counsel for the two tendered as a witness for his clients the wife of the third. This was objected to by the counsel for the prosecution on the ground that her evidence

(1) 1 C. C. R. 377.

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in their case must affect the case of her husband. It was said that the general policy of the law which rejected the evidence of the wife, for or against her husband in criminal cases, made it necessary for the court to refuse the evidence of the wife on behalf of the other accused. Boville C.J. said:

> We are all of opinion that the wife of any one of the three prisoners stands in the same position with respect to the admissibility of her evidence as her husband. The prisoners were charged together, they were tried together, and one of them could not be called as a witness for the others, and the wife stands in the same position as her husband.

In the case of *The Queen* v. *Payne and others* (1), it was held that when two prisoners are indicted and tried together, the one of them is not competent to be a witness for the other. It was pointed out that 6 and 7 Vict., ch. 85, s. 1, abolished in general terms incapacity from crime or interest, and that would have admitted the testimony of the parties to any proceeding civil or criminal, including a prisoner under such circumstances as the present, had it not been for the proviso which reads,

> that this Act shall not render competent any party to any suit, action or proceeding individually named in the record.

That then 14 & 15 Vict., c. 99, s. 1 which repealed this proviso in the earlier Act, and sec. 2, makes the party to any proceeding competent witnesses, except those that are hereinafter excepted. Sec. 3 provides that a person charged in any criminal proceeding shall not be a witness for or against himself, and that the husband or wife of a party charged shall not be admissible for or against the wife or husband. The old incapacity on the ground of interest having been swept away by the earlier Act, and the excluding proviso in that Act repealed by sec. 1 of the later Act, and parties expressly made competent by sec. 2, the

(1) 1 C. C. R. 349.

only witnesses whose testimony is excluded are those excepted in sec. 3, the prisoner called on his own behalf and the husband or wife of a prisoner called for or against the wife or husband. Cockburn C.J. said:

We are all of opinion that the evidence rejected was properly rejected. We are all agreed that the exception in 14 & 15 Vict. c. 99, s. 3, was introduced to prevent any possibility of its being thought that the law as it had existed from the earliest times had been altered by this Act. By that law it was a distinguishing characteristic of our criminal system that a prisoner on his trial could neither be examined nor cross-examined. We think it is impossible to suppose that it could have been intended to change this rule by a mere side wind by means of this exception.

All the witnesses competent to give evidence are generally compellable, but this does not under our statute apply to the accused, or to the wife in case the husband is accused, or to the husband in case the wife is the accused party. It was held that where a prisoner is competent but not compellable to give evidence on his own behalf, and did not do so, it was not necessarily wrong for the court to comment upon the fact, as was done in the case of *Kops* v. *The Queen*. (1) But under our statute both the judge and the counsel for the prosecution are expressly inhibited from doing so. and I take it to be clear from the words of the statute that neither husband nor wife, where one of them is charged with a crime and put upon trial, can be called as a witness by the Crown. The words are:

That their failure to testify shall not be made a subject of comment by the judge or by the counsel for the prosecution in addressing the jury.

Our legislation has gone a long way in many things, but it has not yet gone so far as to compel the prisoner to testify against himself, nor to compel his wife to be a witness for the prosecution, although in this trial the manner in which the wife was brought into court,

(1) [1894] A. C. 650.

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approaches very closely to such a proceeding. She was kept for some time in the custody of the Crown, and the counsel for her husband was denied an opportunity of discussing her husband's case with her, and she appeared in the court as a witness, not giving her testimony from a sense of duty, but reluctantly as one in duress, giving her testimony because she believed that she was under legal compulsion to do so. This is abundantly shown by the answers she gave to the questions put by the Court, before her examination in the case began.

After she was sworn she was asked by the Court: "Do you consent to give evidence?" Her answer was: "I would prefer not to give evidence."

Q. Do you consent to give evidence?

A. If I must.

Q. What do you mean by "if I must"; you have already been heard as a witness, Madam, and you have declared that you consented to give evidence, and you have given evidence in this cause?

A. Yes.

Q. Now, do you consent to give evidence?

A. If I must

Is it possible to doubt that this woman was a witness against her will, and that she believed herself under legal compulsion? In my opinion when she replied to his Lordship's question, and said she would prefer not to give evidence, she ought to have been discharged. From that time she was a witness under compulsion who had not been sufficiently informed as to her privileges. She was also a witness testifying to matters which she was not competent to disclose, and which was in violation of the marital relations which it is the policy of the law to guard against invasion.

In the *Queen* v. *Gibson* (1) decided by the Court for Crown Cases Reserved, it was held that if in a criminal trial evidence not legally admissible against the prisoner

(1) 18 Q. B. D. 537.

is left to the jury, and they find him guilty, the conviction is bad. Lord Coleridge C.J. said that when such evidence goes to a jury a new trial must be granted as a matter of right; and in this opinion all the judges concurred. It is said here, that the judge not only ordered the wife out of the court, that she might not hear what her husband's counsel was about to say against her being called as a witness, but until after she was sworn no information was given to her as to her right in the matter. And the information given her by the court, and which I have quoted, shows that she still was under the impression that she was obliged to testify in the case. In my opinion her husband's counsel was entitled to see her, and to discuss her husband's case with her if he so desired and she were willing to see him, and no one had any right to intervene and prevent this being done.

When her husband's counsel saw her before she was taken to Quebec, he did so as her husband's agent, and in his name, and on his behalf, and under the protection of the law as to those confidential relations which exist between husband and wife for the protection of what he said to her, as much so as if the husband had spoken in person. It is no doubt most desirable that crime should be punished, and that the zeal of public officers in bringing criminals to justice should not be unduly restricted, but it is of no less consequence, in the pursuit of this object, to see that every accused party who is arrested and put upon his trial has a fair trial—that justice is so administered, that the public confidence in the fairness of its administration may be maintained unimpaired. There should be a new trial.

Appeal dismissed.

Solicitor for the appellant: *E. Roy.*

Solicitor for the respondent: *L. J. Cannon.*

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* April 2,3.

* April 20.

JOHN DEMPSTER AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

F. W. LEWIS AND W. S. WAUGH (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of monument—Sample—Evidence—Questions of fact.

There is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the decision at the trial on the facts.

In an action for the price of a tombstone the defence was that it was not of the design ordered. It had been ordered from photographic samples and an order form was filled in which, when produced at the trial, contained the words "E. M. Lewis Reporter Design" which the defence claimed was not in it when it was signed by the purchaser but which was there two or three hours later when handed to one of the vendors by his foreman who had taken the order and filled in the form. The evidence at the trial was conflicting and the Chancellor, trying the case without a jury, decided for the defence and dismissed the action. His judgment was reversed by the Court of Appeal.

Hetd, per Taschereau C. J., that the evidence establishes that the words in dispute were on the order when it was signed and the plaintiffs were entitled to recover.

Held, per Sedgewick and Davies JJ., Mills J. *hesitante*, that even if these words were not originally on the order the circumstances disclosed in evidence show that the design supplied was substantially that ordered and the judgment appealed from should stand.

Held, per Girouard J., following *Village of Granby* v. *Ménard* (31 Can. S. C. R. 14) that the evidence being contradictory and the trial judge having found for the defendant, which finding the evidence warranted, his judgment should not have been reversed on appeal.

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

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DEMPSTER v. LEWIS.

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

The material facts are sufficiently stated in the above head-note.

Watson K. C. and *Hislop* for the appellants.

The judgment of the trial judge, who saw and heard the witnesses, should not have been reversed. *Village of Granby* v. *Ménard* (1); *Soper* v. *Littlejohn* (2); *McKelvey* v. *Le Roi Mining Co.* (3); *Dominion Cartridge Co.* v. *McArthur* (4).

Aylesworth K. C. and *Fish* for the respondents, referred to *Hale* v. *Kennedy* (5); *North British & Mercantile Ins. Co* v. *Tourville* (6).

THE CHIEF JUSTICE.—This is an appeal by the defendants from a judgment of the Court of Appeal for Ontario by which a judgment of the Chancellor, who had dismissed the respondents' action, was reversed and the conclusions of the action granted. None but questions of fact are involved in the case. The respondents by their action claimed the price of a monument or gravestone sold and delivered to the appellants by the firm of McIntyre & Gardiner, whose assignees they, the respondents, are. The appellants admit that they did order a monument from that firm for which they agreed to pay $1,500, but further say that the monument delivered is not of the design agreed upon. The respondents delivered one which is in accordance with what is known as "The E. M. Lewis Reporter Design," and they produced at the trial a document purporting to be an order in writing signed by the appellants (or the party they repre-

(1) 31 Can. S. C. R. 14.
(2) 31 Can. S. C. R. 572.
(3) 32 Can. S. C. R. 664.
(4) 31 Can. S. C. R. 392.
(5) 8 Ont. App. R. 157.
(6) 25 Can. S. C. R. 177.

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sent) for a monument of that special design, but the appellants assert that the words "The E. M. Lewis Reporter Design" in that writing were fraudulently inserted therein without their knowledge after the order had been signed. The judgment appealed from, however, finds as a fact that these words were in it when it was signed, and that finding is entirely supported by the evidence. The Chancellor at the trial, it is true, appears to have indirectly found the contrary in dismissing the action upon the ground that the monument delivered to the appellants, though it be in fact in accordance with the "E. M. Lewis design", is not of the design contracted for. Such a finding clearly imports that the respondents' witnesses were guilty of wilful perjury, added to a forgery by their agent who received the order. Now, there is nothing in the case to justify such a grave charge against them, and full credit must be given to their testimony. Their sworn statements must be reconciled with those of the appellants' witnesses, if possible, and there is not the least difficulty in doing so. It is not at all contended that the credibility of any of these witnesses depended upon their demeanour in the box at the trial, or anything of that kind. So that the Court of Appeal was, and we are here, in just as good a position to pass upon the evidence as the Chancellor was. As I view the case, full credit can be given to all the witnesses examined either on one side or the other. The appellants' witnesses, I have no doubt, swore to what they honestly and fairly believed to be the truth. They firmly believe that the monument as erected is not of the design selected by the appellants. But they are mistaken. The engraving from which they selected what they wanted failed to convey to their minds what it represented. It left them under a false impression and led them to expect an article different

from that which it really could not but be. But that is not the respondents' fault. They did nothing to mislead the appellants. A photograph, or plan or engraving as was exhibited to them to obtain their order is, we all know, very deceptive, and not many, outside of experts, are capable of grasping correctly from them what the executed article will be. That is what has happened with these people. They did order an "E. M. Lewis" monument. They did get an "E. M. Lewis" monument, but it does not come up to their expectations, and they are disappointed in not getting a monument according to the false impressions they had conceived from the engraving. That is the sole cause of the apparent contradictions in the evidence of the witnesses.

The appellants however, in their endeavours to impugn the judgment *a quo*, seemed to mainly rely at bar upon the ground that the Court of Appeal has thereby overruled the findings of the trial judge. A similar contention, in analogous cases, has so often been repeated before us lately that it is not inexpedient to specially notice it, though I will do so but briefly as there is not the least room for controversy upon the point. No one would contend that where a statute gives a right of appeal upon questions of fact to an intermediate court or to this court, it imposes upon the court appealed to the obligation to confirm the judgment appealed from, or that the Court of Appeal has jurisdiction in such cases only upon the condition that it shall not reverse. Yet that is virtually what the appellants' contentions amount to. In the case of *Grasett* v. *Carter* (1) relied upon by them, this court as subsequently remarked by Mr. Justice Patterson in the *North Perth Election Case* (2), did not hold that if an intermediate court reverses the decision of the

(1) 10 Can. S. C. R. 105. (2) 20 Can. S. C. R. 331-373.

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primary court on a question depending on conflicting evidence, its judgment is, for that reason alone, liable to be in its turn reversed by a second court of appeal. In cases where we sit as a first court of appeal, in election cases or in Exchequer appeals, we have not ourselves hesitated to reverse the findings of fact of the court appealed from when convinced that they were wrong. *Wheler* v. *Gibbs* (1); *Cimon* v. *Perrault* (2); *The King* v. *Likely* (3).

And in *Bell* v. *Macklin* (4) the trial judge had found the facts in the plaintiff's favour, and though a divisional Court had concurred in these findings yet the Court of Appeal had reversed the jugment in favour of the plaintiff. Upon an appeal to this Court, the Court of Appeal's judgment was affirmed, because we were of opinion with that Court that the trial judge's conclusions were wrong and that the Divisional Court's concurrence with him had not had the effect of making them right.

In the *The Queen* v. *Chesley* (5) we reversed, upon the weight of evidence, the decision of the Court in *banco*, which had affirmed the findings of the trial judge, because we were convinced that the evidence did not justify those findings.

In *Demers* v. *The Montreal Steam Laundry Co.* (6) we dismissed the appeal from a judgment of the Court of Appeal which had reversed the primary court upon questions of fact, because the appellant failed to convince us that the primary court was right.

Village of Granby v. *Ménard* (7) cited by the appellants lays down no new rule. In that case we allowed the appeal, and restored the trial judge's findings of fact, because we thought that they were right, and

(1) 4 Can. S. C. R. 430.
(2) 5 Can. S. C. R. 133.
(3) 32 Can. S. C. R. 47.
(4) 15 Can. S. C. R. 576.
(5) 16 Can. S. C. R. 306.
(6) 27 Can. S. C. R. 537.
(7) 31 Can. S. C. R. 14.

that the Court of Appeal should have held that the Court of Review had been wrong in interfering with them.

In England, two or three recent cases upon the same point re-assert what is the unquestionable duty of a Court of Appeal when called upon to review questions of fact.

The Master of the Rolls, in *Read* v. *Anderson* (1) remarked (repeating what has been so often said):

> The learned judge has found many of the questions in dispute as questions of fact and it seems to have been thought that the Court of Appeal cannot dispute his findings, but the Court of Appeal is not bound by the findings of fact by a judge who tries the case without a jury.

Even in cases tried by a jury, the Privy Council and the House of Lords have not hesitated to interfere with the findings of fact when the ends of justice required it.

In *Aitken* v. *McMeckan* (2) for instance, where in a suit to set aside a will the jury had found that the testator was of unsound mind at the date of its execution, the Privy Council, on the ground that the verdict was against the weight of evidence, reversed an order of the full court of Victoria, which had dismissed a motion for a new trial.

And in *Jones* v. *Spencer* (3) the House of Lords set aside the verdict of a jury as not justified by the evidence, though the court of Appeal had refused to interfere with it. I refer also to *Coghlan* v. *Cumberland* (4).

Even where an appeal is taken from the concurrent findings of facts by two Courts, whilst the general rule laid down in such cases as for instance, *Allen* v. *The Quebec Warehouse Co.* (5); *Hay* v. *Gordon* (6); *McIntyre Bros.* v. *McGavin* (7) cannot be disregarded, yet, it

(1) 13 Q. B. D. 779.
(2) [1895], A. C. 310.
(3) 77 L.T. 536.
(4) [1898] 1 Ch. D. 704.
(5) 12 App. Cas. 101.
(6) L.R. 4 P.C. 337.
(7) [1893], A. C. 268.

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unquestionably is, I will not say our right, but our duty, since the law gives an appeal from such findings, to review the evidence and allow the appeal if we are convinced that the first judgment was wrong and that the court appealed from should have reversed it. In *Bell* v. *The Corporation of Quebec* (1) their lordships of the Privy Council said:

> This tribunal usually accepts the concurrent findings of two courts upon questions of fact, and their lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule;—

clearly intimating that obviously there may be cases where their lordships would not feel warranted in adopting the findings of fact appealed from, even if concurred in by two courts.

This court likewise, has always fully recognised the wisdom of the general rule and seldom refused to give effect to it. Yet, in such cases as *The North British & Mercantile Ins. Co.* v. *Tourville* (2) and the *City of Montreal* v. *Cadieux* (3) we felt bound to depart from it.

The attempt in *Russell* v. *Lefrançois* (4) to introduce the doctrine of the inflexibility of the rule did not prevail and the Privy Council refused leave to appeal from the judgment of the court.

In the present case, we think that the Court of Appeal was right in holding that the court of first instance was wrong, so that we are bound to dismiss the appeal. That is our plain duty. We have no discretion in the matter. Mr. Justice Patterson's remarks in the *North Perth Election Case* (5) have here their full application: "For my own part" (said the learned judge.)

> I am not disposed to lay down or to acknowledge the authority or the value of rules or formulas for the decision of questions of fact.

(1) 5 App. Cas. 84-94.
(2) 25 Can. S. C. R. 177.
(3) 29 Can. S. C. R. 616.
(4) 8 Can. S. C. R. 335.
(5) 20 Can. S. C. R. 331.

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The Lord Chancellor said more recently in the same sense:

> I myself rather protest when one is dealing with questions of fact against laying down any rules that are not applicable to the particular case as it comes before us. *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1).

The appeal is dismissed with costs.

SEDGEWICK J. — I concur in the opinion of Mr. Justice Davies on this appeal.

GIROUARD J. (dissenting)—I think that this case falls within the rule laid down in *The Village of Granby* v. *Ménard.* (2) The trial judge in disposing of it prefaces his judgment dismissing the action by remarking:

> There is a great deal of contradictory evidence in this case; but after consideration, I have continued to think as I thought at the close of the case, that credit is to be given to the evidence of the defendant.

There is not only some evidence in support of this view, but the preponderance of it is decidedly for the appellant. Five witnesses swore that the monument was not made according to the design selected, while the agent of the maker, who took the order, said quite the reverse. He is flatly contradicted by his own sister, having no interest in the matter, with whom he was staying on a visit, and on the best of terms. What design was selected was the point of contention between the parties, everything else being mere detail. All the witnesses for the appellant are unanimous upon it.

I am not prepared to ignore their story and accept instead that of the agent, because in immaterial or minor details they do not always agree. I would, therefore, allow the appeal with costs.

(1) [1896] A. C. 70.

(2) 31 Can. S. C. R. 14.

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DAVIES J.—The questions to be determined in this appeal are altogether of fact and depend upon the appreciation given to the evidence taken on the trial, The Chancellor before whom the case was tried, after vainly recommending the parties to settle, found for the defendants upon the ground that, while there was much contradictory evidence, credit should, in his opinion, be given to that for the defendant. The Court of Appeal for Ontario unanimously reversed this judgment, largely upon the ground that the Chancellor had not made any express finding upon the important and crucial question whether the order for the monument, for the price of which the action was brought, contained at the time it was signed and given by the defendant the words now found in it as to the design, viz. 'E. M. Lewis reporter design'. The Court of Appeal having found the facts on this crucial point for the plaintiffs, reversed the Chancellor's judgement dismissing the action, and gave judgment for the plaintiffs.

I am of the opinion that the judgment ot the Court of Appeal is correct and for the reasons given by Chief Justice Moss for the court.

The facts may be given in a short compass. The firm of McIntyre & Gardiner, marble workers of Orangeville, had as their foreman one Ramsay, who being out of health was staying with his sister Mrs. Shingler in Toronto. She was friendly with the Dempster family having been for years one of their customers, and informed her brother of Mr. Dempster's desire to procure a handsome monument to mark his lately deceased wife's resting place and to serve as a family monument for himself and others of his family when they died. Ramsay at once wrote to his employers and having obtained from them all the designs of monuments which they had and which he thought suitable for

submission to Mr. Dempster, saw that gentleman in presence of several members of his family, submitted his designs, and obtained a written order for a monument to cost $1,500. This was on the 8th March 1900. The order was on a printed form but the date, the description of the material, the design, the place of delivery and the price were all written in Ramsay's handwriting in blanks contained in the printed form. No question arises as to Dempster's signature and although many collateral questions were raised at the trial and also in the Court of Appeal the only question argued before us was whether the monument set up in Prospect Cemetery was of the design ordered. If it was no other question as to defendant's liability was raised.

It was of course conceded that if the words describing the design, "E. M. Lewis reporter design" had been written in by Dempster himself no evidence showing that another and different design had been agreed upon at the time could have availed defendant or in fact could have been received to contradict the written contract. And this is equally true apart from questions of fraud, if the words had been written in by Ramsay and were there at the time of the signing. And so, in the presence of much conflicting evidence as to the specific design ordered between the members of the Dempster family supported by Mrs. Shingler on the one hand, and Ramsay, the foreman, supported indirectly at least and strongly, by his employer McIntyre, and the exhibits, on the other, the crucial question remained for determination: Was the character of the design in the order when Dempster signed it? There is no doubt it was there within at least three hours after it was signed, for it was handed then by Ramsay to McIntyre, his master, and by the latter

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forwarded a short time afterwards to Scotland to have the order filled.

Now, is there any internal evidence as to the time the words in dispute were written in? I think there is, and that such evidence is strong. All of the written part of the order outside of Dempster's signature is admittedly in Ramsay's writing. The colour of the ink and the character and style of the writing were exactly similar to those of the words "Prospect" and "Fifteen hundred" which were, it is conceded, written in the order by Ramsay just before Dempster signed it. If the disputed words had been afterwards inserted by Ramsay, either fraudulently or in furtherance of what he thought had been agreed to, the probabilities are that there would have been some difference shown unless indeed by some coincidence the pen and the ink used had been the same. The pen and ink were Dempster's, and the defendant's case was that the words were not in when Ramsay carried away the order.

It is conceded on both sides that all the cheaper designs were at once brushed aside by Dempster, and a $1,500 one agreed upon with little, if any, objection to the price. Ramsay swears he had no other $1,500 design with him than the one selected and delivered, and that the firm he represented had no other $1,500 design. The one next below it in cost was, he said, $1,100. McIntyre, his master, confirms him in this, and indirectly in other important points. The latter was in Toronto himself that day, had gone carefully with Ramsay over the designs just before Ramsay went up to see Dempster, and had marked on the picture or engraving of the E. M. Lewis Reporter Design the figure 15 which he swears now appears there to indicate its price.

There is no doubt that the general character of the design sworn to as having been ordered by Dempster by himself and his family and also by Mrs. Shingler is materially different from the one supplied. But comparing the engraving of the E. M. Lewis design from which the order was given with the photograph of the monument as erected, I am not surprised that witnesses of the apparent education and training of the defendant and his witnesses should have honestly convinced themselves that the article supplied was of a different design. The deep rich colour of the engraved design is entirely absent in the photograph of the monument supplied, and it must be remembered that it was from the photograph Dempster reached his conclusions. He only saw the monument in the cemetery for a single moment on a rainy day and he expressly says he formed his conclusion that the monument supplied was not the one he ordered from its appearance in the photograph. It is true he in common with the other witnesses indicates a material difference in the place where the pillars are placed, but he relies strongly upon the great difference in the colour which evidently made a deep impression upon him.

I entirely adopt the strong and convincing language used by the Chief Justice in the following paragraph of his judgment:

> The defendant has deliberately charged Ramsay with forgery. The latter denies in the most emphatic way that he touched the paper with a pen or made any alteration after it was signed, and the circumstances as well as the probabilities are in his favour. That a design was selected and a price agreed upon; that the paper was handed to McIntyre in its present condition within a short time after it was signed; that the monument was ordered according to the design produced by Ramsay; that a monument of that design was worth $1,500; that the actual outlay was $1,311; that the defendant has been unable, notwithstanding search and inquiry of monument dealers, to produce any design of the kind alleged to have been shown him by

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Ramsay; and that there is an entire absence of motive impelling Ramsay to commit forgery and support it by perjury, go to fortify his sworn testimony.

For these reasons, and notwithstanding the strong contradictory character of the evidence given for the defence, I have reached the conclusion that the appeal should be dismissed.

MILLS J.—I am inclined to agree with the chancellor that the evidence did not show the monument furnished to be in accordance with the design chosen by the purchaser, but I am not so strongly convinced of it as to dissent from the judgment of the majority of the court.

Appeal dismissed with costs.

Solicitor for the appellants: *Thomas Hislop.*

Solicitors for the respondents: *Walsh & Fish.*

CATHERINE ISABELLA MACLEAN AND MINNIE MACTAVISH (DEFENDANTS)..... } APPELLANTS;

AND

JOHN HENNING AND OTHERS (PLAINTIFFS), AND IDA HENNING AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*April 3.
*April 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Survivorship—Intestacy.

H. by his will provided for disposal of his property in case his wife survived him but not in case of her death first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time I request the following disposition to be made of my property" * * * H. died sixteen days after his wife but made no change in his will.

Held, affirming the decision of the Court of Appeal (4 Ont. L. R. 666) which affirmed the judgment of the Divisional Court (2 Ont. L. R. 169) that H. and his wife were not deprived of life at the same time and he therefore died intestate.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the respondent.

The sole question for decision was whether or not Thomas Henning, the testator, and his wife were deprived of life at the same time so that the provision in his will set out in the above head-note attached. If not there was an intestacy as the will made no provision for the event of the testator surviving.

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

(1) 4 Ont. L. R. 666.

(2) 2 Ont. L. R. 169.

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He and his wife had gone to Europe and the latter died at Florence on 11th December, 1888. The testator was ill at the time of her death but lived until 27th December, 1888. The respondents claimed that he died intestate and the courts below have so held.

Aylesworth K.C. for the appellant, referred to *Marklew* v. *Turner* (1); *Davies* v. *Davies* (2).

H. J. Scott K.C. and *O'Brien K.C.* for the respondents (plaintiffs) cited *Wing* v. *Angrave* (3); *Van Grutten* v. *Foxwell* (4).

O'Donoghue appeared for Clara Henning one of the respondents (defendant).

The CHIEF JUSTICE.—The sole question involved in this appeal is as to the meaning of a will in which the testator says:

> In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property.

The testator died sixteen days after his wife. The appellants contend that as, on the testator's death, both he and his wife were then dead, they were deprived of life at the same time, within the meaning of the will. The Court of Appeal could not see its way to countenance such a contention and held that a testator who dies sixteen days after his wife, whether of accident or otherwise, has not been deprived of life at the same time as his wife. That is, in my opinion, a plain interpretation of plain words, and the only one that can reasonably be put upon the will.

The appeal is dismissed with costs to the plaintiffs, respondents against the appellants, but with no costs upon this appeal to the respondent Clara Henning.

(1) 17 Times L. R. 10.
(2) 47 L. T. 40.
(3) 8 H. L. Cas. 183.
(4) [1897] A. C. 658.

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SEDGEWICK and GIROUARD JJ. were also of opinion that the appeal should be dismissed with costs for the reasons stated by His Lordship Mr. Justice Davies.

DAVIES J.—I have no doubt as to the true construction of the will in controversy in this case. To support the appellants' interpretation it would be necessary, as said by the Chief Justice of the Court of Appeal, to interpolate after the words "at the same time," the words "or in case I shall survive her," which of course we have neither the right nor the power to do.

Much has been said as to the "intention" of the testator. It is our duty, however, to gather that intention from the language he has used. Speculation as to what he must have intended has been indulged in based upon the alleged vagueness of the language of the will, the relations of the testator towards his wife who predeceased him, the character of the contingent dispositions he made, and the circumstances surrounding his death. Able and ingenious as many of them are, however, they must not be permitted to alter the plain meaning of the language used. A counter suggestion made by Mr. Scott, as to testator's failure expressly to provide for the contingency of his survivorship, suggests itself as most reasonable. The deceased intended to give to himself or his wife, whoever survived the other a "free hand" in disposing of property they had jointly accumulated. Accordingly he expressly, in the first paragraph of his will, gave to his wife, if she survived him, everything he possessed at time of his death and made her his sole executrix. No attempt was made to control her in the absolute disposition of the property in case she became possessed of it by survivorship.

Then he provided as in the will

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in case both my wife and myself should by accident or otherwise be deprived of life at the same time,

the disposition of the property should follow as there specified and no doubt as they had mutually determined.

The other contingency, that which actually happened, his surviving his wife, left him with the property and a free hand to do with it as he pleased, and as circumstances might then determine, just as his wife was left had she survived him. The will carried out their mutual intention, and the omission on Mr. Henning's part during the fortnight intervening between his wife's death and his own to make another will or other disposition of the property than the law, unaided, did, does not to my mind weaken the force of Mr. Scott's contention that the language of the will fully and completely expressed the intention of the testator when it was written.

MILLS J.—I am also of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Alfred S. Ball.*

Solicitors for the respondents, plaintiffs: *O'Brien & Lundy.*

Solicitor for respondent Clara Henning: *J. G. O'Donoghue.*

HORACE THORNE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM H. THORNE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1903

*April 6.

*April 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise of all testator's property—Chose in action.

A devise of all "my real estate and property whatsoever and of what nature and kind soever" at a place named does not include a debt due by the devisee, who resided and carried on business at such place, to the testator.

Judgment of the Court of Appeal (4 Ont. L. R 682) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in favour of the plaintiffs.

William Thorne, then residing in England and having considerable property at Holland Landing, Ont., made the following bequest by his will;—

"I give, devise and bequeath my mill, tannery, houses, lands and all real estate and property whatsoever and of what nature or kind soever at Holland Landing, in the Province of Canada West aforesaid to my nephew William H. Thorne, his heirs, executors, administrators and assigns absolutely, but charged and chargeable nevertheless with and I hereby charge the said Holland Landing property with the payment of the annuities next hereinafter mentioned, namely, one annuity or yearly sum of eight hundred dollars to be paid by my nephew William Henry Thorne, out of

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

(1) 4 Ont. L. R. 682, *sub nom. Thorne* v. *Parsons.*

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such property to my wife Patience Margaret Ann Thorne by equal yearly payments for her life."

At the time of testator's death a firm of which the devisee, W. H. Thorne, was a member owed him nearly $18,000, and both he and the executors considered that such debt did not pass by the devise and he paid a portion of it to the estate. They agreed also that the devisee and not the estate should pay the annuities. The defendants, who are annuitants, now claim that the debt did pass and that the executors should refund the amount paid on account of it.

This contention was raised in an action by the surviving executors against the estate of the deceased executor for delivery up of the books and securities, and for an injunction which, on the hearing, was turned into a motion for judgment and the other parties added.

The only question to be decided is whether or not the said indebtedness passed by the devise.

D. O. Cameron and *Blain* for the appellants. The debt passed by the devise. The residence of the debtor determines the locality of the debt. *Earl of Tyrone* v. *Marquis of Waterford* (1); *Guthrie* v. *Walrond* (2); *In re Prater Designe* v. *Beare* (3); *In re Robson* (4).

Certain words were deleted from the will and should not be looked at in construing it. *Manning* v. *Purcell* (5); *Inglis* v. *Buttery* (6).

S. H. Blake K C. and *Saunders* for the respondents other than W. H. Thorne. The words deleted may be looked at; Williams on Executors, (9 ed.) vol. 1, p. 485; *Shea* v. *Boschetti* (7); *In re Harrison* (8); and they

(1) 1 DeG. F. & J. 613.
(2) 22 Ch. D. 573.
(3) 36 Ch. D. 473; 37 Ch. D. 481.
(4) [1891] 2 Ch. 559.
(5) 7 DeG. M. & G. 55.
(6) 3 App. Cas. 552.
(7) 18 Beav. 321.
(8) 30 Ch. D. 390.

shew that only the mill, tannery and lands and property connected therewith were derived.

Choses in action have no locality. *Fleming* v *Brooke* (1); *Marquis of Hertford* v *Lord Lowther* (2).

It is unsafe to rely upon decisions on other wills where the language and situation of the parties are different. *In re Jodrell* (3); *In re Tredwell* (4); *In re Palmer* (5), overruling *Humble* v *Shore* (6).

Lee for the respondent W. H. Thorne. This respondent was mulcted in costs by the Divisional Court, but did not appeal to the Court of Appeal. I now ask to be allowed to contend that the costs were improperly imposed and to file a factum.

THE CHIEF JUSTICE.—This case involves the construction of the will of one William Thorne who died at Toronto in 1868 The appellants have undertaken the arduous task of convincing us that the testator did not mean what he said, and what he was taken by all the interested parties to have said during the thirty years following his death. The material words in that will upon this controversy are as follows:

I give, devise and bequeath my mill, tannery, houses, lands and all my real estate and property whatsoever, and of what nature or kind soever, at Holland Landing, in the Province of Canada West aforesaid, to my nephew, William Henry Thorne, his heirs, executors, administrators and assigns, absolutely.

At the time of the testator's death a large sum, nearly $18,000, was due him by a firm doing business as lessees of the said mills at Holland Landing, of which the said devisee, William Henry Thorne, was a partner. And the only question is whether or not the gift to him includes the debt so due by the said firm to the

(1) 1 Sch. & Lef. 318.
(2) 7 Beav. 1.
(3) 44 Ch. D. 590; [1891] A. C. 304.
(4) [1891] 2 Ch. 640.
(5) [1893] 3 Ch. 369.
(6) 7 Hare 247.

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testator. The Divisional Court and the Court of Appeal held that it did not. And that conclusion seems to me unassailable. The judgments are reported at page 682, vol. 4 Ont. L. R., *sub nomine*, *Thorne* v. *Parsons*, and I do not see that I could add anything to the opinions delivered by the learned judges who passed upon the different questions raised by the parties. No new points were taken before us. I read the will as if it said simply: "I give all my real property *situate* at Holland Landing to my nephew William Thorne." Indeed, taking the will altogether and the residuary devise and bequest it provides for, the construction contended for by the appellants would perhaps be as untenable even if the will had merely said: "I give all my lands and property *situate* at Holland Landing to W. H. Thorne." If that testator at his death had left a debtor in Toronto, but no real or other personal property of any kind, and had intended to bequeath the sum due to him by that debtor, to his nephew, he would not merely have said: "I bequeath my property in Toronto to my nephew." In ordinary parlance a *chose in action* is not called property.

The appeal is dismissed with costs.

A motion was made on the part of W. H. Thorne for leave to file a factum as appellant on the question of costs to which he contends that, as trustee, he should not have been condemned by the Divisional Court. That motion must be dismissed with costs. He has no standing as an appellant in this court. He was served as respondent by the appellants with a notice of this appeal. But that does not make him an appellant, or entitle him *ipso facto* to the benefit of an appeal.

SEDGEWICK, GIROUARD and MILLS JJ. concurred in the dismissal of the appeal and the motion.

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Davies J.

DAVIES J.—I am of opinion, for the reasons given by Mr. Justice Street, in the Divisional Court, and Mr. Justice Moss, in the Court of Appeal, that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant Horace Thorne: *D. O. Cameron.*

Solicitor for the other appellants: *F. J. Blain.*

Solicitors for the respondents except W. H. Thorne: *Kingsmill, Hellsmuth, Saunders & Torrance.*

Solicitor for the respondent W. H. Thorne: *Lee & O'Donoghue.*

1903

*Mar. 16.

*April 29.

ADELARD ST. LAURENT AND ADELARD TRINQUE (DEFENDANTS) ..... APPELLANTS;

AND

AMABLE MERCIER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY, SITTING IN APPEAL.

Mines and minerals—Placer mining regulations—Staking claims—Overlapping locations—Renewal grant—Unoccupied Crown lands.

In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously staked by W. In 1900 he applied for and obtained a renewal grant for the same area, W.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T. staked bench claims for the lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land.

Held, affirming the judgment appealed from, Davies and Armour JJ. dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and new application and that, following the rule in *Osborne* v. *Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant should not be disturbed.

APPEAL from the judgment of the Territorial Court of Yukon Territory, sitting as a Court of Appeal constituted by the Ordinance of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to the mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner maintaining the plaintiff's action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour JJ.

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ST. LAURENT v. MERCIER.

The principal facts of this case are shortly as follows:— Creek claim No. 245, below Lower Discovery, on Dominion Creek, in the Yukon Territory, was recorded by one Waite, on the 29th January, 1898, renewed by him in January, 1899, but reverted to the Crown in January 1900. The plaintiff recorded a hill-side claim opposite the upper half limit of No. 245, below Lower Discovery, on August 15th, 1899, and applied for and obtained a renewal grant of the same in August, 1900. The defendant, Trinque, staked bench-claim, No. 245, on the first tier, on the 7th March, 1901, and recorded on the 18th March, and the defendant St. Laurent staked bench claim No. 245, on the second tier, on the 10th March, 1901, and obtained a grant for the same on the 19th March, 1901. The other circumstances material to the issues are set out in the judgments now reported.

All these claims were subject to the regulations governing placer mining of the 18th of January, 1898, and section 13 of the regulations of the 13th of March, 1901.

J. Lorne McDougall for the appellants. Under all the regulations staking and location constitute the root of title: See 1894-1899 Regulations, sec. 4; 18th January, 1898, Regulations, sec. 15; 13th March, 1901, Regulations, sec. 14; *Atkins* v. *Coy* (1). A *sine quâ non* of valid location, staking or grant, under all the regulations, is that the ground staked should be vacant unrecorded Dominion lands at the time of staking. 1894-1899 Regulations. See Form H, 18th January, 1898, Regulations, sec. 8 and Form H, 13th March, 1901, Regulations, sec. 8; *Belk* v. *Meagher* (2); *Cranston et al.* v. *English Canadian Co.* (3); *Victor* v. *Butler* (4); Lindley on Mines, p. 363; Barringer & Adams on Mines, p. 306; *Coplen* v. *Callahan* (5).

(1) 5 B. C. Rep. 6.
(2) 1 Morrison's Mining Reports, 510, 522.
(3) 7 B. C. Rep. 266.
(4) 8 B. C. Rep. 100.
(5) 7 B. C. Rep. 422; 30 Can. S. C. R 555.

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If by reason of a prior valid location the staking is ineffectual as to the whole or a part of the ground staked, the subsequent abandonment or forfeiture of the proper location cannot inure to the benefit of the person claiming under the ineffectual location. Free miners have no right to enter upon nor to locate any ground lawfully occupied for mining purposes. A lawful location cannot be made on ground comprising part of a subsisting placer claim, nor will a subsequent abandonment or forfeiture of such subsisting claim make valid such location. Ground once lawfully occupied by a free miner must revert to the Crown before a valid re-location can be made on it.

The appellants do not seek to set aside nor curtail the grant issued to the respondent, but to have it declared that such grant did not include the ground which was, at the time of his staking, lawfully occupied as a placer mining claim, and that the extent of the respondent's grant was not added to nor otherwise altered by the renewal grant.

J. A. Ritchie for the respondent. When the plaintiff located in 1899, the ground was open for location. There is no evidence to the contrary. Even if the ground was not open for location, the defendants had no right to come and locate on ground lawfully occupied by the plaintiff.

Reference is made to *Osborne* v. *Morgan* (1); *Williams* v. *Morgan* (2); *Scott* v. *Henderson* (3); and to Williams on Real Property, (18th ed.) p. 540.

The CHIEF JUSTICE, and SEDGEWICK J. were of the opinion that the appeal should be dismissed with costs.

(1) 13 App. Cas. 227. (2) 13 App. Cas. 238.
(3) 3 N. S. Rep. 115.

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Davies J.

DAVIES J. (dissenting.)—This was a boundary action brought before the Gold Commissioner to determine the boundaries of the respective adjoining placer mining locations of the litigants. The Commissioner found as facts; (1). That the location of the respondent, Mercier, was staked in August, 1899, partially over a then legally existing creek claim and that such staking included the locus in dispute which was not then unoccupied Crown land; (2). That when Mercier obtained his renewal license in 1900 the said creek claim had lapsed and the lands in dispute were then unoccupied Crown lands but that Mercier did not re-stake or make any new application for a license, relying upon his former staking and application; (3). That, after Mercier's renewal license had issued, viz. on March 7th, 1901, St. Laurent staked his bench claim covering the lands in dispute and applied for and obtained a grant or license for the same.

Under these facts I am of opinion that the appeal should be allowed. I agree with the judgment of Mr. Justice Craig that the staking of a claim on unoccupied Crown lands is essential to the obtaining of a legal grant or license. It is the root of title, as has been so frequently determined under the law of British Columbia.

The staking by Mercier of the locus in August, 1899, was invalid because, at that time, the lands in question formed part of the creek claim, No. 245, below Lower Dominion. After this creek claim lapsed these lands became unoccupied Crown lands and were never again staked or located until staked by St. Laurent, the appellant. His was the only staking or locating on which a legal grant or license could issue and the renewal to Mercier of his original, but so far as the locus is concerned invalid, license or grant could not operate to give him any legal rights in the lands in dispute.

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Mills J.

MILLS J.—The matter in dispute here between the parties related to a mining location in the Yukon Territory. One Waite had acquired a certain location in 1898. Subsequently, Mercier acquired a location which overlapped that of Waite by six hundred feet. Waite's location being first in point of time Mercier acquired nothing of that portion of the land embraced within it. Waite's claim lapsed and Mercier, subsequently, applied for a renewal, embracing precisely the same area which he had at first staked out and which he had applied for on the first occasion and he obtained entry for the same. St. Laurent made application for the location that had been previously held by Waite and he did this some time after Mercier's second entry.

It has been argued before us that, if Mercier desired to renew his application when there was no longer any impediment in his way, he ought to have re-staked his claim, although the stakes which he had previously placed were still standing, and the limits which he had on the first occasion marked out, while Waite's claim stood in the way of his obtaining a valid entry of a part of what he claimed. I do not think this is so. I think the limits of the grounds which he required being well known from what he had done, that his making application for a renewal of what he had then staked out was sufficient, as there was, at the time this entry was made, no legal impediment in the way of his getting that part of the area which he had marked out and of which he desired to obtain a valid entrance. I do not think it was necessary that he should have gone upon the ground a second time, pulled up the stakes which he had previously planted and put them again in the same places in order to obtain a proper entry for his claim in the Gold Commissioner's office. I think this would have been,

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under the circumstances, an altogether unnecessary proceeding and I think that the Gold Commissioner was right in recognizing the claim which Mercier had made as a valid one. He had been in possession; he had done work on the ground; he had obtained a renewal of his original claim, and there was no power in any one to make a second valid entry. At all events, if there was any irregularity in what he had done that irregularity was not one that St. Laurent could question.

In *Osborne v. Morgan* (1) I think the law is settled, that the party who had received here an entry after that obtained by Mercier had no right to try the validity of Mercier's claim, that this could only be questioned by the Crown. The statute, it was there said, gave no right whatever as against the land held by the Crown, and no title to try the validity of Crown leases relating thereto.

Here, Mercier had possession, and was recognized by the Gold Commissioner as having a valid claim to carry on mining operations within the area which he had marked out. When he obtained the second entry no one stood between the Crown and himself with any prior claim. The claim subsequently made was by a party who had knowledge of the claim which Mercier held under the authority of the Gold Commissioner and the recognition of such a proceeding would furnish facilities for illegal practices in those distant regions.

The acts of the Gold Commissioner are administrative acts and his decisions should, as far as possible, be supported. It would be a misfortune to have parties, many of whom are uneducated men, deprived of their claims on some technical ground and in this way pass into the possession of others. Such a course would lead to dishonest practices and sometimes to violence, and

(1) 13 App. Cas. 227.

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in a country so distant from the settled parts of the Dominion, it is desirable, as far as possible, to enable men who have honestly undertaken to mark out claims for themselves and to obtain entry to succeed.

Here, there is no doubt that Mercier's stakes were standing; that the limits of the ground claimed by him could be easily ascertained or seen. This ought to have been sufficient to have warned the party who was seeking to oust him from a claim which had already been recognized by the Gold Commissioner, that he could not acquire a title to any portion of the claim.

ARMOUR J. dissented from the judgment dismissing the appeal for the reasons stated by Davies J.

Appeal dismissed with costs.

Solicitors for the appellant; *Pattullo and Ridley.*

Solicitors for the respondents; *Noel, McKinnon and Noel.*

FRANK J. BELCHER AND OTHERS, EXECUTORS OF ALEXANDER CALDER, DECEASED, (PLAINTIFFS), } APPELLANTS;

AND

ALEXANDER McDONALD (DEFENDANT) ..... } RESPONDENT.

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*Mar. 23,24.

*May 5.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, SITTING IN APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Appeal—Concurrent findings of courts below—Reversal on questions of fact—Improper rulings—Reversal on a matter of procedure.

Where the findings of the trial courts were manifestly erroneous and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the courts below and also reversed the concurrent rulings of those courts refusing leave to amend the statement of claim by alleging an account stated.

APPEAL from the judgment of the Supreme Court of British Columbia affirming the judgment of the Territorial Court of Yukon Territory.

The material questions at issue on this appeal sufficiently appear from the judgment reported.

Sir Charles Hibbert Tupper K.C. for the appellants.

Davis K.C. for the respondent.

The judgment of the court was delivered by:

ARMOUR J.—This appeal should in my opinion be allowed. It is impossible in the evidence before us to uphold the judgment of the trial judge affirmed by the Supreme Court of British Columbia, being, as it is, manifestly against the evidence.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour JJ.

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BELCHER v. McDONALD.

Armour J.

The admissions made by the defendant to the plaintiffs of his indebtedness to Calder in the $50,000 balance of the $100,000 note and in one-half of the clean-up of 1899, amounting to $26,222, none of which admissions did he go into the witness-box and deny; his assignment to the plaintiffs of Calder's one undivided half of the claim, 27 Eldorado; his assignment of the dumps to the plaintiffs; and his offering security to the plaintiffs for the amount of his indebtedness to Calder in respect of the $50,000 and the $26,222; were wholly inconsistent with the more than doubtful story which he afterwards set up that the $100,000 note was given by him to Calder "in lieu of property and whatever I owed him at the time."

The erroneous rulings of the trial judge suffice also to set aside his judgment among which were his refusing to amend allowing the plaintiffs to allege an account stated, his refusing to allow the referee to consider the $50,000 and refusing to allow evidence to be given of the deposits made by the defendant in 1898 in banks and elsewhere.

The appeal should therefore be allowed and a new trial had, and the defendant should pay the costs of this court and of the court appealed from and the costs of the last trial, with leave to the parties to amend their pleadings as they may be advised.

Appeal allowed with costs.

Solicitor for the appellants: *C. M. Woodworth.*

Solicitor for the respondent: *Auguste Noel.*

JAMES A. WILLIAMS (DEFENDANT)...APPELLANT; 1903

AND *Mar. 30, 31.
*May 5.

JOHN W. STEPHENSON (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, SITTING IN APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Assessment of damages — Estimating by guess — Concurrent findings — Reversal on appeal—New trial.

The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. Armour J., however, was of opinion that the proper course was to order a new trial.

APPEAL from the judgment of the Supreme Court of British Columbia affirming the judgment of the Territorial Court of Yukon Territory.

The case is stated in the judgments now reported.

Aylesworth K.C. for the appellant.

Wallace Nesbitt K.C. for the respondent.

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

DAVIES J.—I think this appeal should be allowed, and the action dismissed. The evidence is unsatisfactory and somewhat conflicting. No evidence was given by the plaintiff from which damages could be estimated; as the record now stands the only damages

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour JJ.

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Davies J.

which could be given would be nominal. This is well shown by the fact that the trial judge in giving his judgment stated that he had been obliged to guess at the amount he assessed the damages at. I do not see that any good result would follow from sending back the case for another trial. We have before us the evidence of all of the parties who know anything about the facts in dispute. On the main question, as to the agreement, the trial judge found on the facts for the plaintiff. I doubt very much whether I would have so found had I been trying the case, but accepting that finding as correct, the result would be that the plaintiff would get defendant's two-thirds of the property as a present. Accepting plaintiff's own statement as correct, there was no purchase of any specific goods, and no change of property or possession. The sale complained of was made by the defendant's agent, Campbell, day by day, and for the best prices obtainable. The amount realized, $11,103, fell short of the amount due to the defendant personally, and which had to be paid before the partnership became entitled to anything. This is perfectly clear from the evidence of the accountant Graff. Then again, I am of opinion that the agreement for the sale of the business to the plaintiff, if made, was rescinded, and that the plaintiff acquiesced in the sale of the goods by the defendant, having first taken away for himself about $1,300 worth. The evidence given by defendant of the plaintiff's acquiescence in the sale was uncontradicted and must, I think, be accepted. On that ground the action fails and should be dismissed.

ARMOUR J.—The plaintiff and defendant were carrying on the hotel business in Dawson City under the following agreement:

This agreement, made this 1st day of July, 1899, between J. A. Williams, party of the first part, and J. W. Stephenson, party of the second part, both of the town of Dawson, Yukon Territory, Canada.

Witnesseth, That for and in consideration of the sum of one dollar ($1.00) lawful money of Canada, in hand paid said party of the first part by said party of the second part, the receipt whereof is hereby acknowledged, and certain services as manager of "The Hoffman Hotel" in said Dawson, to be performed by said second party, the said first party hereby agrees to convey unto said second party an one-third interest in said hotel business and the leases thereof and including everything used in the conduct thereof and belonging thereto, clear and free from incumbrance, when the profits of said business shall equal the capital invested therein, and said capital shall have been repaid to said Williams, it being understood and agreed between the parties hereto that said second party shall act as manager of said business without hinderance or reservation, and that the one-third interest to be conveyed as above mentioned shall be for the purpose of compensating said second party for services rendered as manager of said business.

In witness whereof the parties hereto have hereunto set their hands and seals at Dawson, aforesaid, this the 10th day of August, 1899.

J. A. WILLIAMS.
J. W. STEPHENSON.

Signed, sealed and delivered
in the presence of
LEROY TOZIER.

And on the 1st December, 1899, the following agreement was made between them according to the evidence of the plaintiff and his witnesses, which was accepted by the learned trial judge as true. That the defendant should retire from the business, and that the plaintiff should carry it on; that the plaintiff should pay the defendant daily the net proceeds of the business until the debt due to the defendant in respect of the business should be paid off; and that the stock in trade should continue to be under the control of the defendant and if the plaintiff wanted to use any of it for the daily running of the business, he was to take it, but at no time was he to take an amount of it greater than the amount of payments he had already

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made, for example, if to-day's receipts were $500 he was not to take over $500 worth, so that the security would be ample to protect the defendant.

There was no provision made for replacing the stock in trade if exhausted before the defendant was paid off.

The business was carried on by the plaintiff under the foregoing agreement from the 1st to the 10th of December when the defendant closed up the business and sold the goods, and for this breach by him of this agreement this action was brought.

The only evidence of damage was the following:

> Q. What do you estimate the damage you have sustained by reason of this breach of contract?—A. Well, he put me out of business. I was doing a good business and making money and I would have made between $5,000 and $10,000 in the house.

The learned trial judge said in giving judgment as to damages:

> What exactly should be given under the circumstances is only a guess which this court has to make. I think $10,000 which is claimed is too much. I reduce the same to $5,000 as a fair compensation to plaintiff.

With all due deference, I am of the opinion that it was not competent for the learned trial judge to guess the amount of damages in an action such as this which was an action to recover damages for the breach by the defendant of the agreement above set out.

The plaintiff should have given such evidence as would have enabled the learned trial judge to have ascertained the damages with reasonable certainty and not to have contented himself with also guessing as to his damages as he apparently did.

Evidence should have been given showing the amount due to the defendant on the day he closed the business, the value of the goods on that day, deducting therefrom the value of the goods removed by the plaintiff and variously stated to be from $500 to $1,300,

the length of time the carrying on of the business would have taken till the defendant's debt was paid off by the use of the said goods, the value of the goods which would have remained after such debt was paid off, and the value of the services of the plaintiff from the day the business was closed until such debt was paid off.

These things having been shown the value of the goods remaining after the defendant's debt was paid off, less the value of the plaintiff's services, would have established with reasonable certainty the damages which the plaintiff sustained by reason of the breach by the defendant of the agreement.

I am of opinion, therefore, that the appeal should be allowed and a new trial had between the parties and the plaintiff should pay the costs of this court and of the court appealed from and the costs of the trial.

Appeal allowed with costs.

Solicitors for the appellant: *White, McCaul & Davey.*

Solicitors for the respondent: *Clarke, Wilson & Stakpole.*

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*Mar. 6, 10.
*May 5.

JOSEPH JACQUES ARTHUR PLACIDE REMILLARD *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

MARCEL HUBERT CHABOT *et al.* (DEFENDANTS) ..... } RESPONDENTS.

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

Construction of will — Opening of substitution — Legacy to substitutes — Legatees taking per stirpes or per capita.

By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime and, after her death, to his surviving children and, by the sixth clause, provided as follows:

Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par, mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété.

Held, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes*.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiffs' action with costs.

*PRESENT:—Sedgewick, Girouard, Davies, Mills and Armour JJ.

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The action was taken by one of the grandchildren of the deceased testator for a declaration that the will created a substitution which opened at the death of each of the institutes (his children), for the portion of the estate representing the one-fifth of the revenues bequeathed to such institutes and that the partition should be made, under the clauses of the will recited in the judgments now reported, among all the grandchildren *per capita* and not *per stirpes*. The defence was that the division among the grandchildren should be made *per stirpes*, the children of each institute being called into the substitution for the share of which the revenue had been bequeathed to their respective parents to be equally divided between them and not among the whole of the grandchildren *per capita* In the Superior Court, Cimon J. decided that the will created a substitution and that the children of the five institutes were entitled to receive *per capita* the share of each of the institutes. The present appeal is from the judgment of the Court of King's Bench which reversed the decision of the trial judge, Bossé and Würtéle JJ. dissenting, and decided; 1. That the will created a substitution; and 2. That the children of each institute were alone entitled to receive *per stirpes* the portion of their parent.

Stuart K.C. and *Dorion* for the appellants.

Belleau K.C. and *Malouin K.C.* for the respondents.

SEDGEWICK J.—I concur in the judgment dismissing the motions to quash and to add parties as appellants and also dismissing the appeal and restoring the judgment of the Superior Court with costs in all the courts for the reasons stated by my brother Girouard.

GIROUARD J.—Il s'agit d'une substitution et du partage d'une succession testamentaire valant une cinquantaine de mille piastres.

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L'intimé fait d'abord motion pour renvoi de l'appel alléguant que l'intérêt de l'appelant n'allait pas jusqu'à $2,000. Ce que voyant un autre héritier et mis en cause, qui jusqu'ici n'avait pris a ucune part au litige, demande à être reçu partie appelante, et grossir ainsi l'intérêt des appelants, qui dès lors dépasserait de beaucoup le montant fixé pour la juridiction de cette cour. S'il nous paraissait nécessaire de permettre à cet héritier de se joindre aux appelants, ce serait notre devoir d'accorder sa motion. Tous les héritiers ont en effet intérêt à avoir une interprétation finale du testament de leur ancêtre. Les appelants ont cependant produit des affidavits qui établissent que leurs intérêts dans la cause excèdent $2,000 et partant la motion de cet autre héritier, mis en cause, est inutile et elle est renvoyée sans frais, ainsi que la motion pour le renvoi de l'appel faute de juridiction.

Il ne nous reste plus qu'à décider la cause au mérite.

Il s'agit du testament de François Evanturel devant Mtre. Petitclerc et son confrère, notaires, en date du 15 mai 1852, qui a déjà attiré l'attention de tous les tribuneaux du pays, compris le Conseil Privé, dans la célèbre cause de *Evanturel* v. *Evanturel* (1). La question soulevée dans la présente instance se rapporte à l'interprétation de l'article 6e du testament qui dispose finalement des biens du testateur en faveur de ses petits-enfants. Toutes les parties admettent qu'il y a substitution et qu'elle s'ouvre pour autant au décès de chaque grèvé. Mais le partage doit-il se faire par souches ou par têtes? C'est là et là seulement qu'il y a divergence d'opinion.

L'article 6e du testament déclare :—

Quant à la propriété de mes dits biens, meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants ; *pour par mes petits-enfants, jouir, faire et disposer de mes*

(1) 5 R. L. 606 ; 1 Q. L. R. 74, 144 ; L. R. 6 P. C. 1.

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dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituent mes légataires universels en propriété.

La cour de première instance, (Cimon J.) décida que les petits-enfants étaient appelés par têtes et non pas par souches. La cour d'appel, (Bossé et Würtéle JJ., différant) jugea tout le contraire. La Cour d'Appel procède comme si le testateur avait chargé les enfants de rendre à leurs propres enfants. Je ne lis pas le testament de cette façon.

Il me semble que les enfants sont chargés de rendre à tous les petits-enfants du testateur collectivement, sans distinguer s'ils sont leurs propres enfants ou simplement leurs neveux et nièces. Nous sommes unanimement d'opinion que telle fut l'intention du testateur, telle qu'il l'a manifestée en son testament. L'opinion du juge Cimon et celle du juge Würtéle expriment si parfaitement les motifs qui conduisent à cette conclusion, qu'il nous suffit d'y renvoyer les parties. Nous nous contenterons d'une courte citation de l'opinion de M. le juge Würtéle :

In the first place, the words used in clause six, by which the testator gives the ownership of his property to his grand-children, instituting them, collectively, his universal legatees in ownership, are plain, distinct and capable of having a legal sense and effect and they should be construed according to their literal import and plain meaning. The words are that he bequeathes his property, in ownership, to his grand-children from the death of his children, to be owned and enjoyed by them, and to be divided among them in equal shares from the day that the usufruct given to his children should cease to exist. The plain meaning of this disposition, it seems to me, is that all the grand-children participate in the legacy and that the property representing the fifth of the revenue given to each of the testator's children on the opening of the substitution for that portion of his estate, is to be divided among all the grand-children then living, in equal shares, by heads and not by roots. The words being plain and not ambiguous, the literal import should be followed, for the function of the court is to construe or interpret the testator's words and to give effect to them and not to make a will for him by a supposition as to what his inten-

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tion was, or by adding or implying any words which may be thought to have been omitted; and it must be borne in mind that legal effect can be given to the words and expressions contained in this clause. There is nothing in the context which can indicate that that cannot be the meaning of words used, nor that it was the intention of the testator that the words should not be taken in their ordinary sense.

L'appel est accordé et le jugement de la cour supérieure rétabli, avec dépens devant toutes les cours.

DAVIES J. concurred in the judgment of the court for the reasons stated by His Lordship Mr Justice Girouard.

MILLS J.—In this case I concur in the judgment of my brother Girouard.

I hold that the children took from the testator a life interest and that, upon the death of the children, the property went to the grand-children, so that the grand-children took directly under the will from the testator and so took *per capita* and not *per stirpes*.

ARMOUR J.—The question for our determination arises upon the will of François Evanturel, senior, who died on the seventeenth of May, 1852, and the following provisions of the will are those necessary to be considered in arriving at such determination.

Fourthly: I give to Marie Anne Bédard, my wife, the enjoyment and usufruct of all the rest of my property, moveable and immoveable, for my said wife to have the enjoyment and usufruct of all my said property during her lifetime, from the day of my death, instituting my said wife my usufructuary legatee, without her being obliged to have an inventory made of my said property; my said wife being obliged to pay an annual life rent of sixty pounds to each of my children born of my present marriage with her who shall not be married on the day of my death, from the day of their respective marriage and during the lifetime of my said wife, which life rent shall be payable to the husband of each of my daughters who would be married and would die before my said wife;

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Armour J.

Fifthly: I order that, after the death of the said Marie Anne Bédard, my wife, if I die before her, all my furniture, animals, carriages and other moveables, which I shall die possessed of, be sold by public or private sale by my testamentary executor hereinafter named, and that the price thereof be deposited by my said testamentary executor in one of the savings banks of this city and that the price of my said moveables be used solely for the keeping of and repairs of the houses and dependencies which I shall die possessed of; and I order further that, after the death of my said wife, the enjoyment and usufruct of the rest of my property moveable and immoveable whatsoever, which I shall die possessed of, pass and go to the children born and to be born of my present marriage with my said wife; towhich, my said children, I give and bequeath the enjoyment and usufruct of my said property, for my said children to have the said enjoyment and usufruct during their lifetime, from the day of the death of Marie Anne Bédard, their mother, until the death of each of my said children respectively, my said children to divide by equal shares between them the income of my said property; and, if any one of my said children should die without leaving any legitimate issue of his marriage, or if he should die before having been married, then and in such case, I order that the share of my said child who should so die without leaving any legitimate issue, or before having been married, in the income of my said property, pass and go to my other children then living, who shall enjoy the said share by equal parts between them during their lifetime as aforesaid; this present legacy is so made to my said children on the express condition that the share coming to each of them in the income of my said property shall not be seizable in any manner whatsoever by any of the creditors of my said children, respectively, for such is my will;

Sixthly: As to the ownership of my said property, moveable and immoveable whatsoever, which I shall die possessed of, I give and bequeath it to the legitimate children of my children, who shall be my grand-children, for my said grand-children to enjoy possess and dispose of my said property in full ownership and in equal shares between them, from the day on which the said enjoyment and usufruct given to my children shall cease, instituting them my universal legatees in ownership.

And the question is. Was it the intention of the testator that his grand-children should take *per capita* or *per stirpes*?

In my opinion, the grand-children take *per capita* and not *per stirpes*.

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REMILLARD v. CHABOT.

Armour J.

The language of the will is plain and unambiguous and I do not see how the testator could have more clearly expressed his intention that his grand-children should take per capita, than he has done.

In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed with costs.

Solicitor for the appellants : *C. E. Dorion.*

Solicitors for the respondents : *Malouin, Bédard et Chalout.*

CHARLES H. LETOURNEUX, (SUPPLIANT)..... } APPELLANT ;

AND

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

1903

*Feb. 27.

*May 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Negligence of Crown officials—Right of action—Liability of the Crown—50 & 51 V., c. 16, ss. 16 23, 58—Jurisdiction of the Exchequer Court—Prescription—Art. 2261 C. C.

Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it.

Held, reversing the judgment appealed from (7 Ex. C. R. 1), Davies J. dissenting, that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisons of the 16th, 23rd and 58th sections of the Exchequer Court Act. *The Queen* v. *Filion* (24 Can. S. C. R. 482) approved ; *The City of Quebec* v. *The Queen* (24 Can. S. C. R. 430) referred to.

The prescription established by art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his Petition of Right.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing the suppliant's Petition of Right with costs.

By his Petition of Right the Suppliant complained, among other things, that his lands had been injuriously affected on account of the Government of Canada

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

(1) 7 Ex. C. R. 1.

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assuming control and diverting the course of the River St. Pierre for public uses for the benefit of and in connection with the Lachine Canal and constructing drains in the vicinity; that a portion of his property had been taken and spoiled by throwing back upon it a quantity of earth from the excavations made, and that it had been rendered useless through flooding caused by the neglect of the officers of the Crown to clear and maintain in good order a siphon-tunnel intended to carry off the subsidiary drainage and the waters of the River St. Pierre which had been diverted from their natural channel and made to pass, by this tunnel, underneath the Lachine Canal.

The judgment of the Court dismissed the Petition of Right with costs and the suppliant appealed to the Supreme Court of Canada.

Maréchal K. C. and *Belcourt K. C.* for the appellant, cited *Davidson* v. *The Queen* (1); *The City of Quebec* v. *The Queen* (2); *The Queen* v. *Filion* (3); *The Queen* v. *McLeod* (4); 17 Am. & Eng. Encyc. of Law (1892) ed.) p. 183, and arts. 501, 1057 C. C.

Newcombe K. C. and *Hutchinson K. C.* for the respondent. Under art. 2261 C. C., damages such as claimed are prescribed by two years. Consequently, appellant's claim must, in any event, be restricted to damages suffered for the two years immediately preceding the date of his Petition of Right. Prescription is not pleaded, but it was not necessary that it should be pleaded; art. 2188 C. C.; *Dorion* v. *Crowley*, (5); *Kerr* v. *The Atlantic and Northwest Railway Co.* (6); No damages are proved to have been suffered during this period. The appellant acquired this property in 1891 and 1892. There has been no construction of any public works

(1) 6 Ex. C. R. 51.
(2) 24 Can. S. C. R. 420.
(3) 24 Can. S. C. R. 482.
(4) 8 Can. S. C. R. 1.
(5) Cass. Dig. (2 ed.) 709.
(6) 25 Can. S. C. R. 197.

in the vicinity since those dates, except the completion of the collecting drains, and the deepening and straightening of the river, which have much improved the appellant's property.

Under sec. 16, of 50 & 51 Vict., ch. 16, the appellant cannot possibly have any right of action; *The City of Quebec* v. *The Queen* (1).

As to the claim of $544. as the value of land taken for works done on the River St. Pierre, the respondent quotes the reasons of the learned Judge of the Exchequer Court, at page 8 of the Exchequer Court Reports, vol. VII., and the cases there cited.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The statute of 1867 (2) by sec. 31 provides for the appointment of official arbitrators who shall arbitrate on, appraise, determine and award the sums which shall be paid to any person for land or property taken for any public work, or for loss or damage caused by such taking (3).

Under secs. 34, 35, 37, claims for *property* taken, or for damage to *property* arising from the construction may be referred to official arbitrators (4).

The statute 33 Vict. c. 23 [sec. 1] (1870) "An Act to extend the powers of the official arbitrators," authorises the reference to official arbitrators, (besides claims for damages to property, or for property taken,) of claims arising out of any death, or any injury to person or property on any public work—provided [sec. 2] that nothing herein contained *shall be construed as making it imperative* on the Government to entertain any claim under this Act, but that Head of the Department shall refer to arbitrators such claims only as he may be instructed so to refer by the Governor-in-Council.

The statute 44 Vict. c. 25, sec. 27 (1881), (Railway Act) extends the previous right of reference to official arbitrators to claims as to damages to property, etc.,

(1) 24 Can. S. C. R. 420.
(2) 31 Vict. ch. 12.
(3) Secs. 2, 5, ch. 40 R. S. C.
(4) Secs. 6 to 32, ch. 40 R. S. C.

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by any Dominion railway (1); and, by subsec. 3 of sec 27, to claims for any death or injury to person or property on any such railway,

but the *arbitrators' duty in such case shall be confined* to reporting his or their findings upon the questions of fact, and upon the amount of damages, if any, sustained, and the principles upon which such amount has been computed (2).

Now come in chronological order the cases of *The Queen* v. *McFarlane* (3); and of *McLeod* v. *The Queen* (4), 1882-1883, which determine that no statute up to 1883 altered the rule that the Crown was not liable in tort or damages for negligence of its officers.

Next comes in 1886, the Revised Statute, ch. 40, which embodies the above statutory provisions as to official arbitrators.

Then comes in 1887 The Exchequer Court Act, 50 51 Vict., ch. 16, s. 58, which repeals ch. 40 of the Revised Statutes, and enacts that for the purposes of any reference as authorised by the said Act for claims against the Crown, the Exchequer Court shall replace the official arbitrators. By sec. 23, it is enacted that "any" *claim against* the Crown may be prosecuted by Petition of Right, and secs. 15 and 16 give exclusive original jurisdiction thereon to the Exchequer Court. So that this action lies in law. Such is the jurisprudence of this court as finally settled by *The Queen* v. *Filion* (5).

We are of opinion in this case, however, that the only damages that the appellant can in law recover against the Crown under subsec. 3 of sec. 16 of the Exchequer Court Act, are those that he suffered within the two years preceding his action by the negligence of

(1) Sec. 6 ch. 40 R. S. C.
(2) Sec. 11 ch. 40 R. S. C. now replaced by sec. 54, Ex. Ct. Act, 50 & 51 Vict. ch. 16.
(3) 7 Can. S. C. R. 216.
(4) 8 Can. S.C.R. 1.
(5) 24 Can. S. C. R. 482.

the officers of the Crown in not keeping the siphon-culvert clear and in proper order.

We do not see anything in *The City of Quebec* v *The Queen* (1), that militates against his right to recover these damages. There is no question of jurisdiction in the case. If the appellant had a right of action, the Exchequer Court had exclusive original jurisdiction over it. And upon the authority of *The Queen* v. *Filion*, (2) under secs. 16, 23 and 58 of the Exchequer Court Act this right of action cannot be controverted. He should also get compensation for that part of his land that was taken, for which he claims $544. He may not be entitled to more than half that sum, perhaps, but we have nothing to do with assessing the damages either upon this head or upon the first one.

The appeal is allowed with costs and the case referred to the Exchequer Court to assess, 1st the damages that the appellant has suffered during the two years preceding his action by the negligence of the officers of the Crown in not keeping the siphon-culvert clear and in proper order; 2nd the damages suffered by the appellant by throwing back upon his land part of the bank dug up in widening the River St. Pierre, unless the appellant agrees, within three months from this date, to accept in full compensation the sum of seven hundred dollars with interest from the date of the Petition of Right, in which case, upon his filing his consent to that effect, judgment will then be entered against the respondent for that amount with interest as aforesaid and costs in the Exchequer Court, less the costs of the trial incurred in respect of the claims of the appellant which are not hereby allowed.

DAVIES J. (dissenting).—On the authority of *The City of Quebec* v *The Queen* (1), and *The Queen* v *Filion*

(1) 24 Can. S. C. R. 420. (2) Can. S.C.R. 482.

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Davies J

(2) I am of opinion that this appeal must be dismissed for the reasons given by the learned judge of the Exchequer Court. I do not, however, wish to commit myself to the proposition laid down by him, that if there had been jurisdiction to try the action, actionable negligence had been proved. The damming of the siphon drain appears to have been caused by an extraordinary flood which the authorities had no reason to anticipate, and for the results of which they would not be responsible.

Appeal allowed with costs.

Solicitors for the appellant : *L. T. Maréchal.*

Solicitor for the respondent : *E. L. Newcombe.*

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*May 5, 6.

GONZALVE DESAULNIERS AND OTHERS (OPPOSANTS)..... } APPELLANTS;

AND

LOUIS PAYETTE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS;

AND

LA COMPAGNIE DE L'OPERA COMIQUE DE MONTRÉAL..... } DEFENDANT.

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

Appeal—Jurisdiction—Interlocutory proceeding—Final judgment.

An order requiring opposants *à fin de charge* to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely an interlocutory judgment from which no appeal lies to the Supreme Court of Canada. *Lacroix* v. *Moreau* (16 L. C. R. 180) referred to.

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

(1) 24 Can. S. C. R. 482, 484.

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DESAULNIERS v. PAYETTE.

MOTION to allow security to be filed by the opposants on an appeal from the judgment of the Court of King's Bench, appeal side, affirming the order of the Superior Court, District of Montreal, requiring them to furnish security that the real property under seizure in execution, if sold subject to the charge mentioned in their opposition, would realize a price sufficient to give the execution creditors the amount of their debt.

The circumstances under which the motion for leave to appeal to the Supreme Court of Canada was made are stated in the judgment reported.

Belcourt K. C. for the motion.

Goudin contra.

The judgment of the court was delivered by his Lordship the Chief Justice as follows :

LE JUGE EN CHEF.—Motion pour permission de produire le cautionnement requis pour en appeler d'un jugement de la cour du banc du roi, siégeant en appel.

Les faits de la cause sont comme suit : Les intimés, Payette *et al*, ont poursuivi la Compagnie de l'Opéra Comique de Montréal, en liquidation, pour réclamer une somme de $15,704.90, montant d'une obligation hypothécaire. Ils ont obtenu jugement contre la compagnie, et sur un bref d'exécution, le vingt-neuvième jour de mai 1902, le shérif a mis en vente l'immeuble hypothéqué appartenant à la compagnie défenderesse. La vente devait avoir lieu le dix-septième jour de juillet dernier (1902). Les appelants qui, avant la liquidation de la compagnie défenderesse, avaient loué l'immeuble mis en vente de la dite compagnie, et dont le bail avait été enregistré, ont fait une opposition à fin de charge demandant que le dit immeuble soit déclaré sujet à la charge de leur bail. Le quatrième jour de juillet, 1902, les intimés ont fait une motion en cour inférieure

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The Chief Justice.

demandant que les appelants fussent tenus de fournir bonne et suffisante caution que la vente de l'immeuble susdit, avec la charge demandée rapporterait un prix suffisant pour assurer le montant de la créance due aux intimés. Cette motion fut accordée par la cour supérieure dans les termes suivants:—

Considérant la motion bien fondée.

Ordonne aux opposants de fournir, dans huit jours, de la date des présentes, bonne et suffisante caution que la vente du dit immeuble à la charge du bail mentionné dans l'opposition produira un prix suffisant pour assurer le montant de la créance due aux demandeurs; frais réservés.

Avec la permission spéciale requise pour en appeler d'un jugement interlocutoire, ce jugement fut porté en appel à la cour du banc du roi par les opposants, mais leur appel fut débouté.

Ils veulent maintenant en appeler de ce jugement de la cour d'appel. Mais nous ne pouvons recevoir leur appel.

Il n'y a appel à cette cour que d'un jugement final. Or le jugement en question n'est évidemment qu'un jugement interlocutoire, un jugement d'instruction. Les appelants eux-mêmes n'ont pas cru qu'ils pouvaient en appeler de plein droit à la cour d'appel comme d'un jugement final. Et ils avaient raison. Or, il n'est pas plus final maintenant qu'il l'était alors. *Lacroix* v *Moreau* (1).

Motion pour permission de donner cautionnement rejetée avec dépens.

Motion refused with costs.

Solicitor for the appellants; *Gonzalve Desaulniers.*

Solicitor for the respondents; *Angers, DeLorimier & Godin.*

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(1) 16 L.C. R. 180.

ARTHUR ISIDORE CLEMENT (DEFENDANT)..... APPELLANT;

AND

LA BANQUE NATIONALE (PLAINTIFF) ..... RESPONDENT.

AND

FRANÇOIS-XAVIER BILODEAU.....MIS EN CAUSE.

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*May 5, 6.

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

Appeal—Jurisdiction—Amount in controversy—Secretion of estate by insolvent—Contrainte per corps—Arts. 885, 888 *C. P. Q.*

On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned the appellant, under the provisions of art. 888 C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000.

Held, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada.

MOTION to quash an 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 appellant was condemned to three months imprisonment in the common gaol under the provisions of the 885th and 888th articles of the Code of Civil Procedure of the Province of Quebec for want of jurisdiction.

Belcourt K.C. for the motion.

Mignault K.C. contra.

The judgment of the court was delivered by:

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

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CLEMENT v. LA BANQUE NATIONALE.

The Chief Justice.

The CHIEF JUSTICE.—This case comes up on a motion to quash the appeal.

By a judgment of the Court of King's Bench, affirming a judgment of the Superior Court, the appellant, who had made a judicial abandonment for the benefit of his creditors, was found guilty of having, in his statement filed in court, secreted a portion of his property, to the value of at least $6,000, within the year preceeding his abandonment and statement, under art. 885, subsec. 3 of the Code of Civil Procedure, and he was condemned, under art. 888 of that Code, to three months' imprisonment. He appeals from that judgment and rests his right to appeal exclusively upon the ground that the matter in controversy amounts to $2,000.

Now there is clearly no amount in controversy here. There is no condemnation for any pecuniary amount against the appellant. Under subsection one of said article 885, the judgment would have been the same irrespective of the pecuniary amount, provided it amounted to at least one hundred dollars and, under subsection 3, no amount is fixed. Any secretion of property, within the year preceding, however small the amount of it, renders the debtor liable to the penalty provided for in article 885, sub-sec. 3, and article 888 C P. Q.

Motion to quash allowed with costs and appeal quashed with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Desbois & Dion.*

Solicitors for the respondent: *Laurendeau & Bazin.*

MICHAEL PATRICK DAVIS (DEFENDANT)..... APPELLANT; 1903 *May 5, 6.

AND

MARIE ROY ET VIR (PLAINTIFFS).....RESPONDENTS.

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

Appeal—Jurisdiction—Matter in controversy—Right of appeal—Personal condemnation—Action possessoire.

In a possessory action with conclusions for $200 damages, the defendant admitted plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed the trial court judgment, dismissing the possessory conclusions and adjudging $200 for rent of the premises in question.

Held, that the defendant had no right of appeal to the Supreme Court of Canada.

MOTION to quash an appeal from the judgment of the Court of Review, at Quebec, affirming the judgment of the Superior Court, District of Quebec, on the ground of want of jurisdiction.

Belcourt K. C. for the motion.

Alex. Taschereau contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—This case originated in a possessory action by the respondent against the appellant with conclusions for $200 damages. To this action the appellant pleaded that it was as the respondent's tenant that he occupied the premises in question.

The judgment of the Superior Court, affirmed in review, maintains the appellant's plea and dismisses

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davis and Mills JJ.

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the respondent's possessory conclusions but condemns the appellant to pay the respondent two hundred dollars for the rent of the premises from the 25th of October, 1900, to the 9th of February, 1901.

The appellant, under these circumstances, has clearly no right to appeal from that judgment. The Court maintained the appellant's contention that he was the respondent's tenant and dismissed the principal conclusions of the action, but condemned him to pay rent, and he now claims the right to appeal from a mere personal condemnation for $200, the amount of the rent. His contention is untenable.

Motion to quash allowed with costs and appeal quashed with costs.

Appeal quashed with costs.

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

Solicitors for the respondents: *Drouin, Pelletier & Baillargeon.*

STÉPHANIE ANCTIL (PLAINTIFF)....APPELLANT; 1903

AND *May 26.

THE CITY OF QUEBEC (DEFENDANT)...RESPONDENT.

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

Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata—Right of action.

A lessee of premises used as an ice house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease:

Held, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *The City of Montreal* v. *McGee* (30 Can. S. C. R. 582), and *The Chaudière Machine and Foundry Co.* v. *The Canada Atlantic Railway Co.* (33 Can. S. C. R. 11) followed.

APPEAL from the judgment of the Superior Court, sitting in review, at Quebec, affirming the judgment of the Superior Court, District of Quebec, dismissing the plaintiff's action with costs.

The plaintiff's deceased husband leased an ice-house for nine years from the 30th April, 1899, by deed of lease dated 7th January, 1899. On 4th January, 1901, the City of Quebec took possession of a portion of the leased premises for public purposes under expropriation

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

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proceedings previously taken in virtue of powers conferred by the city charter and the lessee brought action against the city for $5,000 damages as indemnity for injuries suffered by him as tenant of the leased property on account of such expropriation, with special reservation of his recourse for other damages. On 29th June, 1901, he was awarded $350 damages and this judgment was affirmed on appeal by the Court of King's Bench. The appellant, after her husband's death, brought the present action, as his universal legatee and testamentary executrix, claiming $7,000 damages for loss of the use of the leased property during the unexpired term of the lease. The respondent pleaded *res judicata.* The trial judge maintained that plea and dismissed the action with costs. The Court of Review affirmed this judgment and the plaintiff appealed to the Supreme Court of Canada.

Belcourt K.C. and *Beaubien K.C.* for the appellant.

Sir Alphonse Pelletier K. C. for the respondent.

The CHIEF JUSTICE (Oral) :—We are all of opinion that this appeal should be dismissed with costs. In view of the express reservation in his first action of the claim for the damages upon which his present action is grounded, the appellant may be right in his contention that the judgment *a quo* is wrong in holding that there is *res judicata* as to such damages by the judgment in that action. He cannot, however, succeed upon this his second action, and it was rightly dismissed by the Court of King's Bench, affirming the Superior Court; and this we hold upon the ground that his damages had to be assessed once for all and that the law gave him only one action therefor. If he did not include them all in his first action, he must suffer the consequences of his failure to do so. They

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then were all known to him and were not unforeseen, if that were material. His reservation of the right to a second action was illegal and can be of no avail to him, though prescription cannot be invoked against him. The law protects the defendant from being twice sued for the same cause. *The City of Montreal* v. *McGee* (1); *The Chaudière Machine and Foundry Co* v. *The Canada Atlantic Railway Co.* (2) and the cases there cited; *Lambkin* v. *The South Eastern Railway Co.* (3); Cripps on Compensation, (4 ed.) p. 138.

Appeal dismissed with costs.

Solicitors for the appellant: *Bernier & Beaubien.*

Solicitors for the respondent: *Pelletier & Chouinard.*

(1) 30 Can. S. C. R. 582. (2) 33 Can. S. C. R. 11.
(3) 5 App. Cas. 352.

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*Feb. 18, 19.
*May 5.
**June 8.

IRVINE A. LOVITT AND OTHERS, EXECUTORS OF THE ESTATE OF GEORGE H. LOVITT, DECEASED (DEFENDANTS)..... } APPELLANTS;

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF NOVA SCOTIA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Succession duties—Property exempt—Sale under will—Duty on proceeds—Costs—Proceedings by or against the Crown.

Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate.

Held, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ. dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were.

Costs will be given for or against the Crown as in other cases.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) in favour of the Attorney General on a case stated for the opinion of the court.

The case so stated was as follows:

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*PRESENT:—Sir Elzéar Taschereau, C. J. and Sedgewick, Davies, Mills and Armour JJ.

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

(1) 35 N. S. Rep. 223.

George H. Lovitt, late of Yarmouth, in the Province of Nova Scotia, ship owner, departed this life at Yarmouth, on the fourteenth day of November, A.D, 1900, having first made his last will and testament, whereby he appointed the defendants, Irvine A. Lovitt, John Lovitt and Erastus H. Lovitt his executors and trustees of his estate.

Probate of the said will was duly granted by the Judge of the Court of Probate in the County or Yarmouth, on the nineteenth day of November, A.D., 1900, and a true copy of the said will is hereunto annexed.

The inventory filed in the Court of Probate by the said executors contains, among other property, the following:

Province of Nova Scotia Debentures, issued under Chapter 3, Acts of N. S. for 1889	$15,000 00
Accrued interest on do	491 70

The whole estate was appraised at the sum of $440,-442.13, and debts and executor's commissions, amounted to $22,868.10.

Section 5 of chapter 3 of the Acts of the Legislature of Nova Scotia for the year 1889 enacts as follows:

"The debentures issued under authority of this Act shall not be liable to taxation for provincial, local, or municipal purposes in Nova Scotia."

The Attorney General for the Province of Nova Scotia claims, and the defendants deny, that the said sum of $15,491.70 so invested and held by testator in provincial debentures, should be included in the estate, for the purpose of fixing the amount of succession duty payable, and that duty should be paid in respect thereto.

The questions for the decision of the court are:

1. Should the sum so invested in provincial debentures be included in the valuation of the estate for

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LOVITT v. ATTY. GEN. FOR NOVA SCOTIA.

the purpose of fixing the amount of succession duty payable?

2. If not, should the said sum be deducted from the residue or should a proportionate part be deducted from each legacy and duty be calculated on the basis of the amounts so reduced?

The first question having been answered in the affirmative the executors appealed to this court.

W. B. A. Ritchie K.C. for the appellant. The duty is a tax upon the estate, not on the legatee or devisee. *Re Estate of Swift* (1) per Gray J.; *Bittinger's Estate* (2); *Attorney General* v. *Newman* (3).

The cases of *Lambe* v. *Manuel* (4), and *Thomson* v. *The Advocate General* (5) were also referred to.

Mackay for the respondent. The duty is not a tax on property but on the privilege of taking property by will or intestacy. *Mager* v. *Grima* (6); *Minot* v. *Winthrop* (7). And see *Wallace* v. *Myers* (8).

THE CHIEF JUSTICE.—I would dismiss this appeal. I fully concur in Mr. Justice Graham's reasoning in the court below. The wording of the statute is perhaps not strictly accurate, but these succession duties cannot generally be considered otherwise than duties not on the property itself, but on the transmission of that property, and the appellant has failed to convince me that the legislature of Nova Scotia intended to deviate from the principle upon which legislation of this nature is generally assumed to be based.

SEDGEWICK J.—I am of opinion that this appeal should be allowed.

(1) 137 N. Y. 77.
(2) 129 Pa. St. 338.
(3) 31 O. R. 340; 1 Ont. L. R. 511.
(4) [1903] A. C. 68.
(5) 12 Cl. & F. 1.
(6) 8 How. (U. S.) 490.
(7) 162 Mass. 113.
(8) 38 Fed. R. 184.

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DAVIES J.—Part of the estate of George H. Lovitt, appellant's testator, consisted of debentures of the Province of Nova Scotia. These debentures were issued under chapter 3 of the Acts of 1889, (N.S.), which contains this provision;

The debentures issued under the authority of this Act shall not be liable to taxation for provincial, local or municipal purposes in Nova Scotia.

Testator, by his will, after having made certain specific bequests and devises, directed that the residue of his estate should be converted into money and that the same should be invested by his executors and held by them upon the trusts in his will mentioned. The respondent claims succession duty under chapter 8 of the Acts or 1895 (1), from the legatees in respect to the whole estate including the Provincial debentures, while appellants claim that the amount realized from the sale of the debentures should be exempt under the above provision of chapter 3 of the Acts of 1889.

The 4th section of the Succession Duty Act, 1895, exempted from its operation all estates the value of which, after payment of the debts and expenses of administration, did not exceed $5,000; and (2) property passing under a will, intestacy or otherwise to or for the father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of deceased where the value of the property so passing did not exceed $25,000. The 5th section is as follows:

5. Save as aforesaid all property situate or being within the Province of Nova Scotia, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto last dwelt within said province or not, passing either by will or intestacy, or which shall be voluntarily transferred by deed, grant or gift made in contemplation of the death of the grantor or bargainor, or made or intended to take effect in possessson or enjoyment after such death,

(1) The Succession Duty Act, 1895.

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to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property or the income thereof, and all property wherever situate or being over which the trustee, executor or administrator shall or may exercise control, and which shall or may come into his possession, shall be subject to a succession duty, to be paid for the use of the province, over and above the fees provided by chapter 128 of the Revised Statutes, fifth series.

The subsections following regulated the rates of duty to be charged which varied and depended upon the amount of the estate and upon the degree of relationship to the deceased, of the person to whom the property passed.

Subsequent sections of the Act provided that the duty payable in respect to an annuity should be paid in four equal annual payments with a proviso that if the annuitant died before payments were completed no further duty should be payable. There were also special provisions regulating the time and manner of payment of the duty where any property was devised, bequeathed or descended to or for the benefit of different persons in succession. The 18th section declared that in addition to the person receiving the property, executors, trustees, &c., through whose hands it passed should be accountable for the duty.

The Supreme Court of Nova Scotia held that succession duties were payable upon the whole estate which came into the hands of the executors for distribution to the legatees under the testator's will and that the amount of the estate represented by these debentures was not exempted from the duty, on the broad ground that the succession duty was not a tax upon the debentures themselves or the money they represented, but a duty or burden imposed by the province upon the passing or devolution, or privilege of taking or receiving property under wills and intestate laws. The debentures in the hands of the executors were not

liable to any tax or duty, nor when they were sold by the executors as provided for by the will would they be liable in the hands of any purchaser, but the passing or transfer of the proceeds when it came into the hands of the executor and was transferred by him to the beneficiaries under the will operated to bring into effect the succession duty. If these proceeds of the sale of the debentures, when they became part of the estate and were so transferred to and divided amongst the beneficiaries, were exempted from the succession duties, and the debentures passed to the purchaser free of duty or tax, the anomalous condition would have existed of the estate profiting by the sale at an enhanced price of the debentures because of their exemption from duty and holding and dividing the proceeds under the will among the legatees also without paying duty. But it is fair to say that even if the testator had specifically devised the debentures to a legatee the transfer to the legatee by virtue of the provincial law would be subject to the payment of the duty or burthen placed upon it by the act. It comes back again to the principle underlying and governing the judgment appealed from that the duty is not a tax upon the property as such at all but a burthen, bonus, excise duty or assessment as variously defined, imposed by the Government upon the passing or devolution of the property by will or intestacy to the beneficiaries, such duty or burthen being regulated and determined in its amount or extent by the relationship of the beneficiary to the testator.

The statute in question is one modelled upon and closely following similar statutes of the States of New York and Pennsylvania, (ch. 713 Laws of 1887, N.Y.; No. 37 Laws of 1887, Pa.,) and does not follow the Imperial legislation by which legacy succession and estate duties were imposed. In the sections imposing the duty the

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phraseology of the Nova Scotia Act now under consideration and the New York and Pennsylvania Acts are almost identical. Mr. Justice Graham who delivered the judgment of the Supreme Court of Nova Scotia has cited and reviewed most of the cases determined in the New York and Pennsylvania Courts of Appeal and in the Supreme Court of the United States, where questions substantially the same as that now before us were determined. There is a concensus of opinion in all these courts and in many courts of appeal of other States of the Union on statutes of a similar kind, to the effect that these statutes must be construed as imposing a burden upon the passing, transmission or devolution of the property as distinguished from taxes imposed upon property real or personal as such because of its ownership or possession. I fully agree with the conclusions reached by the Supreme Court of Nova Scotia and for the reasons given by Mr. Justice Graham. I would merely add to the authorities cited by him that of *Knowlton v. Moore* (1). The judgment of the Court was pronounced by Mr. Justice White, who said, p. 47:

> It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Taxes of this general character are universally deemed to relate not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy as distinguished from taxes imposed on property real or personal as such, because of its ownership or possession. In other words the public contribution which death duties exact is predicated on the passing of the property as the result of death as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy.

See also Dos Passos on Inheritance Tax Law, par. 8.

I am of the opinion that the succession duty imposed by the Succession Duty Act 1895 is not a tax upon property as such but rather an impost upon the privi-

(1.) 178 U.S. R. 41 (1899).

lege of taking or transmitting property by will or intestacy, and that while the value of the property is the measure of the amount of the duty it is upon the privilege that the duty is imposed. In the case of limited interests such as life estates it is the estimated value of the limited interest and not the property which fixes the amount of the duty payable, but the nature of the tax remains the same. The duty upon a life interest is not payable out of the corpus, but out of the income. The duty varies according to the degree of relationship of the person suceeding to the property to the person from whom or from whose estate the property comes, and it is only paid once, that is when the beneficiary takes or receives the amount of his gift, legacy or devise as the case may be.

For these reasons I am of opinion that the judgment of the Supreme Court of Nova Scotia should be affirmed and this appeal dismissed with costs.

MILLS J:—One George H. Lovitt, in Yarmouth, Nova Scotia made a will in which he disposed of, among other things, certain bonds which had been issued by the Government of Nova Scotia under a statute passed by the Legislature in 1889, and which expressly provided that the debentures issued under the authority of that Act should not be liable to taxation, for provincial, local or municipal purposes in Nova Scotia.

There was enacted by the Legislature in the previous year a statute to amend and consolidate the Acts relating to municipal assessments, by section 6 of which, funds invested in provincial or municipal debentures were exempt from taxation. Section 5 of that statute enacts

That no income shall be taxed which is derived from provincial or municipal debentures, exempted from taxation by Acts of this Province.

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By the statute of 1895, known as the Succession Duty Act, it was provided by section 5, that save as aforesaid, all property situate or being within the Province of Nova Scotia, and any interest therein, or any income therefrom, whether the deceased person owning or entitled thereto last dwelt within said Province or not, passing either by will or intestacy, or which shall be voluntarily transferred by deed, grant or gift, made in contemplation of the death of the grantor, or bargainor or made or intended to take effect in possession or in enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof, and all property wherever situate or being over which the trustee, executor, or administrator shall or may exercise control, and which shall or may come into his possession, shall be subject to a succession duty, to be paid for the use of the Province, over and above the fees provided by chapter 128, of the Revised Statutes fifth series.

1. When the value of the property of the deceased after payment of all debts and expenses as aforesaid, exceeds $25.000 and passes to the persons named in this subsection ; or

2 Where the value of the property after such payments exceeds $100,000 a duty of $5.00 per every hundred.

3. Where the value of a property after payment as aforesaid exceeds $5,000 so much as passes to the benefit of a lineal ancestor other than father or mother, or to any brother or sister of the deceased, a duty of $5.00 per every hundred dollars.

In this case among the assets were $15,000 in provincial bonds issued under the provincial Act in question, not being liable to taxation under that provision of the statute which I have quoted, and the inquiry was for the purpose of determining whether these bonds should be considered in fixing the amount of property subject to the succession duty.

The first question to be considered is whether the imposition of such a duty is taxation upon property, or whether it is a sum paid for the transmission from the last owner to the person entitled to receive it. I attach no importance to the contention that a succession duty is not a tax imposed upon the property, but is a mere charge for the privilege of transmission. If it did not so frequently fall within the domain of experience, I would scarcely consider it credible that any one could persuade himself by an argument of this kind. Let me suppose for a moment, that this property had been devised to some one who at the time had no property; instead of receiving the full amount bequeathed, he would find in its transmission that five per cent of its value had been taken out by the executor or administrator, as the case might be, to pay the Government for the privilege of receiving it, and that instead of receiving the whole of what had been bequeathed to him, he would find that $50.00 was retained out of every thousand to pay the succession duty. Could he be persuaded that the property which had been bequeated to him was not subject to taxation, that this was not a charge upon the property at all, but a toll taken for permitting it to pass from his dead ancestor to himself?

It matters not whether the tax is direct or indirect, whether it is a charge upon the property, or upon leave to receive it, it is still a tax imposed for a public purpose, upon the property bequeathed, and the sum total is diminished by the amount of succession duty so charged. Here, the tax is imposed for a specific purpose,—it is to raise a revenue for the support of a particular institution. It is money levied upon the estates of deceased persons for this purpose, and being so levied, it is as much a tax as any other which it is possible for a legislature to impose.

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Webster defines a tax as a rate or sum of money assessed on the person or property of a citizen, by government for the use of the state. Taxes in free Governments are usually made upon the property of citizens according to their income, or according to the value of their estates. Tax is a term of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tributes, subsidies, excise, imposts, or customs. But more generally, tax is limited to the sum laid upon polls, lands, houses, horses, cattle, professions, and occupations. Tax is defined in the encyclopædic dictionary as a contribution imposed by authority upon the people to meet the expenses of government, or other public services. A government imposition is a charge made by the state on the income or property of individuals, or on the products consumed by them. A tax is said to be direct when it is demanded from the very person whom it is intended, or desired should pay it, as a poll tax, an income tax, property tax, taxes for keeping servants, etc. An indirect tax is one demanded from one person who is expected and intended to recoup or indemnify himself at the expense of another, as in customs or excise duties.

It is a matter of no consequence whether the tax is meant to be a charge upon the property, or upon the transmission of the property; it is in either case a burden imposed for a public purpose, to be met by the person, in the case of succession duties, to whom the property may go. Some taxes are paid periodically; some are paid upon the happening of a particular event; but no matter in which way, they are alike taxes —burdens, imposed by the state for public purposes. A charge imposed, as a stamp duty upon a bill of exchange, or note, though imposed but once for all, is not less a tax, than a charge imposed periodically upon

lands, or upon income—such charges are monies taken from some one by the state, to meet some public requirement. Taxes may be made on legacies, and on inheritances, when the money or capital held by one party is, by reason of his death, in the course of transmission to another. If the property is still retained in the family, it may well be that they are worse off than before, and the tax upon the succession may diminish the amount of capital by the amount of the tax at a time when the income is lessened by the death of the one chiefly relied upon for support, and when the disbursements may be largely increased. Succession duties are usually levied on testamentary gifts. Sometimes they are confined to collateral successions only. It may well be, that a government and legislature exempt certain public securities from taxation, in order that those securities may so command a higher market value. It would be a gross breach of faith, after having received a larger sum from the sale of public securities by reason of their being exempt from taxation, to impose a further charge upon them. This would be, in fact, receiving a double taxation, first, in the form of an advanced price, and secondly by the imposition of a further burden upon them.

It is a fair question to consider whether the words of the statute, properly interpreted, imply an absolute or qualified exemption from taxation. It has been held that a general declaration of exemption from taxation of every kind will not exempt from an assessment for street improvements specially beneficial to the exempted property. *Sheehan* v. *The Good Samaritan Hospital* (1). An exemption from all taxes and assessments has been held to exempt from assessments for benefits as well as exemptions from general taxes. *The State* v. *City of Newark* (2).

(1) 50 Mo. 155.

(2) 36 N.J. (L.R.) 478.

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In a New York case, where a public cemetery was, by law, exempt from "all public taxes, rates and assessments," it was nevertheless held by the court not to be exempt from the paving assessment. Folger J. said in that case:

> We think that the current of authorities in this and some of the sister states runs to this result: that public taxes, rates, and assessments are those that are levied and taken out of the property of the person assessed for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him towards the expense of carrying on the government, either directly, and in general that of the whole Commonwealth, or more immediately and particularly, through the intervention of municipal corporations, and that those charges and impositions which are laid directly upon the property in a certain circumscribed locality, to affect some work of local convenience which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public but are local and private so far as this statute is concerned. *Buffalo City Cemetery* v. *City of Buffalo* (1).

In another case, *City of Patterson* v. *Society for Establishing Useful Manufactures* (2) the exemption was from "taxes charges, and impositions" but it was held not to extend so far as to exempt from assessment for grading and paving a street. In another New Jersey case *The State* v. *City of Newa rk* (3) the exemption was "from charges and impositions," and the same ruling was had. These cases shew that the exemption is from taxation imposed for ordinary revenue, and that it does not exempt from special charges from which special advantages are derived. But where the language is explicit, exempting from all taxes and assessments, it has been held to exempt from assessments by which the property is to benefit as well as from the burden of general taxation.

Succession to an inheritance, it is true, may be taxed as a privilege and notwithstanding the property is

(1) 46 N. Y. 506. (2) 24 N.J.(L.R.) 385.
(3) 27 N.J.(L.R.) 185.

already taxed, but it ought to be clear and explicit that the legislature intended the burden. The question we have here to consider is whether under the statute of Nova Scotia the property is exempt from the burden of a succession duty. It is expressly provided by the statute that, "the debentures issued under the authority of this Act shall not be liable to taxation for provincial, local, or municipal purposes, in Nova Scotia." This is as far as the legislature could go; it could not protect him if domiciled elsewhere, as then the maxim *mobilia sequuntur personam* would apply; but here the legislature went to the full extent of its authority in declaring that neither the provincial legislature, nor any body acting under its authority, should tax these bonds. But it is said that this tax is not a tax upon the bonds, but a tax upon their transmission. The statute declares otherwise. The distinction may have served the purpose of enabling the courts in the United States to surmount a constitutional difficulty, but it has no applicability here. There is a burden, as the law has been construed, imposed on the holders of these bonds, from which the Legislature of Nova Scotia expressly promised they should be exempt. By the statute of 1889, ch. 3, sec. 5, it is provided that the debentures issued under the authority of that Act, shall not be liable to taxation for provincial, local, or municipal purposes in Nova Scotia. This succession duty is a tax imposed for provincial purpose—to provide a fund for defraying in part the care of the insane, by a succession duty on certain estates. It is not a charge for the privilege of transmission, but a charge upon the estate, and declared to be so in express words. The law is not less violated were it true that the charge is not upon the property, but upon its transmission; but this contention is without foundation, as it is negatived by the words

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of the statute. Sec. 5 provides that all properties situate or being within the province of Nova Scotia, and any interests therein, or income therefrom, passing either by will or intestacy, and *all property* wherever situate or being, over which the trustee, executor, or administrator shall or may exercise control, and which shall or may come into his possession, *shall be subject to a succession duty.* This duty is a first charge upon the property, and it is made the duty of the executor or administrator (sec. 18) *to retain out of the property the amount of the duty*, and he is *not to deliver the property subject to the duty*, until he has deducted his duty therefrom, and by section 19, the executor or administrator is authorised to sell *so much of the property as may be necessary for the payment of the duty.* It is a burden upon the estate, the same as any other indebtedness, which must be met out of the estate. The Act imposes not simply a charge upon the person who may receive the estate, but a tax upon the property itself, and it is to be diminished in the hands of the executor or administrator, by the payment of this claim made on the part of the provincial government. It is the property which passes that is subject to the duty. It is not a burden imposed for the privilege of transmission but a burden imposed for the purpose mentioned, and it is impossible to succesfully contend in the face of the provisions of the statute, that the burden is not a tax upon the property, but a tax on the act of transmission. The words of the statute are *all property situate*, or being within the Province of Nova Scotia, or *any interest therein*, or *income therefrom*, shall be subject to a succession duty to be paid for the use of the province; it is upon the property, and not on the right of succession that the statute imposes the burden, and therefore, the rule which the courts in the United States have found it necessary to adopt, in order to

escape from a constitutional difficulty, has no applicability here; the words of the statute are plain, the burden is imposed not simply upon the transmission but upon the property which is the subject of transmission. In the case of *Pullen* v. *The Commissioners of Wake County* (1) Rodman J. says,

> We do not regard the tax in question as a tax on property, but rather as a tax imposed upon the succession, on the right of the legatee to take under the will.

In *Strode* v. *The Commonwealth* (2), Chapman P.-T. said:

> Now this is not to be viewed as a tax assessed upon the estate of the decedant, or of any one, but a restriction upon the right of acquisition by those who, under the law regulating the transmission of property, are entitled to take as beneficiaries without consideration. The state is still made one of the beneficiaries. It lays its hands upon the estates under such circumstances, and claims a share, and whether the share exempted is exacted as a tax, or duty, or whatever else, is of no consequence.

And the learned judge considered that the tax was therefore an exercise of the same power as a change in the law of descent.

I need not analyse this doctrine, and show how far a constitutional difficulty has carried the courts of the neighboring republic away from the doctrine of the common law in respect to property. This rule does not apply to the case before us. The words of the statute are against it. We would be ignoring them were we to say that this succession duty is not a tax upon the property.

No doubt if a state chose to do so it could provide that no one should have any right of property reaching beyond a life estate; that upon the death of the owner the property should vest in the state, and be made to revest in certain individuals, upon the payment of a certain percentage of its ascertained value, but it would

(1) 66 N. C. Rep. 361. (2) 52 Pa. St, 181.

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require a very clear statement that this was the intention of the legislature, before it would be accepted. It is declared here, that the property in question is to be exempt from all taxes, (an expression which includes succession charges as well as any other,) provincial, local, and municipal, which embraces every form of tax that can be imposed by the provincial legislature, or by any municipal body under its authority. This exemption was no doubt adopted to appreciate the value of the bonds, and to obtain for them a higher price than if no such exemption existed, and it is not consistent, in my opinion, with the honour of the legislature to suppose that they endeavoured to mislead the purchaser, and to secure from him a higher price for their securities than they would otherwise have commended. In the case of *Thompson* v. *The Advocate General* (1) in which after deciding that the property in question was not liable to the legacy duty by reason of the domicile of the deceased not being a British domicile, Lord Campbell observed :

> I think this caution should be introduced, that this exemption applies only to legacy duty, and not to probate duty. But with respect to the probate duty, if it is necessary to take out probate (the property being in Great Britain) for the purpose of administering the property, it would still be considered as situate in Great Britain, and the probate duty would attach.

And their Lordships were all agreed that where the deceased leaves a will, all the personal property, situate in Great Britain, passing under that will, is liable to probate duty, but not to legacy duty

In *Wallace* v. the *Attorney General* (2), it was held that a succession duty was not payable upon legacies given by the will of a person domiciled in a foreign country. The Lord Chancellor said—"That no claim could be sustained for a legacy duty, was not disputed. The law on that subject was finally settled in the House

(1) 12 Cl. and F. 1. (2) 1 Ch. App. 1.

of Lords, in *Thompson* v. *The Advocate General* (1)". And the converse proposition was settled by the *Attorney General* v. *Napier* (2). It was held in England in the case of *The Lord Advocate* v. *Fleming* (3), that where a policy for life insurance on the life of a father was voluntarily assigned by him to his daughter, several years before his death, during which time she paid the premium, she was held not liable to the payment of succession duty, as she had become entitled to the property prior to the death of her father.

To say that a tax may be imposed upon property in passing from one person to another, is a proposition perfectly consistent with the settled law of property, but to maintain that such an imposition is not a tax, but a charge imposed upon the beneficiary for the privilege of being allowed to succeed, is a proposition inconsistent with the words of the statute by which the duty is created, and in my opinion will be very difficult to bring within the taxing power of the Province in the face of *The Attorney General for Quebec* v. *The Queen Insurance Co.* (4) decided by the Judicial Committee, and also with *The Attorney General for Quebec* v. *Reed* (5).

In my opinion the debentures in question are exempt from taxation, and ought not to be included in the value of the estate for the purpose of fixing the amount of succession duty payable, as such charge is inconsistent with the terms of the statute by which the issue of these debentures was authorized.

ARMOUR J.—I agree in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *Lewis Chipman.*

Solicitor for the respondent: *A. A. Mackay.*

(1) 12 Cl. & F. 1.
(2) 6 Ex. 217.
(3) [1897]. A. C. 145.
(4) 3 App. Cas. 1090.
(5) 10 App. Cas. 141.

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On a subsequent day a motion was made to vary the judgment as settled by the Registrar by striking out the portion giving costs to the respondent.

Borden, K.C., in support of the motion, contended that except where it was altered by statute the common law rule that the Crown never paid nor received costs was in force in Canada, and there is no such statute in Nova Scotia. He cited 3 Blackstone, p. 533 sec. 400; *The King* v. *Archbishop of Canterbury* (1); *Reg.* v. *Beadle* (2); Maxwell on Statutes 3 ed. p. 186.

Burritt contra.

Judgment on the motion was delivered for the majority of the Court by;

THE CHIEF JUSTICE—The Court is of opinion that the motion must be refused with costs.

Section 62 of the Supreme and Exchequer Courts Act provides as follows:

> The Supreme Court may, in its discretion, order the payment of the costs of the court appealed from, and also of the appeal, or any part thereof, as well when the judgment appealed from is varied or reversed as where it is affirmed.

For twenty-five years this section, as all the other sections of the Act, has been construed as applicable to the Crown. It was so interpreted, for instance, in the cases of *Attorney General* v. *Flint* (3) and *The Queen* v. *The Bank of Nova Scotia* (4); and in *The Maritime Bank* v. *The Queen* (5), and *The Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick* (6) no costs were given in this court because the court was of opinion that they were not proper cases for so doing, but upon appeal to the Privy Council costs were given to the Crown against the appellants upon the dismissal of their appeals (7).

(1). [1902] 2 K. B. 503 at p. 569.
(2). 7 E. & B. 492.
(3) 16 Can. S. C. R. 707.
(4) 11 Can. S. C. R. 1.
(5) 17 Can. S. C. R. 657.
(6) 20 Can. S. C. R. 695.
(7) 8 Times L. R. 677.

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The Chief Justice.

The jurisprudence of this Court in the matter, until overruled by the Privy Council, will be followed in cases in which the Crown is concerned as well as in all other cases.

NESBITT J.—I neither concur in nor dissent from the judgment given on this motion. I express no opinion either way.

Motion refused with costs.

REPORTERS' NOTE.—In the following cases, where the Crown was concerned costs were allowed by this court: *Severn* v. *The Queen* (1), *City of Fredericton* v. *The Queen* (2), *Quirt* v. *The Queen* (3), *Mercer* v. *Attorney General of Ontario* (4), *St. Catharines Milling Co.* v. *The Queen* (5), *Reid* v. *Atty. Gen. of Quebec* (6), and by the Privy Council in *Hodge* v. *The Queen* (7), and *Russell* v. *The Queen* (8).

(1) 2 Can. S. C. R. 70.
(2) 3 Can. S. C. R. 505.
(3) 19 Can. S. C. R. 510.
(4) 5 Can. S. C. R. 538.
(5) 13 Can. S. C. R. 577.
(6) 8 Can. S. C. R. 408.
(7) 9 App. Cas. 117.
(8) 7 App. Cas. 829.

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*May 23.
*June 2.

ELIZE HUOT (PLAINTIFF).....APPELLANT;

AND

THÉOPHILE BIENVENU (DEFENDANT) ..... } RESPONDENT.

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

Marriage covenant—Universal community—Don mutuel—Registration—Arts. 807, 819, 1411 *C. C.—Construction of contract.*

A marriage contract contained the following clause: "Les futurs époux se sont fait et se font par ces présentes au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les biens meubles et immeubles, acquêts, conquêts, propres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès, de quelque nature qu'ils soient, et à quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant, à sa caution juratoire et gardant viduité." It was admitted that the only thing affected consisted of property belonging to the community.

Held, affirming the judgment appealed from, that the donation was one within the provisions of article 1411 of the Civil Code of Lower Canada and, as such, did not require registration, as the clause of the contract is divisible and the stipulation in question as to universal community merely a marriage covenant and not subject to the rules and formalities applicable to gifts.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, (Archibald J.), which dismissed the plaintiff's action in so far as it sought a condemnation against the defendant for an account and permitted him to proceed to a partition of the *nue propriété* of the community subject to his usufruct under the marriage contract.

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

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The question at issue on this appeal is stated in the judgment reported.

Lafleur K.C. and *Laurendeau* for the appellant.

Mignault K.C. for the respondent.

The judgment of the court was delivered by:

GIROUARD J.—Le 6 janvier, 1888, l'intimé et Euphrosine Marchand signaient à Beauharnois, devant le notaire Tassé, un contrat de mariage, dans lequel on lit la clause suivante :

Les futurs époux se sont fait et se font par ces présentes, au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les biens, meubles et immeubles, acquêts, conquêts, propres et autres biens généralement quelconques, qui se trouveront être et appartenir au premier mourant, au jour de son décès, de quelque nature qu'ils soient, et à quelques sommes qu'ils puissent monter, consister et valoir, et en quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit, sa vie durant, à sa caution juratoire et gardant viduité.

Euphrosine Marchand décéda le 22 juillet, 1900, sans enfant, ni testament et sans autre bien que sa part des biens de la communauté. Le contrat de mariage ne fut pas enregistré de son vivant. Les parties admettent que si cette clause du contrat de mariage ne constitue qu'une stipulation de communauté universelle aux termes de l'article 1411 C. C, l'enregistrement n'était pas nécessaire; si elle forme une donation, le défaut d'enregistrement en emporte la nullité. Ajoutons que les époux n'ont jamais eu de propres. L'appelante prétend que cela ne fait aucune différence et que le simple fait d'avoir inclus dans la convention tous les propres, tant ceux qui entraient en communauté que ceux qui pourraient en être exclus, déterminait le caractère de la convention et en faisait une véritable donation sujette à l'enregistrement. Nous sommes d'abord d'opinion, avec la cour d'appel et la cour de première instance, que, vu que les époux n'avaient à l'époque de

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leur mariage aucun propre exclus de la communauté et n'avaient aucune raison d'en espérer à l'avenir, appartenant tous deux à des familles pauvres, c'était une stipulation prévue par l'article 1411 du Code Civil qu'ils avaient en vue.

Mais en supposant que la convention contiendrait en sus une donation, peut-on en invoquer le défaut d'enregistrement, lorsqu'il s'agit de mettre en force l'autre partie de la clause, c.à.d., la stipulation de la communauté universelle? En d'autres termes, supposons qu'à raison de la possibilité pour les époux de recevoir des propres exclus de la communauté, doit-il s'en suivre que toute la clause du contrat de mariage est nulle faute d'enregistrement ?

Nous ne pouvons accepter la proposition légale des avocats de l'appelante que cette clause est indivisible. Ils nous réfèrent à Sirey, pour établir que la stipulation de communauté universelle autorisée par l'art. 1411 du Code Civil, correspondant à l'art. 1525 du C.N. est indivisible. Mais personne n'est venu prétendre le contraire.

La question est de savoir si la clause du contrat de mariage qui consacre à la fois une stipulation et une donation est indivisible. Sirey ne dit pas qu'elle l'est et pas une seule autorité n'a pu être citée dans ce sens.

Nous sommes d'avis qu'elle est divisible, et qu'elle peut établir deux conventions distinctes. La donation de propres exclus de la communauté faite en contrat de mariage est sujette à l'enregistrement, tandis que la stipulation de l'universalité des biens de la communauté ne l'est pas. L'une peut avoir son effet sans l'autre. Les parties admettent que les époux n'avaient que des biens de communauté, et, par conséquent, notre décision est purement théorique et n'entraîne dans l'espèce aucune conséquence pratique. Nous l'avons adoptée simplement pour déterminer le caractère

légal des conventions matrimoniales des parties. C'est ainsi que nous interprétons les articles 807, 819 et 1411 du Code Civil.

L'appel est renvoyé avec dépens.

Appeal dismissed with costs.

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Solicitors for the appellant: *Laurendeau & Laurendeau.*

Solicitors for the respondent: *Monty & Duranleau.*

GEORGE B. BURLAND (PLAINTIFF)...APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) .....RESPONDENT.

1903
*May 20,
*June 8.

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

Municipal corporation—Construction of sidewalks—Trespass—Action en bornage — Petitory action — Amendment of pleadings — Practice—R. S. C. ch. 135, s. 63.

The plaintiff brought his action to recover the value of a strip of land of which the defendant was illegally in possession. The courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au pétitoire*. In order to cease litigation, the Supreme Court of Canada reversed the judgments of the courts below, directed that the record should be remitted to the trial court for the purpose of ascertaining the extent of the property affected by the trespass and ordered the restoration thereof to the plaintiff.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the

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

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BURLAND v. CITY OF MONTREAL.

Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The case is stated in the judgment now reported.

Perron for the appellant.

Atwater K. C. and *Archambault K. C.* for the respondent.

The judgment of the court was delivered by:

The CHIEF JUSTICE.—This is an appeal from a judgment of the Court of King's Bench, at Montreal, by which the appellant's action was dismissed. He claims thereby the value of 473 feet of land of which, as he alleges, the respondent is illegally in possession.

The respondent pleaded that, if its officers or contractors had taken possession of any of the appellant's property, they were ready to return the possession of it to the appellant. The appellant replied that the respondent's offer was now too late, and that the city was bound to pay the value of his land of which it was in possession.

The judgments of the Superior Court and of the Court of Appeal concede that the respondent is, in fact, in possession illegally of a strip of the appellant's property, but they dismissed the action on the ground that the appellant's remedy is by an action *en bornage* or *au pétitoire*.

I would think that the controversy between the parties, as it appears upon the record, ought to be determined in the present case so as to avert any further litigation in the matter.

What is now the real controversy between the parties? (See sec. 63 of the Supreme Court Act.) Nothing else than a controversy as to the extent of appellant's land which the respondent's contractors took possession of when they built, in 1892, a permanent sidewalk in front of it.

At the trial, one of the witnesses put it at 473 feet, and another one at 271 feet. So that, under the circumstances, the record should be remitted back to the Superior Court for the purpose of ascertaining, by expertise or otherwise, as the court thinks proper, what is the extent of the appellant's property which is covered by the said sidewalk, and ordering that the respondent should, within the delay fixed by the court, restore the said property to the appellant in exactly the same state as it was when the said sidewalk was constructed, all the necessary amendments of the pleadings being treated as having been made.

There will be no costs upon this appeal nor in the Court of King's Bench. Costs in the Superior Court to be later adjudicated upon in its discretion.

Appeal allowed without costs.

Solicitors for the appellant: *Préfontaine, Archer & Perron.*

Solicitors for the respondent: *Ethier & Archambault.*

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*Mar. 31, April 1,2. *May 5.

THE CITY OF OTTAWA (DEFENDANT)..... APPELLANT;

AND

THE CANADA ATLANTIC RAILWAY COMPANY (PLAINTIFFS).... RESPONDENTS.

THE CITY OF OTTAWA (DEFENDANT)..... APPELLANT;

AND

THE MONTREAL AND OTTAWA RAILWAY COMPANY (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Highway crossing—Compensation to Municipality—Terminus "at or near" point named.—Control of Streets.

Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.

A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa passing through the counties of Vaudreuil, Prescott and Russell.

Held, that if it were necessary the railway could pass through Carleton County though it was not named.

Held also, that in this act the words "at or near the City of Ottawa" meant "in or near" said city.

Judgment of the Court of Appeal (4 Ont. L. R. 56) affirming the judgment at the trial (2 Ont. L. R. 336) affirmed.

APPEAL from decisions of the Court of Appeal for Ontario (1) affirming the judgments at the trial (2) in favour of the respective plaintiffs.

* PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour J.J.

(1) 4 Ont. L.R. 56. (2) 2 Ont. L.R. 336.

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CITY OF OTTAWA. v. CANADA ATLANTIC RWAY. CO.

CITY OF OTTAWA. v. MONTREAL AND OTTAWA RWAY. CO.

The Canada Atlantic Railway Co., being empowered by charter to build a railway from Coteau Landing to Ottawa obtained from the Railway Committee of the Privy Council an *ex parte* order approving of the plan and profile filed and proceeded with the construction of the road which crossed Bridge street one of the highways of Ottawa. The city authorities attempted to prevent the operation of the road over this highway claiming that their permission therefor was necessary whereupon the company brought an action for an injunction and damages. The city by counterclaim also asked for an injunction against the operating of the road and for a mandatory order for removal of the crossing.

The Montreal and Ottawa Railway Co. was, by its charter, empowered to build a railway from Vaudreuil in Quebec to a point at or near Ottawa passing through the counties of Vaudreuil, Prescott and Russell. Their plan and profile were approved by the Railway Committee and the road was constructed coming into Ottawa and crossing the highway at Wellington street. Similar proceedings to those of the Canada Atlantic Ry. Co. were taken except that the city claimed damages instead of an order for removal of the crossing. It was claimed that the railway had no right to enter the city nor to pass through the County of Carleton as they necessarily did.

The actions were tried and decided together and each resulted in favor of the plaintiffs whose judgment was upheld by the Court of Appeal. The City appealed in both cases to the Supreme Court of Canada.

Aylesworth K.C. and *McVeity* for the appellants. The fee in the soil of the highway is in the municipality; *Roach* v. *Ryan* (1); *Galbreath* v. *Armour* (2); R. S. O. [1897] ch. 223, secs. 598, 601, 640 (2), 657; Lewis on Eminent Domain, secs. 110–118.

(1) 22 O. R. 107,

(2) 4 Bell App. Cas. 374.

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CITY OF OTTAWA. v. CANADA ATLANTIC RWAY. CO.

CITY OF OTTAWA. v. MONTREAL AND OTTAWA RWAY. CO.

The Railway Committee had no right to authorize the highway to be crossed without consent of the city. *The City of Toronto* v. *Metropolitan Railway Co* (1).

The Montreal and Ottawa Railway Co. were not authorized to pass through Carleton County and the power to build to a point "at or near" the city precluded them from coming within it.

Chrysler K. C. for the respondents, The Canada Atlantic Railway Co. The municipal authorities have no proprietary rights in the soil of the streets but only hold them as trustees for the public with a limited power of sale on compliance with the conditions contained in the Municipal Act. *Municipal Council of Sydney* v. *Young* (2), ; *Coverdale* v. *Charlton* (3) ; *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts* (4).

The company, being authorized to take the land for purposes of the railway, are not liable to make compensation unless the statute so provides. *East Freemantle Corporation* v. *Annois* (5) ;

Nesbitt K. C. and *Curle* for the respondents, The Montreal and Ottawa Railway Co. As to ownership of highway see *Gooderham* v. *City of Toronto* (6).

THE CHIEF JUSTICE.—This is an appeal by the defendants from the judgment of the Court of Appeal for Ontario, reported at page 56 of 4 Ont. L.R., affirming the judgment pronounced at the trial which had granted an injunction as prayed for by the respondents' action, restraining the said appellants from preventing or interfering with the railway company, respondents, in crossing with their railway a certain street called Bridge street, in the City of Ottawa, and had dismissed a counter-claim of the apppellants, for an injunction

(1) 31 O. R. 367.
(2) [1898] A. C. 457.
(3) 4 Q. B. D. 104.
(4) 15 Q. B. D. 1.
(5) [1902] A. C. 213.
(6) 25 Can. S. C. R. 246.

restraining the respondent company from crossing the said street with their railway.

The respondents raised *in limine* an objection to the appellants' right of appeal on the ground that the case did not fall within the Act 60 & 61 Vic. c. 34, which governs, as to Ontario cases, the jurisdiction of this Court. But as we have come to the conclusion that the appeal must be dismissed on the merits, it is unnecessary to pass upon the point so raised by the respondents.

The broad question involved in this case is, whether or not the respondent company had the right to cross the highway in question without expropriating its right of way from and without making compensation therefor to the defendant Municipality in which the said highway is situated.

We are of opinion with the court appealed from that the company had that right. The elaborate opinions delivered upon that point in support of the judgment reported, (1), render it useless, as we fully agree with them, that we should here review again the statutes upon which the solution of the question depends. This company is chartered with authority to construct a railway from Coteau Landing to Ottawa. That gives them, by necessary implication, the authority to cross each and every one of the numerous intervening highways between such termini. The interference with them is of necessity made lawful. Then the Dominion statute, 51 V. ch. 29, sec. 90 (g) specially enacts that the company may make or construct, in, upon, across or over any highway, roads, ways, passages, &., and (q) do all other acts necessary for making and maintaining the said railway. The appellants have failed to point to anything in the statute which could at all support their contention

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(1) 4 Ont. L. R. 56.

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The Chief Justice.

that no highway can be crossed without the leave of the municipality. And the Railway Committee's interference is required, not to give leave to cross, but to decree what measures of protection for the public safety the company will have to adopt under the circumstances of each case. And that has been found as a fact to have been done in this case by the two Ontario courts. Then as to the claim for compensation. It is not an expropriation of the highway that the respondent company are claiming. They do not intend to divest the appellants of their rights of property in the road bed. They merely want to cross it. Now, nowhere in the statute is any provision to be found for compensation to a municipality in such case. And there is no right of compensation if the statute has not provided for any.

In the case of the Montreal and Ottawa Railway Company, the further objection is taken by the appellants that the respondent company has no right to enter the City of Ottawa and consequently cannot cross any of its streets.

The preamble to the respondents' special Act says that:

> The construction of a line of railway from a point on the Grand Trunk Railway in the Parish of Vaudreuil in the Province of Quebec, to a point at or near the City of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott and Russell, would be greatly beneficial to the population of the counties traversed by the railway as to the general trade of the country,

and the company was authorized to construct a railway, from a point on the Grand Trunk Railway in the Parish of Vaudreuil to a point *at or near the City of Ottawa* in the Province of Ontario, passing through the Counties of Vaudreuil, Prescott and Russell, (and were empowered to) connect their railway with the Grand Trunk Railway in the Parish of Vaudreuil and with the railway of any other railway company having a terminus *at or near the City of Ottawa.*

The appellants contend that, as the railway cannot reach Ottawa without passing through the County of

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Carleton, and as only the Counties of Vaudreuil, Prescott and Russell are mentioned as those through which the railway is to pass, that, coupled with the words "at or near the City of Ottawa", does not authorize them to enter the City of Ottawa. But that contention cannot prevail. We must give to the words in that charter a reasonable interpretation with reference to the subject matter and the public object that the legislative authority had in view. If necessary to pass through the County of Carleton to reach its terminus, the statute must be read as if that County was included in express words. A statute must not be construed so as to defeat the clear intention of Parliament as the appellants would have us to do here. The same thing may be said as to the words "at or near". There is no inflexible rule that "at" is always to be construed as exclusive, and we have not to lay down any broad proposition as to its signification. What it means in this statute is all what we have to determine. That the words "to a point at the City of Ottawa" must in this charter be read as "to a point in the City of Ottawa" is to my mind the only reasonable construction to be given to those words under the circumstances. And the words "near" given as the alternative point where the terminus may be shows that "at" and "near" cannot be construed as meaning the same thing, as the appellants' contention implies.

Then, any doubt in the matter is removed by the Act 63 & 64 Vic., c. 66 by which the railway company is granted in 1900 an extension of four years to complete the railway that their charter authorized them to construct. As their road was then completed up to the boundary line of the City, that statute must be taken as a legislative declaration that their charter authorized them to build up to a point in the City.

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Mills J.

GIROUARD, DAVIES and ARMOUR JJ. concurred.

MILLS J.—I concur in the judgment of my lord the Chief Justice. I am of opinion that the Railway Company had the right to cross the highway in question without expropriating it. The right of way which a railway company acquire in a public street which continues to be such is a mere easement, and it is for the Railway Committee of the Privy Council to settle the terms and conditions upon which that easement is to be exercised, whenever their authority is properly invoked. I am of opinion that the words "at or near the City of Ottawa" mean "in or near the City of Ottawa", otherwise, the same meaning would be given to the two words. When it is said A. is at home, the idea conveyed is not that he is near to his home, or upon his border, but that he is within his own domain, and so the proposal to extend a line of railway from the City of Montreal, to a point "at or near the City of Ottawa" means near it, or within its limits.

Appeals dismissed with costs.

Solicitor for the appellants: *Taylor McVeity.*

Solicitors for the respondents C. A. Ry. Co.: *Chrysler & Bethune.*

Sollicitors for the respondents M. & O. Ry. Co.: *Scott, Scott, Curle & Gleeson.*

THE NORTH AMERICAN LIFE ASSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

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*Mar. 26.

*April 22

AND

JANE ELSON (PLAINTIFF)..... ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Life insurance—Delivery of policy—Escrow—Incontestability—Operation of conditions.

An application for life insurance dated 16th September, 1894, and made part of the contract to be effected, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof and that the place of contract for all purposes should be the head office of the company at Toronto. The policy insured the applicant's life to the fifth day of October, 1895, and provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the President and Managing Director signed and delivered this contract "at the City of Toronto this 27th day of September, A.D. 1894." The insured lived in British Columbia and the policy and receipt were mailed at Toronto on September 27th to the company's agent at Winnipeg, and forwarded by him on October 1st to the insured who would not receive it before October 7th. The insured died on 30th September, 1897.

Held, Taschereau C.J. dissenting, that the policy and receipt were delivered, and the contract of insurance was completed, at least as early as 27th September, 1894, when the papers were mailed at Toronto.

The policy provided that, after being in force for three years, only certain specified conditions therein should be binding on the holder and in all other respects the liability of the company thereunder should not be disputed. The insured violated a condition, but not one so specified, that would have avoided the policy but for this clause.

* PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour JJ.

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Held, that said provision covered breaches of conditions made during the three years the policy was in force, and was not confined to those committed subsequently thereto, and as the three years expired on 27th September, 1897, the insured dying three days later, the company was liable.

APPEAL from the decision of the Supreme Court of British Columbia reversing the judgment at the trial in favour of the defendants.

The only questions raised on the appeal were as to the date on which the policy came into force on which depended the operation or otherwise of the clause making it incontestable after the lapse of three years and as to whether or not such clause applied to breaches committed during the three years. The facts on which the decision of these questions depended are sufficiently stated in the above head-note.

J. K. Kerr K.C. and *Paterson K C.* for the appellants By the terms of the policy and the receipts for the premiums, the policy did not commence its operation until delivered in British Columbia some time later than 5th Oct. 1894. The application provided that the place of the contract for all purposes should be the place of the delivery of the policy. There was, therefore, no contract until the policy was delivered. By the terms of the application, the policy was not in force until the delivery to the insured of the initial premium receipt and this receipt was sent with the policy in letter of 27th September, 1894, by the appellant to Wm. McBride, and followed the same course as the policy, getting into Elson's hands in ordinary course between 7th and 10th Oct., 1894. By its terms the policy was not in force until the annual payment to and acceptance of the first premium due thereon by an authorized agent of the company and the delivery to the insured of the necessary receipt signed by the managing director, the life proposed for insurance being

at the time of such payment in the same condition of health as stated in the application.

The insured, in May, 1897, entered into a business of extra hazard, that of brakesman on a railroad and was killed in an explosion upon the railway on 30th September, 1897. The policy provided that if he, without a permit, engaged "in the employment on a railroad" then that the policy should forthwith become and be null and void without any act on the part of the company and all payments made upon it should be forfeited to the company. The insured was not, therefore, protected by the clause as to incontestability after three years and the appellant is consequently not liable and the judgment of the learned judge at the trial should not have been reversed.

Even on the assumption that the contract became operative at the time of the application on 18th September, 1894, the clause as to incontestability after three years will not avail the respondent. The deceased entered into the forbidden occupation on a railway in May, 1897, which was within the three years. It must follow by the terms of the policy that in May, 1897, without any act on the appellant's part it became *ipso facto* null and void. The contract thereupon came to an abrupt conclusion and there was nothing upon which the respondent could base any claim.

It is definitely provided that it requires four combining circumstances to put the policy in force in this case:—(1.) Actual payment to and acceptance of the first premium by an authorized agent of the company; (2.) The delivery to the insured of the initial receipt signed by the managing director; (3.) The life proposed for insurance being at the time of such payment in the same condition of health as stated in the application; (4.) The delivery of the policy. Respondent did not prove the delivery of the receipt or policy

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before 5th Oct., 1894. The case of *Xenos* v. *Wickham* (1) does not apply. See *per* Piggott B. at p. 309, of that report citing *Doe d. Garnons* v. *Knight* (2), and also *per* Cranworth L.J. at p. 322. Until the special time has arrived or the condition has been performed the instrument is not a deed but an escrow. See also *Tiernan* v. *Peoples Life Ins. Co.* (3), at p. 354; *Sun Life Assur. Co.* v. *Page* (4); *Confederation Life Association* v. *O'Donnell* (5).

The agent in British Columbia had no power to waive forfeiture or to modify the contract. Elson had notice that the agent had no such authority, and stated his preference to deal directly with the head office at Torouto. For these reasons, *Campbell* v. *National Life Ins. Co.* (6), and *Moffatt* v. *Reliance Mut. Life Assur. Soc.* (7), do not help the respondent. Elson knew of this limited authority, and therefore *Wing* v. *Harvey* (8) does not apply in favour of respondent, nor does *Acey* v. *Fernie* (9).

The appellant knew nothing of Elson having worked as a brakesman until after his death, and therefore the acceptance of payment of the last premium, on the 29th September, 1897, was no waiver of the forfeiture; *Jacobs* v. *Equitable Ins. Co.* (10), at p. 46. The appellant was justified in retaining this premium, as it is part of the contract that "if any material information has been withheld by the insured all sums which shall have been paid to the company upon account of the insurance made in consequence shall be forfeited and the insurance shall be absolutely null and void." The retention was no waiver of the forfeiture. Furthermore the insurance was absolutely null and void in

(1) L. R. 2 H. L. 296
(2) 5 B. & C. 671.
(3) 23 Ont. App. R. 342.
(4) 15 Ont. App. R. 704.
(5) 10 Can. S. C. R. 92; 13 Can. S. C. R. 218; 16 Can. S. C. R. 717.
(6) 24 U. C. C. P. 133.
(7) 45 U. C. Q. B. 561.
(8) 5 DeG. M. & G. 265.
(9) 7 M. & W. 151.
(10) 17 U. C. Q. B. 35.

May, 1897, and there was therefore nothing left upon which any waiver could operate.

We also rely upon *The Mutual Life Insurance Co. of Canada* v. *Giguère* (1); *Provident Savings* v *Mowat* (2); *Kohen* v. *Mutual Reserve* (3); *Misselhorn* v *Mutual Reserve Fund Life Assn.* (4); *McCully's Administrator* v. *Phœnix Mutual Life Ins. Co.* (5); *Steinle* v. *New York Life Ins. Co.* (6).

The respondent cannot recover in this action, as no contract was ever made with her by the appellant. The contract was with the deceased, and with nobody else, and the right to sue passed to his legal representatives, and they are not parties to this action. *Cleaver* v. *Mutual Reserve Fund Life Assn.* (7); *Wright* v. *The Mutual Benefit Life Assn.* (8); at page 243,

Duff K.C. for the respondent. The change of occupation is not disputed, but the plaintiff's case is on the grounds that either a permit was granted, or that breach was waived, and that, even in the absence of waiver, the defendants are not entitled to set up the breach, because of the clause in the policy making it indisputable after three years. The case as to waiver is that in June, 1897, after the change of employment, the insured informed the defendants' manager in British Columbia of the change, who, subsequently, informed his father that the company did not object to the change because it involved no increase of risk. The clause providing that no provisions in the policy shall be waived except in writing under the hand of the President or Managing Director does not help defendants, because, (*a*) it refers only to waiver of terms of the policy, not to waiver of a breach of such terms, a distinction recognized in the policy; and (*b*) if necessary the jury might

(1) 32 Can. S. C. R. 348.
(2) 32 Can. S. C. R. 147.
(3) 28 Fed. Rep. 705.
(4) 30 Fed. Rep. 545.
(5) 18 W. Va. 782.
(6) 81 Fed. Rep. 489.
(7) [1892] 1 Q. B. 147.
(8) 118 N. Y. 237.

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infer a formal waiver by the company. *Wing* v. *Harvey* (1); *Phœnix Life Co.* v. *Raddin*, (2). Further, by the claim papers, the company had notice in October, 1897, of the change of employment, and with that knowledge they kept a premium paid in September, 1897, five months after the alleged breach. The retention of this premium was a waiver of the alleged breach, because the company cannot, while holding moneys paid on the faith of the policy subsisting, resist an action upon it on the ground that at the time those moneys were received the policy had ceased to be binding on them. *New York Life Ins. Co.* v. *Baker*, (3); *Canada Landed Credit Co.* v. *The Canada Ag. Ins. Co.* (4). The incontestability clause forbids the defence upon which defendants rely. The obligation of defendants commenced not later than 17th Sept., 1894. The first premium receipt was delivered to Elson on 18th Sept., 1894. This receipt is said by the Managing Director of the defendants to have "put the policy in force." The risk was finally accepted and the policy issued on 27th Sept., 1894. The company "delivered this contract at the City of Toronto this 27th day of September, A.D. 1894." The last sentence of the incontestability clause governs the clause, and at the end of the period, the only defences open to the company are those specified in its earlier sentences. Every other clause in the policy must be read subject to this provision of the incontestability clause. See *Davenport* v. *The Queen* (5) at p. 128; *Doe d. Bryan* v. *Bancks* (6); *Roberts* v. *Davey* (7); and other cases in the notes to *Dumpor's Case* (8); *Turquand* v. *Armstrong* (9); *Massachusetts Benefit Life Assn.* v. *Robinson* (10); *Goodwin* v. *Provident*

(1) 5 DeG. M. & G. 265:
(2) 120 U. S., R. 183.
(3) 83 Fed. Rep. 647.
(4) 17 Gr. 418.
(5) 3 App. Cas. 115.
(6) 4 B. & Ald. 401.
(7) 4 B. & Ad. 664.
(8) 1 Sm. L.C. (11 ed.) 32.
(9) 9 Ir. L.R. (N.S.) 32.
(10) 30, S.E. Rep. 918, 927.

Savings Life Assur. Society (1); *Manufacturers' Life Ins. Co.* v. *Anctil* (2) per Sedgewick J. at p. 126.

In the construction of policies the *strictum jus* or *apex juris* is not to be laid hold of, but they are to be construed largely, for the benefit of trade and the insured. *Per* Mansfield L. J. in *Pelly* v. *Royal Exchange* (3); *Notman* v. *Anchor Ass. Co.* (4); *Fitton* v. *Accidental Death Ins. Co.*, (5); *Thompson* v. *Phœnix Insurance Co.* (6); Porter on Insurance (3 ed.) p 32.

THE CHIEF JUSTICE (dissenting).—I would allow this appeal upon the ground that, as held by Mr. Justice Martin at the trial, the policy in question did not come into force before the 5th October 1894, and consequently had not been in force for three years at the time of the death of the insured on the 30th September 1897; so that the incontestability clause cannot be invoked by the respondent. And without the benefit of that clause she clearly cannot succeed.

The application for insurance dated 18th September, 1894, the terms of which application are expressly made part of the contract in question, contains the following declarations and agreements.

That a policy if issued in the company's usual form and delivered shall be the only acceptance of this application.

That such policy will be accepted *when presented* subject to the terms n and upon the said policy and as herein set forth.

The policy itself dated 27th September, 1894, contains the following declarations and agreements.

After being in force three years the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided, and that the provisions as to military and naval services, proofs of age and death and limitation of time for action or suit shall be observed. In all other respects after

(1) 66 N.W. Rep. 157.
(2) 28 Can. S. C. R., 103.
(3) 1 Burr 341, 348.
(4) 4 C.B.N.S. 476 at 481.
(4) 17 C.B.N.S., 122 at 135.
(5) 136 U.S.R., 287 297.

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the expiration of the said three years the liability of the company under this policy shall not be disputed.

The following is indorsed on the policy:

This policy is issued and also accepted by the insured upon the following additional provisoes and agreements therein made a part thereof and, (*inter alia*) if without a permit the insured engaged*** in the employment on a railroad, steamboat or other vessel*** this policy shall thereupon become and be null and void without any act on the part of the company and all payments made upon it shall be forfeited to the company.

The first premium receipt, dated 18th September 1894, is stated to be

subject to all the provisions of the said policy and those on the back hereof hereby incorporated herein.

By the terms of the policy and of the receipts the contract ended upon the 5th October in any year. And as the premiums were annual premiums the policy must have commenced its operation upon the 5th October, 1894. That seems to me unquestionable.

By the terms of the application the contract commenced from the delivery of the policy and the policy was sent by the appellant's letter dated 27th September, 1894, to William McBride at Winnipeg, agent of the appellant, for delivery to Elson in British Columbia. McBride forwarded it from Winnipeg to Elson on the 1st October, 1894. According to the evidence it would then have reached Elson in ordinary course between the 7th and 10th October, 1894.

By the terms of the application moreover, the policy *was not in force* until the delivery to the insured of the initial premium receipt and this receipt was sent with the policy in letter of 27th September 1894, by the appellant to Wm. McBride, and this receipt followed the same course as the policy, getting into Elson's hands in ordinary course between the 7th and 10th

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October, 1894. Until that receipt reached Elson, his life was not insured.

The onus was upon the respondent to prove when the contract commenced, and for that purpose she examined Wm. McCabe the appellant's managing director. From his evidence it appears clearly that the contract could not have commenced before the 5th of October 1894. The receipt itself for the premium of 1897 leaves no room for doubt upon that fact It is a continuance of the policy from the 5th of October, 1897, for one year. That necessarily implies that the first year began on the 5th of October of the year 1894 in which the policy was issued. It reads as follows :

HEAD OFFICE, TORONTO, ONT.

Due October 5th, 1897—$9.$\frac{88}{100}$. Sum insured $1,000.

Received this 29th day of September, 1897, Nine $\frac{88}{100}$ Dollars from the owner of Commercial Policy No. 02647, on the life of Geo. Wm. Elson, Esq., for the regular premium *due as above stated*, hereby continuing the insurance thereunder for twelve *months from above due date* only, subject to all the provisions of the said policy and those on the back hereof, hereby incorporated herein.

WM. McCABE,
Managing Director.

Elson had taken employment on a railroad contrary to the express stipulation of the policy, so that he had forfeited all his rights under it, and he having died before the expiration of three years from the date that the policy was in force the company is not precluded, by the incontestability clause, from pleading such forfeiture in answer to the respondent's action.

The judgment of the majority of the Court was delivered by

DAVIES J.—By their policy of insurance dated at the Head office of the Company, Toronto, on the 27th September 1894, the North American Life Ass. Co. insured the life of George Elson for the term ending at

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noon on the 5th October 1895 and promised to pay to the plaintiff his mother the sum of $1,000 within a certain time after proofs of his death. The policy was mailed by the company on the day of its date to one of its western agents to be handed the insured, and the subsequent premiums were paid annually up to and including that due on the 27th September 1897. About five months before his death the insured engaged in employment upon the Canadian Pacific Railway which is one of the hazardous employments prohibited by the policy. The substantial question raised upon this appeal was as to the meaning and effect of the clause known as the "incontestable clause" of the policy sued on. A question was raised and argued by Mr. Kerr as to the date when the policy came into force and we were of the opinion on the hearing (and in fact the respondent's counsel was stopped on the point) that the policy went into operation and took effect from, at any rate, the date when it was posted by the company in Toronto, 27th September 1894, for transmission to the insured. If, therefore, the "incontestable clause" covers breaches of the conditions committed during the three years the policy was in force, the company would be liable, the insured not having been killed until the 30th September, 1897, two or three days after the expiration of the three years.

The policy contained on its face the following clause :

> After being in force three years, the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided, and that the provisions as to military and naval service, proofs of age and death, and limitation of time for action or suit shall be observed. In all other respects after the expiration of the said three years the liability of the company under this policy shall not be disputed.

In order to construe this clause properly it is necessary to read it in connection with the following condi-

tion or provision indorsed upon the policy and which was made expressly a part of the contract:

1. If any statement made in the application and therein declared to be material to the contract, be untrue; or if any premium, note, cheque or other obligation given for the first or any subsequent premium or any part thereof, or any renewal of any such note or other obligation or any part thereof, be not paid when due; or if, without a permit the insured engages as an occupation: (1) in blasting, mining, submarine labour, the production of any explosive material, or in any naval or military service (except in time of war); or (2) engage in aerial or arctic voyages or in employment on a railroad, a steamboat or other vessel; or (3) reside elsewhere than in Canada, Newfoundland, Europe or the United States; or (4) between the 15th days of June and November in any year reside in any part of the United States south of the 26th degree of North Latitude, or in Europe south of the 42nd degree; this policy shall thereupon become and be null and void, and all payments made upon it shall be forfeited to the company.

I am of the opinion that the Supreme Court of British Columbia was right in holding that the object of the above incontestable clause "was to provide an automatic cutting off at the end of the triennium of all defences arising after the coming into force of the policy except such as are reserved in the clause itself." And, I would add further, of all defences arising out of any untrue or incorrect material statement made in the application for the policy.

The contention of the appellants was that the clause in question did not operate to relieve the insured from any breach of condition invalidating the policy happening within the three years, but only those happening afterwards. But I think a careful examination of the clause in connection with the first condition of the policy will show that such a contention is both narrow and untenable. In fact it whittles down the meaning of the clause so much as to make it practically illusory and valueless. If given effect to it still leaves the policy liable to be avoided by the company five, ten or even twenty years after it was issued, if some state-

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ment made by the insured in his original application and therein declared to be material turned out afterwards to be untrue, or if the company discovered that within the first three years the policy was in force, the insured had, wittingly or otherwise, broken one of the many conditions to which the policy was subject. It seeks to give an effect to the opening words of the clause "after being in force three years" which I do not think they fairly bear and which I feel confident neither party to the contract could have intended, and I think it reaches that conclusion by ignoring or unduly limiting the meaning of the closing sentence of the clause. I construe the first part of the clause as dispensing after three years with further compliance by the insured with any condition excepting the ones expressly reserved, viz. those relating to payments, military and naval service, proofs of age and death, and limitations of time for bringing actions. In that view, with which Mr. Kerr concurred, the last sentence was unnecessary. That last sentence, however, does not confine itself to stipulations about conditions but broadly and unreservedly says

> in all other respects after the expiration of the said three years the *liability of the company under this policy shall not be disputed.*

One part of the clause dispenses with future compliance with the general conditions and the other renders the policy indisputable after the three years, except for breaches of some of the special conditions which are retained and continued. The words of the latter clause are not that the liability of the company shall not be disputed because of breaches committed after three years, as is now contended for, but that absolutely and in all other respects than the ones specifically set out, it shall be indisputable. If the clause is to operate as containing the limitation sought to be put

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upon it now by the company then they must alter its phraseology and clearly insert the limitation.

The counsel for the respondents were on the argument pressed with the question whether the clause covered untrue statements made in the application and Mr. Patterson felt himself compelled to admit that apart from fraud he thought it did. If it does it is indisputable that the clause relates as well to breaches within the three years and covers them as to breaches occuring after three years. Once it is admitted that the phase "In all other respects" with which the last sentence begins applies to untrue statements made in the original application, then, in my opinion, it must follow that it covers other breaches although made within the three years. In fact the last sentence was unnecessary if limited alone to breaches arising after three years. There could be no breach because there was no condition then existing. The first part of the clause annulled all conditions after three years excepting those expressly retained, and there would therefore be no necessity for the last sentence at all. But it was, in my opinion, inserted to cover the obvious intent and meaning of the parties to the contract and to give assurance to the party insuring that, after the lapse of the three years, he need not worry about his policy because it was indisputable except for the breach of the two or three conditions or things specifically mentioned and which therefore he would have to be careful about.

Appeal dismissed with costs.

Solicitors for the appellants: *Drake, Jackson & Helmcken.*

Solicitors for the respondents: *Cowan, Kappele & McEvoy,*

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*Mar. 2–6.

*April 29.

THE CITY OF MONTREAL.....APPELLANTS;

AND

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

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

Contract—Construction of works—Specifications—"From" and "to" streets—Reference to annexed plan—Construction of deed—Mistake—Costs.

The words "from" and "to" streets mentioned in specifications for the construction of works undertaken by an agreement in writing as shown on a plan annexed to and declared to form part of the contract are not necessarily exclusive and, in the case in question, where the agreement provided that the works should be constructed "along Notre-Dame street from Berri street to Lacroix street as shown on the said plan" these words mean as far as the plan shows along Notre-Dame street but not exceeding the most distant side of Lacroix street.

Mills and Armour JJ, dissenting, were of opinion that the plan was annexed to the written agreement merely for the purposes of illustration and that the words in the agreement limited the contract so that the works undertaken would not include constructions shown on the plan over any portion of either Berri street or Lacroix street.

APPEAL from a judgment of the Court of King's Bench, appeal side, which reversed the judgment of the Superior Court, District of Montreal, dismissed the defendant's cross-action for the annulment of a deed on the ground of error and maintained the plaintiff's action with costs.

The action was brought by the company to recover $38,345.09 for a share of a cost of certain works undertaken to be constructed by the city and the company together under an agreement in writing dated the 19th

*PRESENT:—Sedgewick, Girouard, Davies, Mills and Armour JJ.

of December 1893, the material clauses of which are referred to in the judgments on the appeal. The point in controversy between the parties was as to which of them should bear the cost of that portion of the bridging in question which extends across Lacroix street at the Place Viger terminus of the Canadian Pacific Railway in Montreal. The questions arising on the appeal are stated in the judgments reported.

Atwater K. C. and *Ethier K. C* for the appellant.

Lafleur K. C. for the respondents.

SEDGEWICK J.—The appeal should in my opinion, be allowed in part and the judgment appealed from varied in the manner and for the reasons stated by my brother Girouard.

GIROUARD J.—In this, as in all cases where big corporations are litigants and large interests at stake, the record is voluminous, but after having been threshed out in two courts, where their respective pretentions have been fully discussed, I think the issue before us is narrowed down to a simple question of interpretation of contract.

On the 19th December, 1893, the City of Montreal and the Canadian Pacific Railway Company signed a notarial agreement and a plan annexed to it as part of the same, whereby the parties undertook to provide for the erection of what was called the Eastern Station near Place Viger. The Canadian Pacific Railway Co. undertook to build a large station, freight sheds and other works, and the city promised to deliver to the railway company a certain area of land between Craig and Notre-Dame Streets, Berri Street to the west and Lacroix Street to the east, and to construct an iron bridge or viaduct along Notre Dame Street. All these extensive works are indicated in the deed and plan

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which were both signed by the parties and their counsel. The construction of the iron bridge by the city alone is involved in this appeal. Clause 5 of the contract declares:

The corporation covenant that they will construct and maintain a bridge for highway purposes along Notre Dame Street, from Berri Street to Lacroix Street, as shown on the said plan.

The city commenced to build the bridge, but before reaching Lacroix Street expressed the opinion that they were not called upon by the contract to go beyond the westerly limit of Lacroix Street. Thereupon the following deed of compromise was arrived at in 1896. I quote the whole deed in order to understand fully the intention and agreement of the parties:

Whereas under and by a certain deed of agreement passed before the undersigned notary on the nineteenth day of December eighteen hundred and ninety three between the said City of Montreal and the said railway company about the construction of the Eastern Station in the said City of Montreal, the said City of Montreal did undertake to construct and maintain a bridge for highway purposes along Notre Dame Street from Berri Street to Lacroix Street as shown on the plan annexed to the said deed, of such a height as to make the land below it available for railway purposes, and to give the said company the right to use the land below the said structure as it may require for railway purposes;

Whereas the said City of Montreal alleges that it has constructed the said bridge from Berri Street to the *south-west* line of Lacroix Street according to the said contract;

Whereas the said railway company has contended that under the clause hereinabove cited of the said deed of agreement and according to the plan annexed to the said contract, the said city is bound to continue the construction of the said bridge up to a point on the *north-east side* of the said Lacroix street, as shown on the said plan, which contention the said City of Montreal regards as incorrect and not in conformity with the said agreement and clauses thereof;

Whereas the said parties have agreed some time ago to have that question decided by the court and in the meantime to proceed with the completion of the said bridge;

Whereas under said understanding the said city has continued the said works up to date, but is now unable to continue on account of its inability of advancing the funds necessary for the said works;

And whereas the said parties are desirous to complete the said bridge as shown on the said plan as soon as possible;

Now therefore these presents, and I the said notary, witness:

That the said parties do respectively agree one with the other as follows:—

The said railway company agrees to advance to the city all the moneys necessary for the completion of the said bridge, *either on Notre Dame or Lacroix Street as shown on the said plan* to the extent of thirty-five thousand eight hundred dollars, the amount of the city's estimate for the cost of completing the bridge as aforesaid, and the said city agrees to proceed with the said bridge on the following terms, under the supervision of the said railway company's Engineer.

And the City of Montreal agrees that it will apply to the Legislature of the Province of Quebec at its next session for and will use its best endeavour to obtain legislation permitting the city to raise the money necessary to complete the said bridge as aforesaid, and if such legislation be obtained, or (I believe "and" was intended) if a court of competent jurisdiction finally decides that the city is liable under the said agreement to bear the cost of constructing and completing the said bridge *further north than the line of the southerly limit of Lacroix Street*, then any moneys advanced in the mean time by the said company for that purpose, as hereinabove provided, shall be forthwith reimbursed by the city to the said railway company with five per cent per year interest thereon, and the city shall bear alone the cost of constructing and completing the said bridge as aforesaid.

And the said railway company undertakes that if the said judgment finally decides that the said city is not liable under the said agreement to construct the said bridge *further north then the line of the southern limit of Lacroix Street*, then the said railway company will forthwith, on demand, repay to the said city all moneys which the said City may have expended either before or after the execution hereof in completing the same, provided that the amount of such expenditure and the amount expended for the same purpose by the said railway company shall together not exceed thirty-five thousand eight hundred dollars, the amount of the said city's estimate of the cost of completing the bridge as aforesaid, the said company being not bound to repay any sum over said amount, and will also pay interest on such moneys as may have been disbursed by the city for the said purpose at the rate of five per cent per annum from the respective periods of such disbursements.

Nothing in these presents shall be held to affect or diminish the rights of either party under the said agreement of the nineteenth of December eighteen hundred and ninety-three.

A total sum of $35,771.22 was advanced to the city in pursuance of this compromise. The Canadian Pacific Railway Company now sues the corporation for an inter-

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pretation in their favour of the contract of the 19th December, 1893, and the reimbursement of the monies so advanced.

The city met this action by alleging her own construction of the contract, and for the first time set forth by a separate action and an *inscription en faux* that the plan annexed to the deed was not the one agreed to by the corporation, and that it had been signed by error.

A long *enquête* necessarily followed the allegation of error. The Superior Court (Langelier J.) maintained that it had been proved, and dismissed the action of the Canadian Pacific Railway Co. The learned judge further held that the contract of the 19th December. 1893, which must control the plan wherever inconsistent, did not support the interpretation of the railway company, and that the city was not bound to construct the bridge beyond the westerly limit of Lacroix Street. In appeal this judgment was reversed, and the city was condemned to pay the full amount demanded with interest and costs.

We all agree with the court of appeal that there was no error, and that the appeal of the city from the judgment dismissing their action must be rejected, as well as the *inscription en faux*. The learned Chief Justice reviewed at length all the facts bearing upon this branch of the case, and we fully concur in his conclusion. He said:

A tout événement la cité connaissait cette erreur (si elle a existé) dès 1895. C'était le temps de répudier son contrat; au lieu de cela, en 1896, elle a fait un compromis avec la compagnie dans lequel elle admet le contrat de 1893, prétend avoir rempli son obligation de construire son viaduc en s'arrêtant à ligne sud-ouest de la rue Lacroix et n'être pas obligée de construire au-delà. Alors il est convenu que la cité parachèvera la construction avec les argents que la compagnie s'oblige à lui fournir, sauf à rembourser la compagnie si la Législature de Québec lui permet de prélever des fonds pour le parachèvement de l'ouvrage, ou si une cour de justice la déclare liée par son contrat à faire la partie du viaduc à travers la rue Lacroix. La cité consentait donc alors à ce que le contrat fût exécuté suivant sa forme et teneur et il serait trop tard maintenant que la compagnie a avancé des fonds sur la foi de l'acte de 1896, de répudier le contrat de 1893.

Nous sommes d'opinion que la cité n'a pas prouvé l'erreur qu'elle invoque et même qu'elle ne pourrait pas l'invoquer après avoir consenti l'acte de compromis de 1896.

As to the other branch of the case, namely, the interpretation of the contract of the 19th December, 1893, this court is divided. Two take the view of Mr. Justice Langelier and three agree in part with the court of appeal. Sir Alexandre Lacoste, continuing his remarks, said:

Il ne reste que la dernière question: La cité s'est-elle obligée par le contrat de 1893 à construire le viaduc à travers la rue Lacroix? Elle s'est obligée à construire le viaduc suivant le plan; or le plan démontre que le viaduc s'étend au-delà de la ligne sud-ouest de la rue Lacroix. La cité prétend qu'il y a contradiction entre le contrat qui dit "from Berri street to Lacroix street," et le plan. Nous ne voyons pas la contradiction: "from" et "to" n'excluent pas nécessairement l'une ou l'autre rue. Construire un chemin de fer d'une ville à une autre ne veut pas dire qu'on n'entrera pas dans l'une ou l'autre ville. Si un plan n'eût pas été annexé à l'acte, la cité aurait pu prétendre avoir satisfait à son obligation en construisant un viaduc de la ligne sud-est de la rue Berri à la ligne sud-ouest de la rue Lacroix. Mais le plan est déclaré former partie du contrat, par conséquent il explique et complète la convention et doit être suivi.

In this view we also concur. The words *from* and *to* are not always exclusive. This depends upon the circumstances of each case. Suppose C. acquires a piece of land situated from B to C. Here the words are evidently exclusive. But when the deed provides that a certain piece of work is to be constructed, as in this case "along Notre-Dame Street from Berri Street to Lacroix Street as shewn on the said plan," the words mean as far as the plan shows, along Notre Dame, but not exceeding the most distant line of Lacroix Street. That part of the plan referring to this work, which is reproduced below, shows plainly that the iron bridge extends along Notre Dame Street below the western limit of Lacroix Street and even its eastern limit, and along Lacroix Street, north of Notre Dame Street, for wherever railway tracks are indicated the superstructure or bridge was necessary.

North
East
A
Berri Street Subway
ROAD
LEVEL
FREIGHT SHED - 204' x 40'
SHED - 52' and 40' x 350'
WAY
FORM
STEEL TRACK TO BE CONSTRUCTED AFTER RAILWAY HAS BEEN BUILT ON
ESTLE WORK - 25' x
TRACKS
S - GRADE RISING 0·2 %
16'
16'
16'
16'
F
G
H
J
K
ST CROIX ST
BRIDGED
TO BE
WARD LINE
TO BE BRIDGED
NOTRE -DAME ST
TO BE ALTERED TO FREIGHT SHED WITH OFFICES OR STORES ABOVE
Passenger Depot

Here the plan defines the meaning of the words *from* and *to*, that is along Notre Dame Street to the easterly limit of Lacroix Street. We believe therefore that the city was bound to construct the bridge to the easterly line of Lacroix Street, but nothing more, and the judgment appealed from must be varied accordingly.

From the last remarks of the learned Chief Justice, we are inclined to believe that the court of appeal had at first entertained some doubt upon this point. He says:

J'aurais eu quelque doute sur la partie du viaduc qui est en dehors de la rue Notre Dame au nord-ouest sur la rue Lacroix, mais ce doute est dissipé par la convention de 1896. Il y est dit que la compagnie avancera à la cité tout l'argent nécessaire "for the completion of the said bridge either on Notre Dame or Lacroix street," et que la cité remboursera si une cour décide que la cité est tenue de construire à ses frais au delà de la ligne sud-ouest de la rue Lacroix.

The continuation of the bridge along Lacroix Street had to be built without any delay; it was necessary to both the city and the railway company and naturally the deed of compromise provided for the construction of the whole structure, so as to afford as little inconvenience as possible to the public. But the city never promised by the deed of compromise to do more work than it stipulated in the contract of 1893. The last clause of the deed of compromise of 1896 so declares in express terms:

Nothing in these presents shall be held to affect or diminish the rights of either party under the said deed of agreement of the 19th of December, eighteen hundred and ninety-three.

That is the interpretation given by the railway company itself, which claims no right under the deed of compromise beyond the reimbursement of the funds advanced to complete a work which they allege the city had undertaken to do by the terms of the contract of 1893. We have endeavoured to show that their contention is unfounded.

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On the other hand, the city seems to concede in the deed of compromise that it is bound to build along Notre-Dame Street, south of Lacroix Street. It agrees in fact to reimburse if obliged under the contract of 1893 to construct further north than the southerly limit of Lacroix Street. Likewise the railway company agrees to refund all moneys expended by the city in completing said bridge, if the courts hold that it is not so obliged, without saying where the work was to be done on Notre Dame Street, south of Lacroix, or outside of its easterly limit. But all these contentions and distinctions cannot be maintained in face of the express stipulation that the rights of the parties remain intact and unaffected. The deed of compromise may be badly worded but the last clause leaves no doubt as to the intention of the parties. The city never undertook to construct outside of Notre Dame Street, and the railway company only contemplated building the bridge outside the distance between Lacroix Street east and Berri Street, whether on Lacroix or Notre Dame Streets. Therefore that part of the bridge along Lacroix or east of Lacroix, along Notre Dame, must be built at the expense of the railway company.

The appeal is therefore allowed in part, and judgment appealed from varied. The appellants are condemned to reimburse to the respondents the cost of that part of the iron bridge or viaduct extending along Notre Dame Street south, and the whole width of Lacroix Street from limit to limit, and no more, said cost—unless the amount thereof be agreed to by the parties within fifteen days—to be ascertained by the Registrar of this court who, after having heard the parties and their witnesses, shall settle the judgment for the amount so agreed to or ascertained, with interest at the rate of five per cent from the date of payment and costs in the Superior Court and court of appeal. As the conten-

tions of the appellants are not fully adopted, no costs will be allowed before this cour t

DAVIES J.—I have had the advantage of reading the opinion prepared by my brother Armour in this case, and I fully agree with him that the agreement between the parties having been ratified by provincial statute was not open to attack in the courts on the ground of alleged error or mistake in connection with the plans attached to and made part of the agreement.

I am also clearly of the opinion that the supplementary agreement, although its language is in parts obscure and somewhat difficult to interpret, does not alter or modify, and was not intended to alter or modify, the respective rights or obligations of either of the contracting parties under the main and original agreement of 1893. The language of the concluding paragraph of the agreement of 1896, if any doubt otherwise existed on the point, is in my mind conclusive. It says:

> Nothing in these presents shall be held to affect or diminish the rights of either party under the said agreement of the 19th of December, 1893.

Referring, then, back to this agreement of 1893, we find that it was a contract providing for the construction and equipment in the eastern part of the City of Montreal of a terminal railway station of the Canadian Pacific Railway Company on certain specified terms and conditions and on certain reciprocal obligations of the parties to the contract. Attached to this agreement was a large general plan which was declared by the agreement "to form part of it," and was referred to in many of its paragraphs to show more definitely what their language meant. The plan showed the station and grounds attached, the numerous outbuildings and works contemplated, the different tracks and sidings proposed to be constructed leading into and from the

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stan, and the several streets crossed by them, and the general scheme of an eastern railway terminus in the City of Montreal.

The particular clause out of which the litigation arose reads as follows:

5 The corporation covenant that they will construct and maintain a bridge for highway purposes along Notre-Dame Street from Berri Street to Lacroix Street, as shown on the said plan, of such a height as to make the land below it available for railway purposes, but the upper level of said bridge must not be higher then the level of Notre-Dame Street, and to give the company the right to use the land below the said structure as they may require for railway purposes.

Lacroix Street and Berri Street run at right angles to Notre-Dame street which latter is one of the principal streets of Montreal. Lacroix Street was a short street running from Craig Street to Notre-Dame Street, but not going beyond these streets. The plan attached to the agreement showed the proposed different railway tracks crossing Notre-Dame Street, the construction of the bridge over which was being provided for, as extending along Notre-Dame Street for a distance including the entire width of what may be called a prolongation of Lacroix Street, and a small distance beyond it. It showed these tracks to run up and over a part of Lacroix Street, which was also marked on the plan "to be bridged" but by whom was not, of course, stated.

The Court of King's Bench held that, under this agreement and plan and the subsequent agreement of 1896, the city was liable to pay for the construction of the entire bridge as shown upon the plan, as well over Notre-Dame Street as over Lacroix Street. But, as I have said, I am clearly of the opinion that the agreement of 1896 does not alter the rights or obligations of the parties under the agreement of 1893, and it is not, in my judgment, open to argument that any liability on the part of the city exists under this latter agreement for that portion of the bridge built over

Lacroix street and not forming part of Notre-Dame Street. The only point, therefore, on which I differ from the judgment of my learned brother Armour is as to the distance the city was bound to build the bridge over and along Notre-Dame Street. He is of opinion that the words of the agreement "along Notre-Dame Street from Berri Street to Lacroix Street" must be construed to be limited to the distance between the two nearest side lines of these latter streets, and, if we had to depend upon the words of the section eliminating those referring to the plan, I should have no difficulty in accepting his construction. But I am of opinion that the additional words " as shown upon the plan " clearly indicate a different meaning. I think the clause of the agreement under review, read in the light of the plan to which it refers and which was made a part of it, shows that what the city was contracting to build was the contemplated bridge along Notre-Dame Street and that as the plan clearly showed the bridge as extending along Notre-Dame Street nearly across what would be the prolongation of Lacroix Street which opened into it, the obligation of the city is not to be limited to that portion of the bridge along Notre-Dame Street up to the western (or south-western) side-line of Lacroix Street but goes further and covers that portion of the bridge along Notre-Dame Street lying opposite to the opening of Lacroix Street. The words " to Lacroix," therefore, must be interpreted in the light of the plan, as " into " or to use the language of the agreement " to Lacroix Street as shown on the plan," and these latter words, in my opinion, impose a larger obligation upon the city than the clause would if the reference to the plan had not been there. The city is not bound to construct any part of the bridge beyond the prolongation of the eastern or north-eastern side of Lacroix Street, nor any part of the bridge on Lacroix Street.

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Having already decided that the agreement and plan cannot be impeached for error or mistake, we cannot use the plan which the city produced, but which was not annexed to the agreement, as the one which they intended to be bound by. But even this plan shows the bridge to extend along Notre-Dame Street beyond the western (or south-western) line of Lacroix Street, although not quite so far beyond it as the governing plan attached to the agreement shows.

I am therefore of opinion that this appeal should be allowed in accordance with the judgment of my brother Girouard in which I agree.

MILLS J.—In this case the City of Montreal agreed to aid the Canadian Pacific Railway Company in making certain improvements relating to that railway and which the company had contracted to make within the City of Montreal. These improvements are mentioned in the amended declaration of the railway company. The railway company affirm that by a deed of agreement entered into on the 19th of December, 1893, the City of Montreal contracted to construct and maintain a bridge along Notre-Dame Street from Berri Street eastward to Lacroix Street, as shown upon a certain plan attached to and forming part of the said deed, and the railway track went beneath this bridge. They affirm that, by this deed, the parties to it were bound as soon as the said agreement was ratified by an Act of the Provincial Legislature, 57 Vict. ch. 55, according to the true intention of the contracting parties. A difference of opinion arose between the municipal representatives of the City of Montreal and the Canadian Pacific Railway Company with reference to the construction of the bridge, the city maintaining that, under the said agreement, they were required to construct, according to the plan attached, or intended to be

attached, so much of the proposed bridge as extended from Berri Street to Lacroix Street, and that they had so completed so much of the work as they were bound by the agreement with the Canadian Pacific Railway Company to do at their own cost and charges when they built that portion of the structure extending from the eastern boundary of Berri Street to the western boundary of Lacroix Street. The bridge as shown upon the plan extended far beyond the limits mentioned in the agreement, as it extended from the westerly side of Berri Street to the easterly side of Lacroix Street and thence along Lacroix Street for a distance of one hundred and twenty feet, and, as the street itself is eighty feet in width, this would mean the structure of between two hundred and three hundred feet more of bridge than the city maintains they are bound to build.

I am of opinion that the city is right in this contention. When they contracted with the railway company to build within two limitary lines, as shown on the plan, they meant to become bound for the construction of so much of the bridge, in the way the plan indicated, as lay between these limitary lines, and no matter how much of the structure shown upon the plan may have existed beyond these limits, it did not, because it is found there, bind the city to the completion of the whole work at its own cost and charges.

The words "from" and "to" in their ordinary meaning are words of exclusion, and there is no necessary implication that they are used in this agreement in any different sense.

It has been held where a grantor conveyed lands extending to the bank of a stream, that the stream was excluded, and so I think here, the street from which the work takes its commencement, to the street

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to which in the agreement it is to be extended, are neither included, in the work for which the city becomes bound. The words are:

> The corporation covenant that they will construct and maintain a bridge for highway purpose along Notre-Dame Street from Berri Street to Lacroix Street as shown on the said plan of such a height as to make the land below it available for railway purposes, but the upper level of the said bridge must not be higher than the level of Notre-Dame Street, and to give the company the right to use the land below the said structure as they may require for railway purposes.

If it had been intended that the city should construct the whole of the bridge, as shown on the plan, then the limitary lines mentioned ought to have been such as to have embraced the whole bridge, but this is not the case. A large portion of the structure lies outside of the limits mentioned, and those limits must in this case govern.

On the fourth of August, 1896, it was agreed between the city authorities acting on behalf of the city and the Canadian Pacific Railway Company, that the company should advance to the city all the moneys necessary for the completion of the said bridge as shown on the plan, and that the judgment of the court should be sought to decide whether the construction put upon the agreement by the city or by the railway company was the true legal construction.

The agreement that the city should build according to the plan along Notre-Dame Street from Berri Street to Lacroix Street, did not by the agreement of the parties enlarge the obligation into which the city had previously entered. The obligation of the city is to be gathered from the written instrument by which they become bound; the plan attached was intended to illustrate that agreement and to make plain, without further words, the kind of structure that was required in which both the city and the railway company were interested, but it could not supersede the agree-

ment and could not require the city to construct a work not lying between the limitary lines mentioned, but extending far beyon them.

If it is said in a contract that C is to construct a bridge for D extending from A street to B street, the words are exclusive and, if this be done according to a plan attached, and that plan shows the structure continued far beyond B street, it cannot on reason or authority be maintained that C is bound for the construction of any portion of the work beyond that mentioned in his agreement.

I am of the opinion that when the City of Montreal bridged Notre-Dame Street between the eastern boundary of Berri Street and the western boundary of Lacroix Street, it did all that it had contracted to do and the remainder of the work done by the city under the subsequent agreement is done at the expense of the railway company. I am therefore of opinion that this appeal should be allowed with costs both in this court and in the court below and that the action should be dismissed with costs.

ARMOUR J.—The Legislature of the Province of Quebec having by the Act 57 Vict. ch. 55, sec. 1, ratified and confirmed the deed of the nineteenth of December eighteen hundred and ninety-three scheduled to the said Act, and all the conditions and stipulations therein contained, and authorized the contracting parties to fulfil and carry out the conditions thereof according to their terms and tenor, and granted power to the said parties to do all things necessary to carry out the said agreement according to the intention of the contracting parties, the said agreement became part of the statute law of the Province of Quebec, and was not open to attack on the ground of error or otherwise without first obtaining the repeal of the Act, for how

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could any court hold that to be invalid which the legislature had ratified and confirmed ?

It is a common practice to schedule to private or special acts agreements made between the undertakers and other persons and to declare such agreements valid and binding between the parties thereto. The effect of so doing seems to be to make the agreements part of the statute and to exclude the possibility of contending that they are *ultra vires* as being beyond the powers of the contracting parties or void as containing stipulations which would be illegal or void but for the statute, for the agreements by incorporation into the statute cease to be voluntary contracts and acquire statutory effect." Hardcastle, 3rd ed. 497. And see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1); *The Caledonian Railway Co.* v. *Greenock and Wemyss Bay Ry. Co.* (2).

The right of the plaintiffs to recover against the defendants must therefore depend upon the proper construction to be put upon the agreements entered into between them of the 19th December 1893 and of the 4th August 1896 respectively.

By clause 1 of the agreement of the 19th December 1893 the defendants covenanted that they would acquire (in so for as they had not already acquired the same) and would within the time thereinafter mentioned for that purpose convey to the plaintiffs, an area of land bounded on the north by Craig street, on the east by Lacroix street, on the south by Notre Dame street and on the west by Berri street, including the streets within that area as shewn on the plan attached to the said agreement and forming part thereof, and also that part of Parthenais Square (about 4000 feet) which was then in the possession of the plaintiffs by a simple permission of the defendants. And by clause 5 of the said agreement the defendants covenanted that they would construct and maintain a bridge for highway purposes along Notre-Dame street, from Berri street to Lacroix street, as shewn on said plan of such

(1) [1900] 2 Ch. D. 352; [1901] 2 Ch. D. 37.

(2) L.R. 2 H.L. Sc., 347.

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a height as to make the land below it available for railway purposes, but the upper level of said bridge must not be higher than the level of Notre-Dame street and would give the plaintiffs the right to use the land below the said structure as they might require for railway purposes.

By the agreement of the 4th August, 1896, after reciting clause 5 of the agreement of 19th December, 1893, and after reciting that the City of Montreal alleged that it had constructed the said bridge from Berri Street to the south-west line of Lacroix Street, according to the said contract; that the said railway company had contended that under the clause hereinbefore cited of the said deed of agreement and according to the plan annexed to the said contract the said city was bound to continue the construction of the said bridge up to a point on the north-east side of the said Lacroix Street as shown on the said plan, which contention the said City of Montreal regarded as incorrect and not in conformity with the said agreement and the clause thereof; that the said parties had agreed some time before to have that question decided by the court, and in the meantime to proceed with the completion of the said bridge; that under said understanding the said city had continued the said works up to date, but was then unable to continue on account of its inability of advancing the funds necessary for the said works, and that the said parties were desirous to complete the said bridge as shown on the said plan as soon as possible; the said railway company agreed to advance to the said city all the moneys necessary for the completion of the said bridge either on Notre-Dame or Lacroix Street, as shown on the said plan, to the extent of thirty-five thousand eight hundred dollars, the amount of the city's estimate of the cost of completing the bridge as aforesaid, and the said city agreed to pro-

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ceed with the bridge on the following terms under the supervision of the said railway company's engineer, and the City of Montreal agreed that it would apply to the Legislature of the Province of Quebec at its next session for and would use its best endeavour to obtain legislation permitting the city to raise the money necessary to complete the said bridge as aforesaid, and if such legislation should be obtained, or if a court of competent jurisdiction should finally decide that the city was liable under the said agreement to bear the cost of constructing and completing the said bridge further north than the line of the southerly limit of Lacroix Street, then any moneys advanced in the meantime by the said company for that purpose as thereinbefore provided should be forthwith reimbursed by the city to the said railway company with five per cent per year interest thereon and the city should bear alone the cost of constructing and completing the said bridge as aforesaid. And the said railway company undertook that if the said judgment finally decided that the city was not liable under the said agreement to construct the said bridge further north than the line of the southerly limit of Lacroix Street then the said railway company would forthwith on demand repay to the said city all moneys which the city might have expended either before or after the execution thereof in completion of the same, provided that the amount of such expenditure and the amount expended for the same purpose by the said railway company should together not exceed thirty-five thousand eight hundred dollars, the amount of the said city's estimate of the cost of completing the bridge as aforesaid, the said company being not bound to repay any sum over said amount, and would also pay interest on such moneys as might have been disbursed by the city for the said purpose at the rate of five per cent per annum from

the respective periods of such disbursements. And by the said agreement it was provided that nothing therein should be held to effect or diminish the rights of either party under the said agreement of the 19th of December, 1893.

By the Act of the Province of Quebec, 61 Vict. ch. 53, the City of Montreal was authorized to borrow the sum of $310,000 for the following among other purposes:

Amount which the City shall perhaps be called upon to pay for Lacroix Street Bridge..... $35,000

The covenant of the defendants contained in the agreement of the 19th December, 1893, was that they would construct and maintain a bridge for highway purposes along Notre-Dame street from Berri to Lacroix street as shown on the plan thereto attached. The bridge shown on the plan thereto attached extended from the northerly side of Berri street to the southerly side of Lacroix street, thence across Lacroix street to the northerly side thereof, a distance of eighty feet and up Lacroix street a distance of one hundred and twenty feet. The defendants did not covenant that they would construct and maintain the bridge as shown on the plan, but only that they would construct and maintain a bridge along Notre Dame Street from Berri Street to Lacroix Street as shown on the plan, and under no possible construction of their covenant could the defendants be held liable to construct and maintain the bridge up Lacroix Street, nor could the defendants in my opinion, upon a proper construction of their covenant, be held liable to construct and maintain the bridge across Lacroix Street from the southerly to the northerly side thereof as shown on the plan, but only to construct and maintain a bridge along Notre-Dame Street, from the northerly side of Berri Street to the southerly side of Lacroix Street, as shown on the plan.

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The words "from" and "to" are words of exclusion in their primary sense and must be so construed unless the subject matter or the context manifestly require that they should be given a wider meaning. *Dougall* v. *Sandwich & Windsor P. & G. Road Co.* (1); *Bradley* v. *Rice* (2); *Bonney* v. *Morrill* (3); *Montgomery* v. *Reed* (4); *State* v. *Libby* (5).

And here there is nothing in the subject matter or the context which requires that they should be given a wider meaning.

In indictments for nuisance by not repairing roads the words "from" and "to" exclude the termini. *Rex* v. *The Inhabitants of Gamlingay* (6); *Rex* v. *The Inhabitants of Upton-on-Severn* (7); *Reg* v. *Fisher* (8); *Reg.* v. *Botfield* (9).

I am of the opinion, therefore, that the defendants were not liable under the agreement of the 19th December, 1893, to construct the said bridge further north than the line of the southerly limit of Lacroix street.

It was, however, contended that even if the court should determine this question in the defendants' favour, the defendants would nevertheless be liable to the plaintiffs for the money advanced by them for the purpose of constructing and completing the bridge further north than the line of the southerly limit of Lacroix street by reason of the defendants' covenant contained in the agreement of the 4th August, 1896, that they would apply to the Legislature of the Province of Quebec at its then next session for and would use their best endeavour to obtain legislation permitting them to raise the money necessary to com-

(1) 12 U. C. Q. B. 59.
(2) 13 Me., 198.
(3) 52 Me., 252.
(4) 69 Me., 510.
(5) 84 Me., 461.
(6) 3 T. R. 513;
(7) 6 C. & P., 133;
(8) 8 C. & P., 612.
(9) Car. & Marsh, 151.

plete the said bridge as aforesaid, and if such legislation should be obtained that they would forthwith reimburse the plaintiffs the money so advanced; but I am unable to accede to this contention and give effect to this covenant because by so doing I would be affecting and diminishing the rights of the defendants under the agreement of the 19th December, 1893, and by the agreement of the 4th August, 1896, in which this covenant is contained it is expressly provided that nothing therein shall be held to affect or diminish the rights of either party under the said agreement of the 19th December, 1893.

In my opinion, therefore, the appeal should be allowed with costs here and below and the action dismissed with costs.

Appeal allowed in part.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitors for the respondents: *Lafleur, Macdougall & Macfarlane.*

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*Mar. 6.

*May 5.

LA VILLE DE MAISONNEUVE (DEFENDANT)..... ..... } APPELLANT;

AND

LA BANQUE PROVINCIALE DU CANADA (PLAINTIFF)..... } RESPONDENT.

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

Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts. 1065, 1691 *C.C.—Appeal on special questions—Deferred payment—Computation of interest—Payments in advance—Rebates—Powers of appellate court.*

The provisions of article 1691 of the Civil Code of Lower Canada do not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; the contract must, under that article, be in either cancelled *in toto* or not at all.

The municipality agreed to pay, for works to be constructed, by promissory notes payable in two years without interest, said notes to be delivered to the contractor on the completion of the works and to bear a date assumed to be the mean date of completion of the works as carried on in detail. The amount of the notes represented the price of the tender with average interest added, and the municipality reserved the privilege of making payments upon the acceptance of progressive estimates on the works as completed from time to time, without interest or previous notice "en déduisant les intérêts composés au taux de six pour cent par an à échoir après l'époque des paiements et lesquels étaient compris dans le prix de soumission pour la totalité des deux années." The mean date was settled as 15th Dec. 1899, and the notes for the balance due were delivered in 1900. The trial court allowed the municipality interest on advance payments from the dates on which they had been respectively made, both before and after 15th Dec. 1899, up to 15th Dec. 1901, but the judgment appealed from disallowed all interest prior to 15th Dec. 1899, on the payments which were made before that date.

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* PRESENT:—Sedgewick, Girouard, Davies, Mills and Armour JJ.

Held, that upon the proper construction of the contract the method followed by the court of appeal as to the calculation of interest on the advance payments was correct.

The court of appeal, however, calculated this interest on the basis of the actual cost of the works.

Held, reversing the judgment appealed from, on this point, that the interest should be calculated on the basis of the actual amounts of the advance payments made.

Certain of the works were not executed by orders from the municipality and, on this head, the trial court refused to deduct $2,442.50 from the plaintiff's claim. The judgment appealed from did deduct this amount from the judgment in favour of the plaintiff. It appeared, however, that the plaintiff had, at least tacitly, consented to this diminution and made no protest in respect thereof.

Held, that, under the circumstances, the plaintiff could not claim the sum in question as damages under articles 1065 and 1691 of the Civil Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, reforming the judgment of the Superior Court, District of Montreal, at the trial (Archibald J.) which maintained in part the plaintiff's action with costs, and CROSS-APPEAL by the plaintiff against the judgment of the said Court of King's Bench in so far as it reversed the judgment of the trial court.

The questions at issue on the main appeal are stated in the head-note and judgments now reported. The only question raised on the cross-appeal was as to an amount of $2,442.50 which was deducted from the sum awarded to the cross-appellant by the judgment appealed from.

Mignault K.C. and *Bonin K.C.* for the appellant.

Lafleur K.C. and *Lajoie* for the respondent.

SEDGEWICK J.—I concur in the reasoning of my brother Girouard.

GIROUARD J.—J'ai éprouvé beaucoup d'hésitation à former une opinion dans cette cause; mais après un

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sérieux examen, je suis d'avis de modifier le jugement de la cour d'appel. Deux questions se présentent: 1° Le mode de calculer les intérêts sur les paiements faits par anticipation, sanctionné par la cour d'appel, est-il celui prévu par le contrat des parties? 2° Le marché à forfait est-il sujet à diminution des travaux en indemnisant l'entrepreneur?

Je dois dire que ce n'est pas la question des intérêts qui m'a embarrassé. Je crois que le mode de les calculer adopté par la cour de première instance n'est pas celui qui est prévu par le contrat. Les intérêts ne sont pas dûs du jour de chaque paiement, mais seulement à compter du 15 décembre 1899, ou subséquemment, si les paiements ont été faits après cette date. Nous sommes tous d'accord avec la cour d'appel sur ce point, mais nous différons de cette dernière sur la base de ces intérêts. Ils doivent être calculés sur le montant payé, et non pas sur le coût réel des travaux. Voici la clause du contrat à cet égard:

Ce contrat est fait d'après la soumission des dits U. Pauzé & Fils à raison de la somme de cent dix-huit mille quatre cent soixante-dix-neuf piastres et quatre-vingt-dix-sept centins ($118,479.97) pour les travaux d'égouts, et de la somme de vingt et un mille trois cent soixante-quinze piastres ($21,375.00) pour les travaux de terrassement, lesquelles sommes, la dite Ville de Maisonneuve s'oblige de payer aux dits U. Pauzé & Fils par billets promissoires payables dans deux ans de leur échéance, sans intérêt; lesquels billets ne seront délivrés aux dits U. Pauzé & Fils qu'après réception finale des travaux ci-dessus mentionnés par la Ville de Maisonneuve et son ingénieur, mais devront porter la date moyenne de la terminaison des dits travaux.

Advenant le cas où la Ville de Maisonneuve désirerait payer aucun ou tous les billets plus haut mentionnés avant leur échéance, il lui sera loisible de le faire en aucun temps et sans avis et un intérêt composé de six (6) pour cent par an sera *déduit du montant du coût des travaux*, sans intérêt, et sera en proportion du temps qui se sera écoulé depuis le paiement du ou des dits billets jusqu'à la date de son ou de leur échéance,

Puis, les devis et spécifications qui font partie du contrat portent la clause suivante:

15° L'entrepreneur sera payé de ses travaux deux ans a compter de l'époque moyenne de la terminaison des divers ouvrages, par billet promissoire ou obligation de la Ville de Maisonneuve, sans intérêt, et en aucun temps après reglement de comptes avec l'entrepreneur, la ville pourra payer en argent le dit entrepreneur, sans avis préalable, *en déduisant les intérêts composés au taux de six pour cent par an à écheoir après l'époque des paiements et lesquels étaient compris dans le prix de soumission pour la totalité des deux années.*

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Comme on le voit, la corporation avait deux ans pour payer le prix du contrat à compter de la date moyenne de la terminaison des travaux, mais elle devait payer pendant ces deux années un intérêt composé de six pour cent par an, lequel fut compris dans le prix stipulé au contrat. Cette date moyenne fut fixée par les parties au 15 décembre 1899, et c'est alors seulement qu'un ou plusieurs billets portant cette date et payables à deux ans de date, sans intérêt, pouvaient être demandés par les entrepreneurs. Des billets leur furent effectivement livrés, mais à l'automne de 1900, il restait encore une balance considérable non réglée par billets et que la corporation contestait en partie. C'est cette balance—que les entrepreneurs chiffraient à la somme de $45,017.81—qui fut transportée le 3 octobre 1900 à la Banque Provinciale du Canada, et qui est réclamée par la présente action. Les parties sont d'accord sur toutes leurs transactions, à l'exception de la question des intérêts sur les paiements faits par anticipation et d'une réduction de $2,442.50 à raison de la diminution de certains travaux par la ville.

Des paiements par anticipation furent faits avant et après le 15 décembre 1899. M. le juge Archibald, qui jugea en première instance, accorda les intérêts à compter de la date des paiements jusqu'au 15 décembre 1901. En appel il fut jugé que ces intérêts ne doivent courir qu'à compter du 15 décembre 1899, s'ils ont été faits avant cette date, et du jour où ils ont été faits,

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s'ils le furent après. Nous sommes tous d'avis que c'est le mode prévu par le contrat.

De cette façon, si le 15 décembre, 1899, la corporation eût payé le prix entier du marché, le montant total des intérêts qui en faisaient partie devait être déduit. Elle n'avait alors payé qu'une partie, savoir $58,422.86, en quatre paiements, et elle a droit à une réduction pour autant, avec intérêts composés pendant deux ans, et ainsi de suite lorsque des paiements subséquents furent faits. En un mot, lorsqu'elle faisait un paiement par anticipation, elle avait droit d'être remboursée des intérêts composés qui avaient été compris dans le prix du marché. C'est aussi la méthode qu'a consacrée en partie la cour d'appel si l'on en juge par les considérants suivants de son jugement:

The Court, etc.—Considering that the intention of the parties to the contract between the appellant and the commercial firm of U. Pauzé et Fils was that a delay of two years for the payment of the price of the works contracted for should be allowed, to date from the day to be agreed upon as the mean date of the completion of the works, which date was subsequently established to be the 15th day of December, 1899, that compound interest at the rate of six per centum per annum for such two years should be added to the real price in consideration of such term of two years for its payment, that the appellant should give promissory notes to the contractors for the price of the works, with the addition of such compound interest for two years, bearing date on the day to be agreed upon as the mean date of the completion of the works and payable two years after date, and that the appellant should have the privilege of paying the whole or part of the price by anticipation and would be entitled to an allowance of compound interest at the rate of six per centum per annum on the portion of the *real price*, that is the price less the addition of the compound interest for two years, represented by all payments so made, from the 15th day of December, 1899, if made before that date, to the 15th day of December, 1901, and from the date of payment if made within the term of two years stipulated for the payment of the price of the contract to the 15th day of December, 1901:

Considering that the appellant is entitled to compound interest only for two years on the payments made before the 15th day of December, 1899, and to the compound interest from the date of payment on the

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payments made subsequently to the 15th day of December 1899, to the 15th day of December 1901; that there is therefore error in the method employed by the court of first instance for calculating such compound interest, which was calculated on all the payments from the date on which they were made whether before or after the 15th day of December 1899;

Considering that the rebate of compound interest to which the appellant is entitled amounts according to the calculation hereto annexed to the sum of $10,989.13 and not to the sum of $12.730.45 allowed by the judgment appealed from. * * *

Doth declare that the sum due on the claim of the commercial firm of U. Pauzé et Fils by the appellant to the respondent as the transferee of the contractors, is $25,838.19, on account of which the respondent has received the promissory note of the appellant for $22,819.56, payable on the 15th day of December 1901, leaving a balance of $3,018.63, and doth condemn the appellant to pay this balance of $3,018.63 to the respondent, with interest from the 15th day of December 1901 at the rate of six per centum per annum and costs of suit in the Superior Court, the whole with the reservation of all rights which the respondent may have under and in virtue of the promissory note for $22,819.56 against the appellant.

Dans une note, au bas du jugement, on trouve une table du calcul de ces intérêts composés. Elle nous fait voir que, pour en déterminer le montant, la cour a pris comme base le coût actuel (*the real price*) des travaux. Nous croyons que c'est là une erreur. Ces expressions *real price* ne se trouvent pas au contrat. Le contrat, il est vrai, dit que l'intérêt composé "sera déduit du montant du coût des travaux". Mais cela ne veut pas dire coût réel ou *real price*, mais le coût porté au contrat. c'est-à-dire le coût réel et les intérêts qui furent ajoutés. Cette interprétation est la seule raisonnable et possible même en face de la clause 15e des spécifications :—

La ville pourra payer etc.,—en déduisant les intérêts composés au taux de six pour cent par an à écheoir après l'époque des paiements *et lesquels étaient compris dans le prix de soumission pour la totalité des deux années.*

En déterminant le montant des intérêts, nous n'avons pas à considérer le coût réel des travaux, mais le mon-

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tant des sommes payées. Nous croyons donc devoir corriger la table des intérêts calculés par la cour d'appel, de manière à allouer les intérêts composés sur toutes les sommes payées par articipation et nous sommes arrivés au résultat suivant :

Paiements par anticipation.	Terme durant lequel l'intérêt est calculé.	Intérêt composé à 6 p. 100.
$30,204.86	du 15 déc. 1899 au 15 déc. 1901 ; 2 ans	$3,733.32
$10,793.00	du 15 déc. 1899 au 15 déc. 1901 ; 2 ans	1,334 01
9,125.00	du 15 déc. 1899 au 15 déc. 1901 ; 2 ans	1,127.85
8,300.00	du 15 déc. 1899 au 15 déc. 1901 ; 2 ans	1,025.88
15,300.00	du 25 déc. 1899 au 15 déc. 1901 ; 1 an ; 351 jours	1,853.75
5,655.00	du 4 jan. 1900 au 15 déc. 1901 ; 1 an ; 345 jours	6 9.25
18,962.45	du 30 jan. 1900 au 15 déc. 1901 ; 1 an ; 319 jours	2,191.75
4,953.78	du 16 août 1900 au 15 déc. 1901 ; 1 an ; 121 jours	401 66
$103,294 09		$12,347.47

Nous accordons à l'appelante $12,347.47 pour intérêts composés au lieu de $10,989.13 allouées par la cour d'appel. C'est la seule différence qui existe entre les deux cours, c'est-à-dire, qu'il faut déduire $1,358.34 de la condamnation rendue contre elle.

C'est sur la question de la diminution du prix que nous avons longtemps délibéré. Cette diminution se monte à $2,442.50. Je suis tenté de croire, avec mon confrère le juge Armour, que l'article 1691 du Code Civil invoqué par la cour d'appel

pour justifier cette diminution, ne s'applique qu'au cas de la résiliation entière du contrat et qu'il consacre un droit exceptionnel en faveur du propriétaire qui ne peut s'étendre au delà du cas prévu par le texte de cet article, savoir la résiliation et non pas la modification ou l'abandon partiel du contrat de sa part. Il s'agit ici d'une simple contravention au contrat ; alors quel est le recours du créancier ? Lorsque l'on considère qu'aux termes de l'article 1691, le propriétaire doit payer les dommages intérêts dus à l'entrepreneur, ne peut on pas soutenir avec raison que le droit de résilier tout le contrat est illusoire en pratique et qu'il ne confère aucun avantage réel ? La loi, il est vrai, ne permet pas de répudier les contrats bilatéraux, ni d'en violer aucune des dispositions. Mais lorsque la chose arrive, quelle est la conséquence ?

L'entrepreneur pourra-t-il demander le prix de l'ouvrage comme s'il l'eût fait ? L'article 1065, C.C., nous donne la limite du droit du créancier dans un pareil cas :

> Toute obligation rend le débiteur passible de dommages en cas de contravention de sa part.

Comme on le voit, il n'est pas dans une pire position que celui qui, en résiliant un marché et devis, reste dans les limites de la légalité. Appliquant donc la règle générale concernant l'inexécution des obligations, les entrepreneurs n'avaient dans l'espèce qu'une demande pour dommages-intérêts. Mais comment peuvent-ils la faire valoir ? Ils n'ont pas protesté contre la diminution ; ils ont continué les travaux comme si elle n'eût pas été faite ; ils y ont donc consenti au moins tacitement. La cour d'appel affirme que de fait, elle leur était profitable et la cour de première instance ne contredit pas cette appréciation de la preuve. Dommageable ou non, la diminution n'a donné lieu à aucune action ou réclamation pour dommages-intérêts de la

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part des entrepreneurs. Il n'en est aucunement question dans la cause. Voilà cependant tout ce qu'ils pouvaient demander. Ils ne l'ont pas fait et il y a toute raison de croire que ce fût parce qu'ils n'en avaient pas soufferts.

Nous sommes donc d'avis de renvoyer le contre-appel avec dépens et d'accorder en partie l'appel principal et de modifier le jugement de la cour du banc du roi, avec dépens devant cette cour et la cour du banc du roi. L'appellante est condamnée à payer à l'intimée la somme de $1,660.29, l'intérêt sur icelle à compter du 15 décembre 1901, au taux de six pour cent par an, et les frais de la demande en cour supérieure; le tout avec la réserve de tous les droits que l'intimée peut faire valoir à raison du billet promissoire de l'appelante, pour $22,819.56, qu'elle retira de la cour de première instance.

DAVIES J.—Concurred in the result of the judgment for the reasons stated by His Lordship Mr. Justice Girouard.

MILLS J.—In this case I entirely concur in the judgment of my brother Armour, and I do not feel that I can usefully add anything to what he has said in his judgment

ARMOUR J.—The defendant contracted with the firm of U. Pauzé & Fils to construct certain drains and do certain grading for the defendant, and it was the agreement that the 15th December, 1899, should be taken to be the date of the completion of the works, and that the price fixed for the works should be paid for by the promissory note of the defendant payable in two years from that date. The price fixed for constructing the drains was $118,479.97, and for doing the

grading, $21,375. These sums did not represent the true cost of the works, but the true cost of the works with interest at six per cent per annum, compounded for the two years of the currency of the promissory note added to such true cost, and it was agreed that the defendant should be at liberty to pay at any time any part of the said note before the expiration of the two years, and should thereby become entitled to a rebate of such compound interest. The contractors completed the works except a portion thereof which they were directed by the defendant not to do, and they claimed in addition to the fixed price the sum of $2,708.94 for extra work, and the defendant claimed the sum of $2,442.50 as a deduction from the fixed price for the work which the contractors refrained from doing by direction of the defendant. Considerable sums of money were paid by the defendants in respect of the contract as will be shown hereafter. In October, 1900, the contractors assigned their claims against the defendant to the plaintiff, who thereupon brought this action demanding a promissory note dated the 15th December, 1899, payable in two years for the balance due in respect of the contract, or in the alternative, demanding payment of such balance. The defendant pleaded that, after the commencement of the action, it offered the plaintiff a promissory note dated the 15th December, 1899, payable in two years for the sum of $22,819.56, and offered the attorneys of the plaintiff the sum of $53.75 for their costs and it delivered to the prothonotary of the court the said promissory note.

The cause was tried in the Superior Court by Archibald J. who disallowed the claim of the defendant for the sum of $2,442.50 as a deduction for work not done, and found the offer of the defendant insufficient, that the balance due was $26,539.37 for which sum he

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ordered the defendant to deliver to the plaintiff its promissory note dated the 15th December, 1899, payable in two years, and in default he ordered the defendant to pay the said sum with interest at six per cent per annum from the 15th December, 1901, and to pay the costs of the suit. The defendant thereupon appealed to the Court of King's Bench against the said judgment on the ground of the disallowance of the claim for the deduction of $2,442.50 which court maintained the appeal with costs in favour of the appellant against the respondent, set aside and annulled the judgment appealed from, and proceeding to pronounce the judgment which should have been rendered, declared that the sum due on the claim was $25,838.19 on account of which the respondent had received the promissory note of the appellant for $22,819.56 payable on the 15th day of December, 1901, leaving a balance of $3,018.63, and condemned the appellant to pay this balance of $3,018.63 to the respondent with interest from the 15th day of December, 1901, at the rate of six per cent per annum, and costs of suit in the Superior Court, the whole with the reservation of all rights which the respondent might have under and in virtue of the promissory note for $22,819.56 against the appellant. The defendant thereupon appealed to this court against the judgment of the Court of King's Bench so far as it found the balance due to be $25,838.19, and the plaintiff cross-appealed against the allowance of the deduction of $2,442.50.

The defendant contended that the Court of King's Bench should not have interfered with the computation made by the Superior Court of the balance due by the defendant, for it only appealed to that court by reason of the disallowance of the sum of $2,442.50, but they appealed against the judgment and having done

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so it was in the power of that court to give the judgment which the Superior Court ought to have given. Besides the allowance by the Court of King's Bench of the deduction of $2,442.50 rendered a new computation necessary in order to ascertain the balance due by the defendant.

I am of the opinion that the allowance by the Court of King's Bench of the deduction of the sum of $2,442.50 was erroneous.

The contract between the contractors and the defendant was for fixed sums for the entire works, and the contractors refrained from doing that portion of the works contracted for, represented by the said sum, by the orders of the defendant, and the defendant was consequently not entitled to any deduction for the work so omitted to be done.

The law relied upon by the defendant and maintained by the Court of King's Bench as authority for allowing the deduction was article 1691 of the Civil Code:

> The owner may cancel the contract for the construction of a building or other works, at a fixed price, although the works have been begun, on indemnifying the workman for all his actual expenses and labour and paying damages according to the circumstances of the case.

But this article clearly did not apply to this case for there was no cancellation of the contract within the meaning of that article which plainly means an entire cancellation of the whole contract. It does not give the owner power to cancel the contract as to one part of the work contracted for and to maintain it as to another; he must either cancel it *in toto* or not at all. The power is given to cancel the contract, but no power is given to cancel a part of it.

No authority was cited for the construction put upon this article by the Court of King's Bench and the opinions of the commentators upon it seem to me to be opposed to such a construction.

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The price payable at the end of the two years for the construction of the drains was	$118,479 97
For the grading	21,375 00
For extras	2,708 94
	$142,563 91

These items included interest for two years at six per cent per annum compounded; the actual amount therefore payable to the contractors on the 15th December, 1899, was $126,881.37, on account of which the defendant paid prior to the 15th December, 1899, the following sums:

1899.	
Oct. 28	$30,204 86
Nov. 4	2,832 57
" 18	7,960 43
Dec. 6	8,125 00
" 10	8,300 00
Amounting in all to	$57,422 86

on which amount the defendant was not entitled to any interest and which being deducted from $126,881.37 leaves a balance on the 15th December, 1899, of $69,438.51.

The following shows the state of the account subsequent to the 15th December, 1899:

Dec. 15.	To balance	$69,438 51
" 29.	" 14 days comp. int.	157 55
		69,596 06
" "	By cash	15,300 00
		54,296 06

1900.			
Jan. 4.	To 6 days comp. int.....	52 58	
		54,348 64	
" "	By cash.....	5,655 00	
		48,693 64	
" 30.	To 26 days comp. int	203 90	
		49,097 54	
" "	By cash.....	18,962 45	
		30,135 09	
Aug. 16.	To 198 days comp. int.....	203 90	
		30,338 99	
" "	By cash.....	4,953 78	
1901.		$25,485 21	
Dec. 15.	To 1 year and 121 days comp. int.....	1,932 45	
		$27,417 66	

The above statement shows the amount payable by the defendant on the 15th December, 1901, to be the sum of $27,417.66, from which time the plaintiff will be entitled to simple interest thereon until paid.

The appeal should be, in my opinion, dismissed with costs and the cross-appeal allowed with costs in this court and in the court appealed from, and the amount found due by the Superior Court should be varied as above stated.

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

Solicitors for the appellant: *Taillon, Bonin & Morin.*

Solicitors for the respondent: *Brosseau, Lajoie & Lacoste.*

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*Mar 19, 20, 23.

*May 18.

T. G. WILSON (PLAINTIFF)..... .....APPELLANT;

AND

THE CANADIAN DEVELOPMENT COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, SITTING IN APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Contract—Shipping receipt—Carriers—Limitation of liability—Negligence—Connecting lines—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.

Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier.

A shipping receipt with terms as above was for carriage by the defendants' line and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with plaintiff but delivered the receipt to his agent at the point of the shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shown by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants.

Held, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the

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

intermediate point, amounted to a wrongful conversion of the goods by the defendants and that they were not exempted by the terms of the shipping receipt from liability for their full value.

As the evidence shewed definitely what damages had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B. C. Rep. 82), ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour J., however, was of opinion that the jugdment of Craig J. at the trial, including damages for the loss on other goods, should be restored.

APPEAL from the judgment of the Supreme Court of British Columbia (1) reversing the judgment of the Territorial Court of Yukon Territory with costs and ordering a new trial between the parties upon amended pleadings.

The action was to recover damages for loss of and damage to goods which the defendants undertook to carry from Victoria, B.C. to Dawson City, under the contract for carriage set out in the judgment now reported, and either wholly failed to carry or only carried after great delay, and also a certain sum for agreed rebate on freight. The case was tried in the Territorial Court, Yukon Territory, before Mr. Justice Craig who gave judgment for the plaintiff for $28,855.85 for damages and costs. The defendants appealed to the Supreme Court of British Columbia, which by the judgment now appealed from (1) reversed the judgment of the Territorial Court, and ordered the pleadings to be amended and a new trial had between the parties.

The material facts of the case are stated by His Lordship Mr. Justice Davies who delivered the judgment of the court.

Sir Charles Hibbert Tupper K.C. and *Davis K.C.* for the appellant. The plaintiff's representative at the port of shipment had no authority to vary the special agreement nor could the company do so by inserting

(1) 9 B. C. Rep. 82.

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the stamped clause without the knowledge or consent of the plaintiff. But, even if the stamped clause is binding, it does not exempt from liability under the facts of this case, the loss of some shipments and the delay and consequent damage to others being caused by the defendants' own wilful act. The contract of 19th June, in connection with the negotiations at and before its execution, bound the defendants to carry all shipments by plaintiff during the season of 1899, and guarantee their delivery in that season and to pay all charges in order to carry them through, freight being C. O. D. at Dawson. They also were bound to pay the plaintiff a rebate of 7½ p. c. on the total freight. The defendants undertook to carry more than they could handle, created a blockade at Bennett and White Horse, and thus by their own wilful act, prevented the performance of their contract. The most notable example was with regard to a shipment of potatoes and onions which arrived at Bennett on 21st Sep. by the White Pass Railway. The defendants' agent knew they were there, took no steps to pay back-freight nor to ship them on. Although he could have done so immediately, he did nothing. He might have notified the plaintiff by wire, but he did not, and on 28th Sept. the railway company, (who were the defendants' agents) under some imaginary right (see *Atlantic Mutual Insurance Co'y* v. *Huth* (1), sold the shipment to a man who forthwith shipped them to Dawson on a scow, towed by the defendants' boat as far as White Horse, and thence down to Dawson without a tow, and arrived there in good order on 22nd October. He realized $9,000 for this shipment immediately on arrival. If defendants had taken these goods on the 21st and put them on a steamer which was running every day from Bennett or on a scow to

(1) 16 Ch. D. 474.

be towed, they would have got down. The only claim that the railway company could have had was for their freight charges; had these been paid the goods would not have been sold.

Pitts was not our agent and notice to him was not notice to us. The bill of lading is not the contract under which these goods were shipped. It is nothing more than a receipt or document to show title. The contract was made long before the bills of lading were given on 19th June. We may be bound by ordinary terms as to carriage in the bill of lading; but we deny that a clause in it can effect an alteration of our rights under the original contract, See *Rodoconachi* v. *Milburn Bros* (1), at page 319; *Gledstanes* v. *Allen*, (2), and *Wagstaff* v. *Anderson*, (3), per Bramwell L J., at page 177, and in *Sewell* v. *Burdick*, (4), at page 105; *Leduc* v. *Ward*, (5) per Esher, M.R.; Abbott on shipping, (13 ed.) pp. 345, 350 where the whole matter is discussed.

Even if the stamped clause applies, it does not exempt from liability against the negligence and the wilful wrong of the defendants. See remarks of Bramwell L.J., in *Lewis* v. *Great Western Ry. Co.* (6), "owner's risk means at the risk of the owner minus the liability of the carrier for the misconduct of himself or servants." See also *Robinson* v. *Great Western Ry. Co.* (7); *D'Arc* v. *London & North Western Ry. Co.* (8); *McCawley* v. *Furness Ry. Co.* (9); *Grand Trunk Ry. Co.* v. *Fitzgerald* (10), at page 214; Leake on Contracts, 604. The liability for negligence remains unless clearly contracted out of: *The Xantho* (11) at pp. 510, 512; *Hamilton Fraser & Co.* v. *Pandorf & Co.* (12).

(1) 17 Q. B. D. 316.
(2) 12 C. B. 202.
(3) 5 C. P. D. 171.
(4) 10 App. Cas. 74.
(5) 20 Q. B. D. 475.
(6) 3 Q. B. D. 195.
(7) 35 L. J. C. P. 123.
(8) L. R. 9 C. P. 325.
(9) L. R. 8 Q. B. 57.
(10) 5 Can. S. C. R. 204.
(11) 12 App. Cas. 503.
(12) 12 App. Cas. 518.

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The North West Transportation Co. v. *Mackenzie* (1), has no application, as in this case, there was no refusal to take the goods; the goods were taken as the Judge has found under the terms of the contract. The only question is whether the terms of the contract have or have not been varied by the bill of lading. The principle is laid down by King J. in that case, at page 45, and the clause relied on by Mr. Justice Martin was obiter.

The learned Judges erred in finding that the stamped clause applied and, even if right upon that finding they are wrong in the conclusion as to its effect. *Brit. & S. A. SS. Co.* v. *Anglo-Argentine L. S. & P. Agency* (2) shows that the bill of lading merely fixes whether the goods are taken by weight or measurement.

We rely upon the judgment of Mr. Justice Craig, and his findings of fact which are fully justified by evidence and conclusive of the case, and also that the plaintiff was entitled to a rebate of 7½ per cent upon the whole amount of freight from Victoria to Dawson and not only upon such part only as was applicable to carriage by defendants' boats. There are no means of finding out how much freight was applicable to any portion of the voyage, therefore, the contract must be construed as meaning a rebate on the whole through freight.

Duff K.C. for the respondents. The shipments were made by Pitts at Victoria, B.C. and consigned by him to the order of Bank of Commerce at Dawson City, not to appellant, and the bills of lading were forwarded to that bank with drafts attached for collection. When in addition to the natural difficulties of the route and the trouble created by the sudden falling of the river, there was an unexpected rush of business for Dawson in 1899, and in August a blockade of freight occurred

(1) 25 Can. S. C. R. 38. (2) 18 Times L. R. 382.

both at Skagway and White Horse, the congestion was so great that it became plain that difficulty would be experienced in delivering freight already shipped without reference to future business likely to be transported over the same route. In consequence the respondents and other companies issued a notice to shippers that, on and after August 20th, shipments for Dawson City and Yukon points could only be accepted subject to the conditions: 1. That the carriers did not guarantee delivery before the close of navigation, and were released by the shippers and consignees from all claims in respect of non-delivery; 2. That freight charges to Bennett, B.C., be prepaid. And, with notice of these conditions, Pitts continued to ship goods after the 20th August, the bill of lading containing the condition stamped upon its face :—"This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The trial judge finds as a fact that Pitts took each bill of lading with distinct notice of this condition. This condition is sufficient to exonerate the carrier from all liability in the circumstances disclosed by the evidence in this case. *Peninsular & Oriental S. N. Co.* v. *Shand*, (1); *Carr* v. *Lancashire & Yorkshire Ry. Co.* (2); *Crawford* v. *Browne*, (3); *Dickson* v. *Great Northern Ry. Co.* (4); Beal on Bailments, page 411, *et seq*; *Peek* v. *North Staffordshire Ry. Co.* (5); *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *Brown* (6). The only matter, therefore, open for litigation is whether or not the company are liable for breach of contract for refusing to receive the goods except on a condition exempting them from

(1) 3 Moo. P. C. (N.S.) 272.
(2) 7 Ex. 707.
(3) 11 U. C. Q. B. 96.
(4) 18 Q. B. D. 176.
(5) 10. H. L. Cas. 473.
(6) 8 App. Cas. 703 at p. 708.

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liability for failure to deliver during 1899. This issue, however, has not been tried. The court of the first instance proceeded throughout on a misconception, and if the appellant has any remedy he must resort to some other form of action than the one which he has adopted.

The trial judge found that respondents were guilty of actual negligence. If he is right in holding that the contract of 19th June governs and that the guarantee was a part of it, then the question of negligence becomes immaterial. As a matter of fact, however, the finding of negligence proceeds upon the misconception of the duty of the respondents and a misunderstanding of the circumstances surrounding the shipment. In the first place, the blockade occurred before the freight reached respondents, and arose from causes which they could not control. The trial judge finds negligence because the appellant's goods were not forwarded in preference to those of other shippers. There was no contract requiring this and no such duty was imposed upon respondents. All goods were forwarded as rapidly as possible in the order of arrival at Skagway. By reason of the sudden falling of the river, all the larger vessels were compelled to carry much less than their usual tonnage; moreover, the season closed so rapidly that they were not able to make as many trips as it was reasonable to suppose they could accomplish. It is perfectly clear that Wilson's goods were not intentionally delayed.

Then, the appellant was not the legal owner nor consignee of the goods and had therefore no right of action. Leggatt on Bills of Lading, pages 635, 636, 637; *Cahn* v. *Pockett's B. C. S. P. Co.* (1) at page 65; *Shepherd* v. *Harrison* (2); *Kent* v. *Worthing Local Board* (3)

(1) [1898] 2 Q. B. 61. (2) L. R. 5 H. L. 116.
(3) 10 Q.B.D. 118.

We also refer to Abbott on Shipping (13 ed.) pp. 590-593; *Moes* v. *Leith, etc., Co.* (1); *Robertson* v. *The Grand Trunk Railway Co.* (2); *Norman* v. *Binnington* (3).

The judgment of the court was delivered by:

DAVIES J.—We are all of opinion that this appeal must be allowed, and a majority of the court are of the opinion that the damages assessed and allowed by the trial judge should be reduced.

The learned judges of the Supreme Court of British Columbia, in reversing the judgment of the trial judge and ordering a new trial, did so upon the ground that after the contract of June, 1899, a new contract was entered into between the parties for the carriage of the plaintiff's goods, and that the terms of this new contract were to be found in the several bills of lading signed at the time the goods were shipped, and which terms controlled and governed the responsibility of the defendants for the carriage of the goods.

As, however, we are of the opinion that the trial judge was right in holding that the goods were carried under the contract of carriage made between the parties in June and that the terms of this contract could not be varied without the concurrence of the plaintiff who was one of the parties to it, we are not called upon to express any opinion as to the meaning and effect of the stamped clause placed upon the several bills of lading after the 22nd August, 1899, and purporting to limit the carrier's liability. The plaintiff had no notice of this material change in the terms of his contract, and Mr. Pitts, who shipped the goods to him from Victoria, was not his agent to accept or agree to any such change, nor in fact did he pretend to do so.

(1) 5 Ct. of Sess. Cas. (2 ser.) 988. (2) 24 Can. S. C. R. 611.
(3) 25 Q. B. D. 475.

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The Supreme Court of British Columbia were of the opinion that the plaintiff's action, if any, was one simply for a refusal of the defendants to carry the goods under their June contract with the plaintiff. We do not, however, agree with this view, but concur with the trial judge that their action was not a refusal to carry the goods under their contract, but an attempt made by them to vary its terms by the addition of a clause further limiting their contractual liability.

The June contract was in the following terms:

CANADIAN DEVELOPMENT COMPANY, LTD.

FREIGHT CONTRACT entered into 19th June, 1899, between T. G. Wilson, of Dawson City, shipper, and Canadian Development Company, Limited, No. 32 Fort Street, Victoria, B.C., carriers; whereby it is agreed that the goods of class and quantity herein mentioned shall be shipped and carried between the points at the rate and on the terms herein set forth, viz: From Puget Sound and British Columbia ports to Dawson City.

Date of Shipment.—Throughout season of 1899.

Class of Goods.—General merchandise.

Quantity.—Exclusive contract for season of 1899.

Rates as fixed by joint tariff and classification of commodities hereunto annexed, subject to payment of extra packers' charges over White Pass and Yukon route on shipments made prior to July 10, 1899. Shipper to have a rebate at end of season equal to seven and one-half per cent ($7\frac{1}{2}\%$) on the amount of business routed over our steamers.

Terms of Payment—C. O. D., Dawson City.

Consignees—T. G. Wilson, Dawson City.

Shipper to be protected in event of rate war.

A shipping receipt in ordinary form in use by the company to be given for the goods at the time of shipment, to be carried under and pursuant to the terms of the shipping receipt.

T. G. WILSON, Shipper,
Canadian Development Co., Limited.
Per R. T. ELLIOTT.

The joint tariff referred to in this contract was one entered into between a number of transportation companies fixing the rates of through freight to Dawson City from British Columbia and Puget Sound ports.

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The only one of its terms or stipulations which was made applicable to the contract in question in this suit was that fixing the rates. Its other terms or stipulations applied simply as between the companies which were parties to it.

The last clause in the contract of June between the parties hereto provides that a shipping receipt in the ordinary form in use by the company was to be given for the goods at the time of shipment, and that they were to be carried under and pursuant to the stipulations of that receipt.

The terms of that shipping receipt, so far as they are material in determining the liability of the defendant company, are as follows:

It is agreed that in settlement of any claim for loss of or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded, by statute or otherwise, to hold the company responsible in any manner for the keeping or safe or prompt carriage of the goods, and waives and abandons all advantage and benefit accorded by the statute, 37 Vict. c. (blurred), to the shipper, and himself accepts all responsibility for the safe-keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness or want of skill of the company's officers, servants or workmen, but which shall have occurred without the actual fault or privity of the company.

The terms of this agreement are undoubtedly very wide and relieve the company from liability for losses or damages arising out of their contract for "the safe keeping and carriage of the goods" even when caused by the negligence or carelessness or want of skill of the company's officers, servants or workmen. But it was clearly not intended to relieve them of all respon-

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sibility because their liability for damages caused "by the actual fault or privity of the company" is expressly reserved and we are of opinion that, with respect to such of the plaintiff's goods as were actually converted and sold by the defendant company or their agents, while being carried by them to Dawson, the cause does not exempt them from liability. Nor do we think the clause restricting claims for loss of or damage to the goods to their cash value at the port of shipment covers or was intended to cover cases where the goods were wrongfully sold or converted to their own use by the carrier. It is impossible to conceive that such a clause should be so construed as to enable the carrier wantonly to destroy the goods while being carried by him to their destination, and possibly at a time and place when their value had become enormously enhanced, and then say to the owner: "True it is, I have without justification destroyed your goods, but I am only liable to pay you their value at the place of shipment." We do not construe this clause limiting the amount of the claim which the owner of the goods can make for loss or damage to his property as extending to cases of either wanton or unjustifiable destruction or conversion of the goods. In the late case of *Price* v. *The Union Lighterage Company* (1) Walton J. reviewed the cases upon the construction to be given to these contracts of carriage and his remarks and conclusions are instructive.

Now with respect to the shipment of potatoes and onions sent forward on the 5th September, the evidence is that these goods were sold by one of the companies or parties to whom the defendants had given them because of the non-payment of the freight. The purchaser at this wrongful sale himself took the goods forward to Dawson and realised a very handsome profit.

(1) [1903] 1 K. B. 750.

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We are all of the opinion that for this wrongful conversion or destruction of the plaintiff's goods for the carriage of which to Dawson the defendants had contracted, they have not exempted themselves from liability. By the express terms of the contract the freight was not payable by the plaintiff till his goods were delivered to him in Dawson. The non-payment of the freight which was made an excuse for the sale of the goods, was, as between the parties to this suit, due entirely to the actual fault of the defendants.

The evidence as to the actual loss sustained by the plaintiff in consequence of this wrongful conversion of his goods was not contradicted, nor was it seriously contended that, if liable at all, the amount claimed as damages for the goods sold was excessive. As the evidence shows definitely the damages sustained by the plaintiff by reason of the wrongful destruction of this shipment, as distinct from the damages claimed on the other shipments from which the defendants have by contract exempted themselves from liability, we see no good reason for remitting the cause back for further evidence

The damages must be reduced to those proved with respect to the goods sold and converted while on their way to Dawson, viz.: $13,904.71.

The appeal will be allowed with costs in all the courts, and the damages reduced to the amount above specified.

ARMOUR J.—I agree with the findings of fact and the conclusions of law of the learned trial judge, and am of opinion that the appeal should be allowed with costs and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Smith & Macrae.*

Solicitors for the respondents: *Clarke, Wilson & Stacpoole.*

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*May 7, 8.
*June 2.

NEWCOMBE N. BENTLEY AND OTHERS (DEFENDANTS) .... } APPELLANTS;

AND

J. ASHLEY PEPPARD, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF J GOURLEY PEPPARD, DECEASED (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Possession—Statute of limitations.

In 1821 M. obtained a grant of land from the Crown and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons who sold it in 1873, aud by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed of this land to B. who proceeded to cut timber from it. In an action of trespass by P.

Held, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not the deed to his sons in 1870 gave them exclusive possession and if they had not a perfect title then they had twenty years after in 1890.

APPEAL from a judgment of the Supreme Court of Nova Scotia affirming the verdict for the plaintiff at the trial.

The facts are sufficiently stated in the above headnote.

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

(Mr. Justice Mills heard the argument but died before judgment was given.)

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Roscoe K.C. for the appellants.

Borden K.C. and *Gourley K.C.* for the respondent.

The judgment of the court was delivered by :

SEDGEWICK J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia in favour of the plaintiff, respondent, ordering the appellants to restore to him the goods replevied and payment of nominal damages for the trespass. The judgment of the Supreme Court unanimously affirmed the judgment of Mr. Justice Townshend, the trial judge, in favour of the respondent, and upon appeal his judgment was confirmed.

As the decision of the case mainly depends upon the question whether or not the rights of the parties are to be determined by the provisions of the Statute of Limitations, it may be well to state certain fundamental propositions, the proper application of which to the facts in controversy must settle this appeal.

1. According to the English law the word "possession", as applied to real estate, has a purely technical meaning. The word "occupancy" is not a word of legal import apart from its popular acceptation. Occupancy may as a matter of fact negative possession in its legal sense, but possession in the same sense is consistent with non-occupancy. In other words, all land in the dominions of the Crown must be in the possession of some one, whether that "some one" be the Crown itself or a natural or artificial entity. "Vacant" land—"abandoned" land, (where title is involved) is an impossibility. Possession must be somewhere—in somebody—and he who has the title is presumed to have the possession unless the actual dominion and occupancy is elsewhere.

2. Where the owner (also a non-technical word)—the person having a present legal estate, whether by word

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of mouth or by a written instrument—lets blackacre, the tenant accepting and entering by virtue thereof has possession of every foot of ground comprised in blackacre, although he may possess himself of but one foot of it only.

3. Where a person without title and without right (in Canada we call him a "squatter") enters upon land, his possession in a legal sense is limited to the ground which he actually occupies, cultivates and encloses; it is a *possessio pedis* —nothing more.

4. But where a person in good faith under a written instrument from one purporting to be the proprietor, enters into blackacre—a definite territorial area—his actual occupancy of a part—no matter how small—in the absence of actual adverse occupancy by another, gives him a constructive possession of blackacre as a whole. He has it, as the phrase is, under "colour of title."

5. At common law and notwithstanding the old limitation statutes, the actual and exclusive possession of a tenant or parcener could not work to the detriment of his co-tenant or co-parcener. His possession was theirs and could be invoked not only as against the alleged title of a trespasser, but in aid of their own:

(But this principle has long since been changed by statute both in England and Nova Scotia.)

6. Since this change, therefore, exclusive possession by one of such co-owners is regarded as adverse against the others.

7. But independently of that, and notwithstanding the statute, his grant or feoffment of the whole estate to one entering into possession under it operates as an ouster of the others and the latter's right under the Statute of Limitations begins from the date of the grant

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In the present case one Samuel McLellan obtained a grant of the land in dispute in 1821 and a year afterwards permitted his son, Robert, to enter into possession of it. For more than ten years, and until after the death of his father, he lived upon it, built a house and barn upon it, and cultivated a considerable portion of it. It appears that afterwards he removed from the place some few miles distant where he continued to live, but the evidence shows, and the jury has found, that he occupied the land and had sole and exclusive possession for twenty years before the year 1870. And I think they would have been justified in finding a sole and exclusive possession for 47 years.

Samuel McLellan, Robert's father, left ten sons and four daughters, and it is proved that not one of these children, nor any of their descendants, ever claimed title to nor occupancy of any portion of the land in dispute, from the time that Robert entered it in 1823 down to the commencement of this action in December 1899, and that during all of that period, when fencing or pasturing or cultivation of any kind, or the taking of wood or timber therefrom, was necessary, Robert and those claiming under him were the only ones that ever attempted or claimed or exercised the right to do so. In 1870 Robert conveyed the lot to his four sons, Samuel, Charles, John A. and Albert, and although none of them lived upon the lot the possession must be presumed to be in them, they taking seizin under their father. These four brothers just mentioned, in December 1873, sold to one Frederick A. Fullmore, but Fullmore's deed was not registered. Fullmore's title was sold under a registered judgment against him by the sheriff to one Amos Hill on the 13th June 1882, and Hill conveyed to one J Gourley Peppard, by deed dated the 24th March, 1884, the two latter deeds being registered. The plaintiff is the administrator of Gourley Peppard. The

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defendant purported to purchase the lot from Charles McLellan (who had previously conveyed to Fullmore as above mentioned), Edward McLellan and Sylvius McLellan, nephews of Robert McLellan, and cousins of Charles, the deed being dated 10th August, 1896, and registered in November following. It is under this deed that the appellants claim the right to cut the timber in question.

It is, I think, clearly established, as already intimated, that Robert McLellan having been let into possession of the land by his father, then being the patentee from the Crown, the Statute of Limitations began to run against the father in the father's lifetime; that twenty years exclusive possession, in the absence of evidence to the contrary, would give him a good title at their expiration. So that his possession, after his father's death, would not, under the common law, inure to the benefit of his co-heirs, the brothers and sisters above mentioned. That would be a sufficient answer to the plaintiff's claim. But assuming otherwise, the deed from Robert McLellan, he then being in possession, to his four sons, in April, 1870, gave them exclusive possession of the whole lot, and even supposing they had not then a perfect title, that title became perfect twenty years thereafter, namely, April 1890.

The purchase therefore by the defendant in 1896 could not avail as against their deed and possession.

A point was raised at the argument as to whether the defendant's title was good inasmuch as the deed to Frederick A. Fullmore was not registered. The subsequent deeds were registered, as already stated, and it is not necessary to decide whether under the Registry laws these deeds are of no avail as against the purchase by Bentley in 1896 inasmuch as the trial ujdge found, and we think upon sufficient evidence, that the consideration for his deed was merely nominal

and deeds of that character do not come within the protection afforded by the Registry laws.

On the whole we are of opinion that the judgment below should not be disturbed.

The appeal is dismissed with costs.

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Sedgewick J.

Appeal dismissed with costs.

Solicitor for the appellants: *Norman J. Layton.*

Solicitor for the respondents: *G. H. Vernon.*

BISHOP H. PORTER (PLAINTIFF).....APPELLANT;

AND

GEORGE W. PELTON & GEORGE B. HOLDEN (DEFENDANTS).....RESPONDENTS

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*May 18, 19, 20.

*June 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract under seal—Undisclosed principal—Partnership—Amendment—Discretionary order.

P. sold mining areas and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company which received a deed of the land and did some work but finally ceased operations. Only a small part of the stock was sold and none was given to P. who took action against the purchaser and H. claiming that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action.

Held. that no action could lie against H. on the agreement under seal not signed by him even if it was for his benefit and a seal was not necessary.

The court refused to interfere with the discretion of the court below in refusing an amendment to the statement of claim.

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

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PORTER v. PELTON.

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

The plaintiff, Bishop H. Porter, of Bridgewater in the County of Lunenburg, who was the owner of certain gold mining areas at Leipsigate Gold District, in Lunenburg County, on May 9th, 1900, gave a 60 days' option at the price of $6,000 upon those areas to the defendant Pelton, with liberty to do development work on the areas in the mean time.

The defendant Pelton, though unknown to the plaintiff, was in partnership with the defendant Holden and the option was taken for the benefit of the partnership, and by the directions of the defendant Holden. Work was done upon the areas, an extension of the option was obtained, and before it expired the defendants decided to purchase the areas and the plaintiff was notified to that effect. The sum of $1,000.00 was paid to the plaintiff by a cheque furnished by the defendant Holden, and a note for $1,000.00, signed by the defendant Pelton and indorsed by the defendant Holden, was given to the plaintiff. The plaintiff executed a transfer of the areas to the defendant Pelton, and received an agreement executed by him alone by which he undertook to organize a company to operate those areas, said agreement being in the words and figures following:—

"Memorandum of Agreement made this 6th day of August, 1900, by and between George W. Pelton, of Waltham, Massachusetts, Mining Engineer, at present of Bridgewater, Nova Scotia, of the first part and Bishop H. Porter, of Bridgewater aforesaid, in the county of Lunenburg, druggist, of the second part.

"Whereas by transfers from said Bishop H. Porter and from Watson Porter dated and delivered this day,

the said Bishop H. Porter has sold and conveyed to said George W. Pelton, his executors, administrators and assigns, the gold mining areas as set forth in said transfers for the sum of six thousand dollars, although the consideration stated in said transfers is the nominal sum of one dollar; and whereas there is at present unsettled the balance of four thousand dollars of said purchase price: Now, therefore, this agreement witnesseth that the said George W. Pelton, for and in consideration of the delivery of said transfers, the receipt whereof is hereby acknowledged, and of further valuable consideration, doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said Bishop H. Porter, his executors, administrators and assigns, to settle and arrange the said balance of the purchase price in the following manner, that is to say: That he will forthwith proceed to organize a *bonâ fide* joint stock company in connection with said gold mining areas so transferred as aforesaid, and that upon the due organization thereof he will cause to be issued and delivered to said Bishop H. Porter, his executors, administors and assigns, four thousand dollars worth of capital stock in said company at market price."

The defendant Holden, after the purchase of the areas from the plaintiff, returned to the United States where he lives and obtained a charter in the State of West Virginia for a joint stock company by the name of the Black Hawk Mining Company, with a capital of $1,000,000 divided into shares of $1.00 each, with head office in Boston. The defendant Holden appears as one of the incorporators of that company, but the defendant Pelton's name does not appear. The other incorporators were E. W. Baxter, W. C. Keith, H. B. Holden and S. K. Paige.

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Upon the company being organized the defendant Pelton transferred to it the areas obtained from the plaintiff and received in payment 999,995 shares fully paid and non-assessable of the company's stock.

The other five shares were subscribed for by the five above named incorporators who received one share each and paid $1.00.

The defendant Pelton then transferred his shares to the company, his stock certificate was cancelled, and the stock was re-issued.

With the money obtained from the syndicate, the company, under the local management of Pelton, built a mill and did a certain amount of development work underground and while engaged in these operations endeavoured to sell as much stock as possible.

About 15,000 shares were worked off through paid agents upon about 40 investors at par, although the actual value of a share based upon the price paid for the areas and the money expended in the development was not more than $ ·03 a share.

After May, 1901, it became impossible to sell any more stock and the company stopped paying wages to the men at the mine and in consequence the workmen quit work, attached the property and all operations ceased.

The stock of the company never acquired a market value, and the plaintiff never received any stock, nor any part of the $4,000 due.

The plaintiff's action as launched was for damages for breach of agreement of August 6th, 1900, to deliver to him $4,000 worth of stock, and was based on the assumption that Pelton and Holden were partners in the transaction and that the agreement was signed by Pelton on behalf of both. The trial judge refused

to allow the statement of claim to be amended by adding a charge of fraud.

Russell K.C. and *Wade K.C.* for the appellant. Pelton signed the agreement as agent for Holden who ratified his action and is therefore liable. *Hunter* v. *Parker* (1).

It was not necessary that this agreement should be under seal and the technical rule as to sealed instruments does not govern it. *Tapley* v. *Butterfield* (2); *Harrison* v. *Jackson* (3).

Holden was present when the agreement was signed and it was done at his request. It was therefore, in law, his own act. *Ball* v. *Dunsterville* (4).

Holden having adopted the contract and received the benefit of it is liable in a court of equity. *Conant* v. *Miall* (5).

The statement of claim should have been amended to meet the evidence given by defendant himself and it may still be amended. *Zwicker* v. *Feindel* (6); *Riding* v. *Hawkins* (7).

Newcombe K.C. for the respondent. Holden was not a party to the deed and did not execute it. He cannot therefore be held liable on it. Pollock on Contracts, p. 98. *Chesterfield &c. Colliery Co.* v. *Hawkins* (8); *Russell* v. *Annable* (9).

A person cannot bind others by executing a deed under seal. Lindley's Law of Companies pp. 193-5, ed. 6. Fry on Specific Performance, p. 85.

The amendment was properly refused. *Lever & Co.* v. *Goodwin Bros.* (10); *Bentley & Co.* v. *Black* (11).

(1) 7 M. & W. 322.
(2) 1 Met. (Mass.) 515.
(3) 7 T. R. 207.
(4) 4 T. R. 313.
(5) 17 Gr. 574.
(6) 29 Can. S. C. R. 516.
(7) 14 P. D. 56.
(8) 3 H. & C. 677.
(9) 109 Mass. 72.
(10) W. N. (1887) p. 107.
(11) 9 Times L. R. 580.

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The judgment of the court was delivered by:

NESBITT J.—The appellants applied at the opening of the argument to add three alternative claims We are of opinion that all proper amendments should be made where the court is satisfied that such amendments are necessary to do justice and the nature of the demand is not changed, and that neither party can be prejudiced. Such amendments must be dealt with in each case in the sound exercise of a judicial discretion. We cannot in this case interfere with the exercise of a discretion in the court below.

On the cause of action as stated by the plaintiff there can be no doubt. The argument addressed to us by the appellant's counsel, that although the contract entered into between Pelton and Porter was under seal the appellant was entitled to sue Holden, was:

(*a*). Because it was a contract which could be made by an instrument in writing and the seal was unnecessary.

(*b*). Because the original promise to pay for the land could be relied upon against Holden and the price in money claimed since Pelton's promise under seal to pay in stock worth $4,000 had not and could not be fulfilled and the plaintiff could revert to the original consideration.

(*c*). Because Pelton was really a partner of Holden and the partnership name was simply Pelton, and therefore the partnership was bound by the signature "Pelton" under seal, as a partnership signature.

(*d*). Because Holden was an undisclosed principal of Pelton, and therefore bound by the sealed instrument signed on his behalf.

(*e*). Because Pelton was really signing for the benefit and on behalf of Holden.

(*f*). Holden by his fraudulent dealings with the company had rendered the stock of no value.

The cases for over a century establish the rule of law firmly that where partners contract under seal they are bound by the form of the instrument, and where parties so signing are merely acting as agents and are so described, only the parties signing can be bound. A principal or partner cannot be bound unless he has given authority for his signature under seal, and is designated as a party to the deed. A cestui que trust cannot either sue or be sued upon a covenant made by and in the name of a trustee on his behalf.

The case of *Schack* v. *Anthony* (1813) (1), seems to completely set at rest the contentions (*a*) and (*b*) above referred to.

In *Re Pickering's claim*, (1871) (2), the arguments (*d*) and (*e*) were in substance unsuccessfully urged by Sir Roundell Palmer as answers in equity to the technical rules at common law relating to instruments under seal.

See also *Calder* v. *Dobell*, (1871) (3). and particularly Hannen J. at p. 500.

Beckham v. *Drake*, (1841) (4), affirmed on this branch *sub nom. Drake* v. *Beckham*, (5).

We think too that the evidence discloses that the option to purchase given to Pelton was exercised by him by the instrument under seal in question in the action and we see no evidence of any other bargain. The evidence seems also to indicate that Pelton fell in with a suggestion that Holden should sell his stock and that the failure of the mine to realise the high hopes of the promoters has caused the change of view indicated by the letters of the 20th May 1901, and 24th September 1901.

(1) 1 M. & S. 573.
(2) 6 Ch. App. 525.
(3) L. R. 6 C. P. 486.
(4) 9 M. & W. 79.
(5) 12 L. J. Ex. 486.

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Nesbitt J.

We think it is a case of disappointed hope and that the evidence in no way discloses any reason for allowing on terms a charge of fraud to be added.

The case of *Conant* v. *Miall*, 1870, (1), so much relied on by the appellants, is quite consistent with all the authorities. That was a case of property purchased for an undisclosed principal who affirmed the transaction and took a conveyance of the land, and the unpaid vendor was held entitled to recover against the principal to whom the land had been conveyed and in whom was then vested the balance of the purchase money.

The appeal will be dismissed with costs in all courts.

Appeal dismissed with costs.

Solicitors for the appellants: *Wade & Paton.*

Solicitor for the respondent: *E. M. McDonald.*

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(1) 17 Gr. 574.

THE MASSAWIPPI VALLEY RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

JAMES B. REED, (DEFENDANT)..... .....RESPONDENT.

1903

*May 22.

*June 8.

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

Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by Conduct—Words of limitation—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by suffrance—Arts. 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 *C. C.—Art.* 77 *C. P. Q.*—14 *&* 15 *Vict. ch.* 51—25 *Vict. ch.* 61. *s.* 15—*Findings of fact—Assessment of damages—Emphyteutic lease—Contrat innommé—Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*

A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to show the side lines and the railway fencing, at the points in dispute, was placed, here and there, above the water-line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium filum* and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, etc." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter, and *The Railway Act*, 14 & 15 Vict. ch. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas (1) That the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended

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

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beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium filum*; (3) that by ten years possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years and (4) that, by thirty years adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal the Supreme Court held:

1.—That the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium filum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance.

2.—That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under article 2251 of the Civil Code of Lower Canada, but merely an occupation as tenant by suffrance upon which no such prescription could be based.

3.—That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed.

4.—That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company.

5.—That the acquisitive prescription of thirty years under article 2242 of the Civil Code could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after the sale, his occupation of the part of the property the possession of which he had failed to deliver, was merely on suffrance.

The judgment appealed from was reversed on the questions of law as summarized, Davies J. *dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.

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On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was

Held, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as the party having the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees, who held the beneficial estate.

Semble that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant.

APPEAL from the judgment of the Court of King's Bench, appeal side, which affirmed the judgment of the Superior Court, District of Saint Francis, dismissing the plaintiffs' action with costs.

The action was *au pétitoire* for a declaration of the plaintiffs' title to lands in the Township of Hatley on the bank and in the bed of the Massawippi River and for the demolition of a mill and mill-dam constructed thereon by the defendant and his grantors and also for $2,000 damages resulting from the penning back of the waters of the river by the mill-dams which caused damages to the permanent way of the company on the shores of Lake Massawippi.

The plaintiffs had, in January, 1870, purchased from one Putney a parcel of land adjoining his mill property, in the Township of Hatley, containing four and three-tenths acres in superficies and described as bounded on one side "by the Massawippi River" and they alleged that they immediately took possession thereof, constructed their line of railway thereon and that, as riparian proprietors, they were entitled to all the riparian rights thereto appertaining. The fences along the right of way, at the point in question, had

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been built a short distance from the edge of the river and Putney had continued to use the strip of land between the fence and the water's edge and also the bed of the river in connection with his mills and in the construction of the mill-dam. The deed to the company was duly registered and, afterwards, Putney sold the mill property and his rights in the river bed to persons from whom the defendant acquired, the description of the property sold including "that part of the Massawippi River which is not included in the right of way of the Massawippi Valley Railway on said lot, which lies easterly of said right of way." The possession of the strip between the fence and the water's edge by Putney and his assigns, including the defendant, deprived the company of the full quantity of land conveyed to them, but they took no measures in ejectment, nor to prevent those persons using the bed of the river, until November, 1899, when the action was brought principally on account of the inconvenience and damage the company suffered through the damming of the river at the mill-site causing the waters of Lake Massawippi to rise and wash away part of their permanent way.

The plaintiffs were incorporated under charter (25 Vict. ch. 61,) with power to construct the railway, and it was provided that The Railway Act (14 & 15 Vict.ch. 51) should be considered as incorporated in the special Act. Section 15 of the special Act provided that the company might enter into agreements with any other railway company for leasing the railway or the use thereof for any period, and under these powers the company immediately, upon the completion of construction, leased the railway with all its appurtenances to the Connecticut & Passumpsic Railway Co. which operated the railway till it was merged in the Boston & Lowell Railway Co. which was afterwards merged

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in the Boston & Maine Railway Co. which held and operated the railway at the time of the present action.

The pleas material to the issues on the present appeal were those denying the plaintiffs' title and right of action, *au pétitoire* or for damages; the pleas claiming title by possession of ten years with translatory title and of thirty years without title, and the general traverse of the claim for damages.

In the trial court F. X. Lemieux J. held that the plaintiffs had alienated all their interest in the railway and had no right of action; decided the questions as to title and possession in favour of the defendant and, in appreciating contradictory testimony as to the damages, found as a fact that, giving preference to the testimony of the witnesses for the defence, there had been no damages caused through the fault of the defendant and the action was dismissed with costs. The judgment appealed from held that the plaintiffs had reserved the *domaine direct* and had a right to bring the action *au pétitoire* and, on the sole ground that the defendant had acquired ownership by effective possession during ten years under a valid translatory title and considering that "for this reason" there had been no error in the judgment of the trial court, the court below affirmed "the enacting part of the decree" with costs against the present appellant, (Hall J. dissenting).

Lafleur K C. and *Cote* for the appellants. The plaintiffs reserved the *domaine direct*, the legal estate, in the railway and all their rights in respect thereof; the lease is emphyteutic and consequently they are fully entitled to the petitory conclusions as to all the land and rights between the railway fence and the centre line of the Massawippi River, and to have all constructions on the west half of the river demolished, subject to such compensation as experts may determine to be their actual value. We have established damages

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largely in excess of the amount prayed for, and there is sufficient evidence upon which to make an award without the necessity of further expertise as suggested by Mr. Justice Hall.

As to the claim by thirty years possession, the deed by Putney to the company bears date the 3rd of January, 1870, the action was served on 5th December, 1899, less than thirty years afterwards and, at any rate, Putney cannot prescribe against his own conveyance in which he became warrantor of plaintiffs' title.

The prescription of ten years cannot apply as there was notice of the prior title in the registry office which charged all subsequent grantees with knowledge and prevented any possession in good faith.

The appellants must succeed on the petitory conclusions, so far as concerns the strip of land between the railway track and the river. The title deed in distinct and positive terms covers this land. The appellants' rights to the half of the river bed should also be maintained. The deed describes the property as bounded "on the south-easterly side by the Massawippi River," a stream, floatable *à buches perdues*. This description would convey all rights in the river to the middle of the stream; *Hurdman* v. *Thompson* (1). The bed of the river to mid-channel is an adjunct of the grant of adjacent land upon the bank unless it is especially excluded therefrom. In the present case there is no exclusion. In fact there is, in the subsequent deeds, an admission that it was intended to be included. In the deeds from Putney to LeBaron, and from LeBaron to respondent's immediate *auteur*, in which the land on the opposite shore and the remaining rights in the river were conveyed, the property is described as "including that part of the Massawippi River which is not included in the right of way of the Massawippi Valley Railway,"

(1) Q. R. 4, Q. B. 409.

thus recognizing that a portion of the river was included. If any portion was included it must be the full half of the river because there is no reference to the subject except in the general description "bounded by the Massawippi River."

As to the damages, the dam was gradually but materially added to from time to time increasing its height and more particularly increasing its width. The effect of widening the dam was to make it tighter, increasing the height of the water, and giving a larger head. The damages growing more pronounced from year to year, became so serious that, in 1899, appellant instituted the present action for damages to the road-bed and to recover possession of the property illegally detained, and by removing the dam, to prevent further damages. The railway is built along the lake shore, close to its waters, for a distance of eight or nine miles. The dam is about three-quarters of a mile from the outlet of the lake, and the fall from the waters of the lake to the crest of the dam is only an inch or two, the water being practically level between the dam and the lake. The expert evidence is that the dam must of necessity raise the water in the lake and that the rise would correspond with the height of the dam. The respondent's witnesses, however, testify that the dam does not have any effect. So remarkable a result would seem to require explanation.

H. B. Brown K.C. for the respondent. The transfer made by plaintiffs to the Connecticut & Passumpsic Railroad Co. for the term of 999 years, and called a lease, and by which, in express terms, the plaintiffs demised the road with all its franchises, rights and privileges, is in effect an alienation. Art. 1593 C. C.; 25 Vict. ch. 61, s. 15. A lease for 999 years is, for all purposes under our law, a transfer in perpetuity. Arts 389, 390, 391 C. C.; 27 Laurent, nos. 47, 48;

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Fuzier Herman, Code Annotée, Art. 530, note 2; Art. 1709, note 7; Lorrain, "Locateurs et Locataires," p. 3, nos. 9, 10. If the contract be regarded, however, as a *contrat innommé* a *bail-à-rente*, or an emphyteutic lease, it operates an alienation during the term of its existence. 4 Pothier (ed. Bugnet). "Bail à rente," no. 111: Arts. 567, 568, 569, 570, 571 C. C.; *Lampson et al.* v. *Bélanger* (1). If the contract operates as an alienation, plaintiffs have no right of action and are without interest. Art. 77 C. P. Q.

Nor can the plaintiffs claim damages. The question as to whether the lessors and lessees can join in an action for damage, is not in issue here. They are not joined. The lessor, who has not suffered any damage, can not maintain the action in its own name alone. Even under an ordinary lease, it is not competent for the landlord and tenant to bring a joint action against a trespasser for damages, although both parties in such case may sustain injury, their injury being entirely separate and distinct; Beaudry-Lacantinerie, "Contrat de louage," p. 227, Nos. 532, 533. The lessees and their successors have, in fulfilment of the terms of the lease, maintained the road-bed, and there is no recourse of the lessees, in any form, against plaintiffs. Where then is the interest that can warrant a condemnation for damages in favour of the plaintiffs who have not suffered any damage?

The sale from Putney, dated 31st Jan., 1870, is of a strip of land described as having the line of the Massawippi Valley Railway running through it, and bounded on one side by a line drawn at a distance of three rods north-west from the centre line of said railway, and on the other side by the Massawippi River, as "selected and laid out by the company for the purposes of their railway." This is the form given in

(1) Q. R. 7 S. C. 162.

the Act, 25 Vict. c. 61 At this time the company had already taken the land which they required for their railway, and which Putney intended to sell. Within a few months they put up their permanent fences along the right-of-way as already established and left Putney in possession of this narrow strip outside of the fence, which is in dispute. Under the Act, 14 & 15 Vict. ch. 51, sec. 13, the company was required to construct and maintain these fences, "to divide and to keep their land from the neighbouring properties." They interpreted their own deed, by erecting the fence in the position where it has ever since remained, and which is in accordance with the pretentions of the defendant; *Langevin* v. *Morrissette* (1). The possession of defendant and his *auteurs* has ever since been acquiesced in by the company which also has taken freight from defendant's mill, and put in a siding up to the mill at his expense, to encourage him to enlarge his business, and the idea of now claiming the land on which the mill stands comes very late. The fact that for upwards of 29 years since their title, and for upwards of 30 years since their possession, the companies have treated the disputed land as outside of their limits, lays a very heavy onus upon the plaintiffs, especially in view of the money expended in good faith and the business built up on the territory now disputed. See *Dunn* v. *Lareau* (2) at page 230 and *Delorme* v. *Cusson* (3).

The company could only acquire title to land "necessary for the construction, maintenance, accommodation and use of the railway." 14 & 15 Vict. c. 51, s. 9, ss. 2. See the remarks of Halsbury L. J. in *London Brighton & South Coast Ry. Co.* v. *Truman* (4). The presumption of ownership *ad medium filum aquæ* may

(1) 19 R. L. 476.
(2) 57 L. J. P. C. 108 ; 32 L. C. Jur., 227.
(3) 28 Can. S.C.R. 66.
(4) 11 App. Cas. 45.

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be rebutted; *Duke of Devonshire* v. *Pattinson* (1). As regards this company with power to acquire land simply for the purposes of a railway, the presumption of ownership *ad medium filum aquæ*, beyond their right of way as laid out, would not exist at all. Cf. 14 & 15 Vict. c. 51, s. 9, ss. 3; *Norton* v. *London & North Western Ry. Co.* (2).

Twenty years before the action Putney sold the property in question to LeBaron, and posts were planted, showing the westerly side line outside the railway fence as it then was and as it is to-day. One of these posts still exists undisturbed. The thing sold had been seen, examined, surveyed, and was known as lying between the railway fence on one side and the middle of the river on the other; *Dunn* v. *Lareau* (3) Sixteen years before action, LeBaron sold the same property to Wilder Reed, and in 1895, Wilder Reed sold to defendant, who, by himself and his *auteurs*, has been in possession under translatory title in good faith. When in the deed from Putney to LeBaron the property sold is described as "including that part of the Massawippi River which is not included in the right of way of the Massawippi Valley Railway", the parties meant, it is manifest, the right of way as it existed and had been fenced off, then, for over nine years.

Although the period between the date of the deed from Putney to the Company, to the date of service of the action, falls short of thirty years by about a month, yet that deed was merely an amicable settlement of the compensation for an expropriation, which had already taken place more than a year previously, with the consent of Putney. The deed is retroactive to the date the company took possession. Abbott's Railway

(1) 20 Q. B. D 263. (2) 9 Ch. Div. 623; 13 Ch. Div. 268.
(3) 32 L. C. Jur. 227.

Law of Canada, p. 211; art. 1085 C. C. There has consequently been 30 years acquisitive prescription in favour of the defendant.

Defendant is, in any event, entitled to retain the property until he has been paid for his improvements, which have been made in good faith.

The question as to whether or not the dam has been the cause of the damage claimed to the road-bed along Lake Massawippi is a question of fact, and the trial Judge before whom the witnesses were examined, came to the conclusion that the plaintiffs had failed to establish this feature of their action. This decision should not been interfered with on appeal; *The Village of Granby* v. *Ménard*, (1).

THE CHIEF JUSTICE.—This seems to me a simple case. Both parties have Putney as their warrantor. Though as to the respondent he is but remotely so, that makes no difference. Art. 187 C. P. Q. So that the solution of the controversy between the parties depends exclusively upon the question, 1st. whether the piece of land that Putney sold to the appellants in 1870 is bounded by the River Massawippi or not, and 2ndly. whether that sale includes the bed of the river *ad filum aquæ*. If not, their action must be dismissed whether the respondent has any title to the property or not. And, *à converso*, if the land purchased by the appellants from Putney includes the land up to the river, with the river *ad filum aquæ*, the respondent's contentions are untenable and he must surrender the property in dispute to the appellants.

Now there seems to me but one possible answer to that question. First, the deed of sale to the appellants in express terms gives the river as the boundary of the land sold; secondly, they purchased four acres and

(1) 31 Can. S. C. R., 14.

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three-tenths, and they would not have that quantity if they did not go as far as the river; thirdly, on the plan deposited with the Government as required by the statute then in force (14 & 15 V. ch. 51), it appears unmistakably that the land previously indicated by the appellants as wanted for their railway was bounded on the east by the river. *Micklethwait* v. *Newlay Bridge Co.* (1).

The respondent contends that the words "the same having been selected and laid out" in the deed should be read as if the description of the land previously given were immaterial. But that contention cannot prevail. If anything in that deed is immaterial, it is those very words and not the description. Then they cannot be read with the addition of the word "as" preceding them for the simple reason that that word is not there. They mean if anything at all "selected as laid out as per the plan filed according to the statute." It must be held consequently that the appellants' purchase from Putney includes the strip of land between the railway fence and the river. That being so, there is no room for the contention that their title does not include the river.

It is settled law that a deed of sale which gives a non-navigable river as the boundary on one side of the land sold cannot be read as implying a reservation of the river, or as excluding it from the sale; and in such a deed, if the description is doubtful, it has to be construed against the vendor. Duranton, Vol. 5, No. 223; 2 Demolombe. Servit. no. 275. In other words, the bed of the river is included in the sale of the land

unless the terms of the sale clearly denote the intention to stop at the edge of the river. Kent's Comment. Vol. 3, p. 427, unless there be *decided* language showing *a manifest intent* to stop at the

(1) 33 Ch. D. 133.

water's edge". Angell, on Watercourses, No. 10; *Hurdman* v *Thompson* (1); *The Queen* v. *Robertson* (2).

The French law and the jurisprudence of the Province of Quebec are in the same sense. And it is not strictly accurate to call this a presumption. The river is, *ad filum aquæ*, included in the sale itself *ex jure naturæ*, as an incident of property, as a part and parcel of the land sold, just as the windows and doors of a house, or its chimneys and heating apparatus, form part of a sale of the house if not reserved in clear language. This deed must be read as if the property sold was described in express words as bounded by the middle of the river. *Lord* v. *The Commissioners for the City of Sydney* (3). The intention to include the river in the sale is proved by the fact that it was not excluded.

Now the appellants' deed having been duly registered in 1870, Putney could not in 1879 give any title of the same property to LeBaron. He did not do so in fact, but simply sold whatever of that lot 24 he had not sold to the appellants; but assuming that he has done so, the sale is a complete nullity, according to the express provisions of Art. 1487 C. C. The appellants' title could not be defeated by their vendor and warrantor himself. The sale to them was as perfect in 1870 for the part not delivered by their vendor, as it was for the part they took physical possession of. Art. 1472 C. C. And not only between them and Putney, but also as to third parties they became the legal owners of all the property they purchased the moment that their deed was registered. Art. 1027-1027, 2089, 2096 C. C. Le Baron then had no title to this property and consequently could not convey any to W. Reed, nor the latter to the respondent. *Kaigle* v. *Pierce* (4).

(1) Q. R. 4 Q. B. 409
(2) 6 Can. S. C. R. 52.
(3) 12 Moo. P. C. 473.
(4) 15 L. C. Jur. 227.

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The possession that Putney kept of the river is of the same charac er and cannot be viewed in any other light than the possession that he was allowed to keep of the strip of land bordering it; *Rondeau* v. *Charbonneau* (1); that is to say, a possession not distinct and separate from that of the shore, and not as proprietor, but by sufferance of the owner, upon which no plea of prescription of ten years can be based.

It is no doubt true that in construing a deed the manner in which it has been executed by the parties may furnish a guide for its interpretation, but that rule can be invoked only when the intent of the parties appears by the deed itself to be doubtful; it cannot defeat a clear and unambiguous written agreement; Putney could not be admitted, under the circumstances of this case, to contend that his failure to deliver the thing sold is by itself evidence against his contract to do so sufficient to defeat it.

The respondent would contend that the clear stipulation in the deed of sale to the appelants must give way before the presumption resulting from Putney's possession up to 1879. But when a vendor so continues to remain in possession with the consent express or implied of the vendee, the legal presumption is that thereafter he possesses as tenant. Art. 1608 C. C. He clearly cannot possess *animo domini* anything that he has sold.

Then Putney himself subsequently acknowledged appellants' rights in the river by selling to LeBaron whatever of that lot he had not sold to the appellants,

including that part of the river which is not included in the right of way of the Massawippi railway,

terms that necessarily imply the admission that the appellants' right of way included a part of the river and are equivalent to an express reservation of that

(1) 11 R. L. 292.

part in their favour, and the Reeds acquired what LeBaron himself had bought from Putney, not more nor less. They consequently have no title to the property in dispute. *Chalifour* v. *Parent* (1). But assuming that they have, they cannot in good faith have believed that Putney had the right to sell to LeBaron in 1879 what they knew by the registry office and their own title deeds he had sold in 1870 to the appellants.

Under any view of the case, therefore, the respondent's plea of prescription by ten years cannot prevail.

Then as to the thirty years' prescription, it could not under any circumstances have run during Putney's possession, for Putney could not possess *as proprietor* what he had himself sold the appellants. Arts. 2193, 2196 C. C. He being their warrantor could not, if he had been called *en garantie*, be admitted to impugn himself the title he gave them and attempt thereby to derive a benefit from his failure to perform his obligation to deliver what he had so sold

As to the appellants' right of action, I am of opinion, with the Court of Appeal, that the respondent's contentions on this point, as on the others, are unfounded. Then if necessary I would have allowed the joining of the appellants' lessees as co-plaintiffs by way of amendment.

As to the damages, I see nothing in the case that would justify an interference with the findings of fact of the trial judge upon this part of the action against the appellants' contentions upon contradictory evidence.

The appeal should, in my opinion, be allowed with costs in all the courts against the respondent, less however the costs of enquête which are to be borne by each party, (*chacun ses frais d'enquête et d'exhibits*),

(1) 31 Can. S. C. R. 224.

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and less half the cost of the printing thereof in this court; the record to be remitted back to the Superior Court for the expertise necessary for the valuation of the improvements made on the property by the respondent; (Arts. 411 to 418 C. C.); which improvements the appellants have agreed to pay. The Superior Court thereafter upon the payment of such improvements, less the costs due by the respondent *s'il y a lieu*, to enter judgment according to the appellants' conclusions *au pétitoire*.

SEDGEWICK and GIROUARD JJ. agreed with His Lordship the Chief Justice.

DAVIES J.—I do not dissent though I entertain grave doubts based upon the decision of the Privy Council in *Dunn* v. *Lareau* (1).

NESBITT J. concurred for the reasons stated by His Lordship the Chief Justice.

Appeal allowed with costs.

Solicitors for the appellants: *Cate, Wells & White.*

Solicitors for the respondent: *Brown & Macdonald.*

(1) 57 L. J. P. C. 108; 32 L. C. Jur. 227.

THE WESTERN ASSURANCE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

ANNIE E. HARRISON AND CUTHBERT HARRISON (PLAINTIFFS)... } RESPONDENTS.

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*May 18.

*June 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insurance against fire—Application—Untrue statement—Materiality—Statutory condition.

In an application for insurance against fire among the questions to the applicant were: "Have you * * ever had any property destroyed by fire?—Ans. Yes. Give date of fire and, if insured, name of company interested. Ans. 1892. National and London and Lancashire." The evidence showed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires.

Held, reversing the judgment appealed from (35 N. S. Rep. 488) that the above questions were material to the risk and the answers untrue. The first statutory condition therefore precluded recovery on the policy.

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

On appeal to the Supreme Court of Nova Scotia from the judgment for plaintiff on the trial of the action on the policy of insurance against fire, the company raised questions of overvaluation of the property insured, untrue statements as to ownership and others, as well as that of the untrue answer to the question as to previous fires above set out. On this appeal counsel

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

(1) 35 N. S. Rep. 488.

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Nesbitt J.

for the plaintiffs was only called upon to argue the latter.

McCarthy K.C. for the appellants.

Newcombe K.C. for the respondents.

The judgment of the court was delivered by:

NESBITT J.—The application in this case forwarded to the head office of the company, and forming the basis of the contract of insurance, contained the following:

Q. 12. Have you, or if a firm, has any member of it, ever had any property destroyed by fire?

A. Yes.

Q. 13. Give date of fire, and if insured name of company interested;

A. 1892. National, and London and Lancashire.

The evidence discloses that the insured had had, prior to the application for insurance, three fires while living on the same property, in which his property had been destroyed.

The answer is therefore untruthful, and we hold material, and under the first statutory condition precludes recovery in this action.

It is unnecessary to consider the other points raised on this appeal.

Appeal allowed with costs in all courts.

Appeal allowed with costs.

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

Solicitor for the respondents: *H. H. Wickwire.*

IN THE MATTER OF THE REPRESENTATION IN THE HOUSE OF COMMONS OF CERTAIN PROVINCES OF THE DOMINION CONSEQUENT UPON THE LAST DECENNIAL CENSUS.

1903
*April 20, 21, 22.
*April 29.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—B.N.A. Act, 1867, *s.* 51—*Construction*—"*Aggregate population of Canada.*"

In determining the number of representatives to which Nova Scotia and New Brunswick are respectively entitled after each decennial census the words "aggregate population of Canada" in subsec. 4 of sec. 51 of the B.N.A. Act 1867, mean the whole population of Canada including that of provinces which have been admitted subsequent to the passing of the Act.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court for hearing and consideration.

The case was referred to the court in the following form:

"Extract from a report of the Committee of the Honourable the Privy Council approved by the Governor General on the 17th April 1903.

"On a report dated 15th April 1903, from the Minister of Justice, submitting that in connection with the proposed readjustment of the representation in the House of Commons of the provinces of the Dominion, consequent upon the last decennial census, the Province of New Brunswick supported by the Province of Nova Scotia contends for a construction of section 51 of the British North America Act, 1867, different from that which has been heretofore applied and which is adopted by your Excellency's advisers. These provin-

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

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ces have therefore asked that a reference be made to the Supreme Court of Canada for a determination of the question in difference.

"The Minister, therefore, recommends that the following question suggested by the Government of New Brunswick and approved as the Minister of Justice is informed by the Government of Nova Scotia, be referred to the Supreme Court for hearing and consideration, pursuant to the authority of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25 intituled 'An Act to amend Chapter 135 of the Revised Statutes intituled An Act respecting the Supreme and Exchequer Courts.'

"In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words "aggregate population of Canada, in subsection 4 of section 51 of the British North America Act 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of Provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?

"The Committee submit the same for approval.

"(Sgd.) JOHN J. McGEE,
"*Clerk of the Privy Council.*"

Counsel:

For the Dominion of Canada: *The Honourable Charles Fitzpatrick K.C.*, Minister of Justice and Attorney General for Canada. *E. L. Newcombe K.C.*, Deputy Minister of Justice.

For the Province of Ontario: *Æmilius Irving K.C.*

For the Province of New Brunswick: *The Honourable*

William Pugsley K.C., Attorney General for the Province of New Brunswick, and *Geo. W. Allen K.C.*

For the Province of Nova Scotia: *The Honourable J. W. Longley, K.C.*, Attorney General for the Province of Nova Scotia, and *E. M. Macdonald Esq.*

For the Province of Quebec: *L. J. Cannon K.C.*, Deputy Attorney General of the Province of Quebec.

Irving K.C. for the Province of Ontario. Your Lordship read yesterday the reference that has been made to this honourable court, and it would hardly seem necessary to read it again. But as it is but a few lines and I would like to state the issue that Ontario takes upon it, I therefore, with your permission, will read it.

"In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada' in sub-section 4 of section 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of Provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

That, I understand, is the question, and the issue that Ontario takes upon it is: That sub-section 4 of section 51 should be construed as meaning the population of the four original provinces of Canada and that there has been no legal change in that to the present time.

I have to beg leave to refer your Lordships to the clauses of the British North America Act which bear upon this question. The third clause of the Act provided that there should be one Dominion.

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Coun-

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cil, to declare by Proclamation that, on and after a day herein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three provinces shall form and be one Dominion under that name accordingly."

Then follows section 4 which is as follows:

"The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union, that is to say, on and after the day appointed for the union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Then the next clause says:

"Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia and New Brunswick."

The next clause I do not think is material to the issue, but I come to clause 8 which says:

"8. In the general census of the population of Canada which is required to be taken in the year one thousand eight hundred and seventy one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished."

That is a very important clause and bears very much upon the general question that is to follow. Then I have to ask your Lordships to allow me to go to section 51 which is the section indicated in the question submitted to your lordships.

"51. On the completion of the census in the year one thousand eight hundred and seventy one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time as the

Parliament of Canada from time to time provides, subject and according to the following rules."

There, your Lordships see that the census which by section 8 was to specially distinguish, the populations of the four provinces, is there again referred to as the representation of the four provinces involved in the census provided for in section 8. The rules are as follow :—

"1. Quebec shall have the fixed number of sixty five members."

"2. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained)."

Then sub-section 3 provides for the computation in fractional numbers which I do not think it is important to trouble your Lordships with. Sub-section 4, which is the sub-section to which your Lordships' attention is particularly directed is as follows :

"(4). On any such re-adjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one twentieth part or upwards."

Your Lordships will see there, that the number of members shall not be reduced unless the proportion which the number of a particular province bore to the number of the aggregate population of Canada, is ascertained at the then latest census to be diminished by one twentieth part or upwards. Now then the next question as I understand here is : What does "Can-

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ada" mean in that clause? At that time and up to say 1871, there was no question that by "Canada" was meant the four provinces which had been before specified under the clause to which I drew your Lordships' attention, as embraced under the term "Canada" as constituted under this Act. It says "Canada" shall be taken to mean "Canada" as constituted under this Act, and in the general census of the population of Canada the respective populations of the four provinces shall be distinguished. Well my Lords, this is as it were the first resting place. Under this Act as it stood then there could be no question but that the re-adjustment was to be of the four provinces, and of the aggregate population of those four provinces thus described here in this particular clause under the word "Canada" as the earlier clauses of the Act has contemplated might be done. Then, the following clause, section 52, may be read because it bears an important signification with reference to this.

"52 The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed."

Now, that might be taken to mean, on the first glance, that Parliament, provided it did not disturb the proportionate representation, might increase the number of members over all the provinces above what they were under the original Act. But it also is capable of being applied differently and I think we will find one of the elements of difference in the following section:

"146. It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the

respective Legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

I therefore say that it is on such terms and conditions in each case expressed and as the Queen thinks fit to approve, that representation in Parliament is to be accorded; now the representation of the provinces prescribed by this Act, as far as we have gone, is of these four first provinces, and if that proportionate representation which is the whole keystone of this Act be preserved, then the Parliament of Canada shall have the right to increase its number of representatives from time to time provided the proportion of representation is not disturbed. I think that is a point that cannot be got over. I think that there can be no disturbance of that arrangement. In this Act, by section 52, it was contemplated that the area of Canada as it then was should be enlarged on terms and conditions to be approved by the Queen and upon addresses to be submitted. If these terms and conditions, as we shall come to them, provide for representation in Parliament and representation in the House of Commons, then here we have laid down the rule under which it is to prevail, namely: Provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed; not the proportionate representa-

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tion of provinces that may be brought in hereafter. This is the primary condition connected with the whole of the building of the act of union.

MR. JUSTICE ARMOUR: It seems to me that you lose sight of the recital of the Act providing for the union. The union is not to consist only of these four provinces but it is to consist also of such provinces as may be brought in from time to time.

And then section 4 says: "The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on or after the union, that is to say, on or after the day appointed for the union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Mr. Irving: That is when there is a proclamation introducing the outlying provinces.

MR. JUSTICE ARMOUR: Suppose only one province comes in and then there was a decennial census, how is that province's representation to be ascertained? Must it not be with regard to the aggregate population of the whole?

Mr. Irving: But there would have been no census taken of it, if I understood your Lordship's premises?

MR. JUSTICE ARMOUR: I say, suppose only one province was introduced, and that after the decennial census had taken place.

Mr. Irving: Including that province.

MR. JUSTICE ARMOUR: Yes. Then how is that province's representation to be adjusted?

Mr. Irving: That province's representation was to be adjusted according to the distribution of the four original provinces

MR. JUSTICE ARMOUR: But then, the four original provinces are always to remain the same according to

your theory, and therefore you would have a stray horse in the province that was outside.

Mr. Irving: This province outside joins subject to terms, according to its proportion of the four provinces of which it is not one.

MR. JUSTICE ARMOUR: Then you would not include its population at all in ascertaining its representation; you would simply take the population of the four provinces.

Mr. Irving: Of the four provinces.

MR. JUSTICE ARMOUR: What proportion then would you give?

Mr. Irving: Whatever was the 65th as provided with reference to Quebec. Then it would get its members in that same proportion.

MR. JUSTICE SEDGEWICK: That is all that is contended for now.

Mr. Irving: That is all I am contending for now. My learned friends, however, say that there is to be a pool of the whole population.

MR JUSTICE SEDGEWICK: And there will be representation by population in each province of Canada; that is what they are contending for.

Mr. Fitzpatrick: Of course.

MR. JUSTICE SEDGEWICK: That is the old question.

Mr. Irving: I am contending for the same thing only it is a different way of putting it. My learned friends take the grand total or aggregate of the whole census of the Dominion of Canada and I say that it should be the aggregate of the four provinces as they were at the last decennial census.

MR. JUSTICE ARMOUR: The motive power that put the British North America Act into force was desire to obtain representation by population.

Mr. Irving: Does it say so in the recital, my lord?

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MR. JUSTICE ARMOUR: The effect of your contention would be that there would be no such thing as representation by population and the older provinces would have a certain representation according to the time when they were constituted, and the newer provinces would have a representation of their own.

MR. JUSTICE DAVIES: I understand you are only arguing so far as the unit is concerned. You say the unit is obtained by dividing the population of Quebec by the population of the old four provinces.

Mr. Irving: Yes, my Lord.

MR. JUSTICE DAVIES: And the other construction involved the division of the population of Quebec by the population of the whole Dominion.

Mr. Irving: Yes, my Lord.

MR. JUSTICE DAVIES: That is the only point between you; representation by population would still remain.

Mr. Irving: I am coming to that. If his Lordship will permit me to say so, I do not think the words "representation by population" are in this Act from one end of it to the other, and whatever the arguments may have been before, I do not think we can now import them into this Act. This is a strict question of the construction of an instrument of Government which is like a great charter.

MR. JUSTICE ARMOUR: You are entitled to look at the position of things when the British North America Act was passed in order to ascertain what they were intending to do, but you are not to alter the wording of the Act by that.

Mr. Irving: I do not know that the political question of representation by population as it was argued before Confederation ever assumed such a concrete form that one could say exactly what was to be introduced here.

MR. JUSTICE MILLS: Your contention is confined to the assumption that the word "Canada" in the British North America Act means the four provinces.

Mr. Irving: I contend that, my Lord.

MR. JUSTICE MILLS: What name would you give to the additional Territories when these Territories became Provinces? You have a larger Dominion and you have no name that you could apply to the entire Dominion.

Mr. Irving: I do not now that it is any argument in favour of the broader question, as to what are the conveniences or the inconveniences to which it may lead, unless we can find in any of the subsequent Acts anything which would lead to a different view than the view I am endeavouring to uphold now.

MR. JUSTICE MILLS: Take section 101 of the British North America Act which provides for the constitution of a general court of appeal in Canada. Would not your contention go this far, that a court of appeal created under that Act would be a court of appeal for the four provinces and not a court of appeal for any other portion of the Dominion?

Mr. Irving: I would like to look at that particular clause before I would give your lordship an answer to that if it be deemed that I should give an answer to it. Section 101 says:

"101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organisation of a general court of appeal for Canada."

MR. JUSTICE MILLS: Would that be the four provinces only?

Mr. Irving: I do not say that necessarily. I am now on the question of representation. I am not dealing with reference to any wider question. I am confined to the question of representation and I say that so far, if I have made out expressly that those four provinces

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are to be the body from which the unit is to be established among themselves and that that is to prevail everywhere, then that does not affect other questions that may arise upon other subjects, because I do not present a scheme which would be perfect as a whole. Your Lordship may say that it is extremely inconvenient. That may be so but I am not dealing with that. I am dealing with what is laid down according to the statute and its convenience or inconvenience has nothing to do with it. I say, therefore, that for other colonies coming in there is a rule preserved by which representation may be given to them. That is rather anticipating some remarks which I am going to make, but does not alter at all the fact that a general court of appeal of Canada should not apply to these provinces that may be admitted. I am only dealing now with the question of the respective representation in Parliament of the four original provinces and illustrating how other provinces might be affected, and that there is a rule existing to give them representation upon the distribution, in section 52:

"Provided the proportionate representation of the province prescribed by this Act is not thereby disturbed."

Now the next in order is the Imperial Act of 1871. Prior to that there had been two Acts of the Parliament of Canada. One of them was on the surrender, or the acquisition perhaps would be at this time the proper term, of Rupert's Land. That provided for the peace, order and good government of that part of Canada, and there is also the "order" afterwards for giving Manitoba a constitution and a representation. It was deemed questionable, whether the Province of Canada had any power to admit or to create a new province out of the territories without special power, the

British North America Act not covering that. This Imperial Act is as follows:

"Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces and territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts and to vest such powers in the said Parliament."

The second clause is:

"2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament."

That was establishing a new province. Then again:

"3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish or otherwise alter the limits of such province upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby."

"4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province."

Now then, those matters do not apply so much to Manitoba. This was for establishing new provinces,

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but in the case of Manitoba the following acts were passed by the Parliament of Canada: An Act for the temporary Government of Rupert's Land and the North West Territories when united with Canada; and an Act to Amend and continue the Act 32 and 33 Vict. ch. 3 and to establish and provide for the government of the Province of Manitoba, shall be deemed to have been—

THE CHIEF JUSTICE: Do I understand you to contend, or if I understand you well I think you do contend, that the word "Canada" in sub-section 4 applies to the four provinces only.

Mr. Irving; Yes, my Lord.

THE CHIEF JUSTICE: Do you contend that the word "Province" preceding and subsequent, extends only to the four provinces?

Mr. Irving: Only to the four provinces.

THE CHIEF JUSTICE: The word "Province"?

Mr. Irving: Yes—on any such readjustment.

THE CHIEF JUSTICE: Does that mean only for a province?

Mr. Irving: Yes.

THE CHIEF JUSTICE: That is one of the four provinces.

Mr. Irving: That is one of the four provinces.

THE CHIEF JUSTICE: And later on if in the North West Territories or British Columbia or Manitoba, or if anywhere the number should be reduced, this would not apply according to you—this applies only to the four provinces.

Mr. Irving: To the four provinces.

THE CHIEF JUSTICE: Altogether.

Mr. Irving: Altogether.

THE CHIEF JUSTICE: I do not see how you can work it out.

Mr. Irving: I have not got quite through, my Lord; I am trying to work it out. These four provinces are to be measured in their readjustment by the aggregate of these four provinces, under the name of "Canada". I understand that the argument on the other side will be, that the aggregate population of Canada is the aggregate of the whole of Canada whatever it may be, a dozen provinces or a dozen territories, and then that these four provinces are to be measured by the unit of Quebec divided under that grand total. Now, I come back to it being to the four provinces, and then I say: That the representation which is to be accorded to the other provinces is to be in the same proportion according to the unit that is allowed to Quebec out of the population of Canada, that is, of these four provinces.

I am now at 33 Vic. ch. 3, which is one of the Acts of Canada which was validated by the Imperial Act of 1871, and therefore it has to be read as, and is in fact, an Imperial Act to the full extent as though it were embraced in the British North America Act. The first clause of that Act deals with the boundaries of Manitoba and the second clause gives to Manitoba a constitution. This Act gives a constitution to the Province of Manitoba and section 2 deals with the application to the Province of the provisions of the British North America Act which may be said generally to apply to all the provinces, but it does not touch the question of representation. It says:

"On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honourable Privy Council, under the 146th section of the British North America Act 1867, shall, by order-in-council in that behalf, admit Rupert's Land and the North West Territory into the union or Dominion of Canada, there shall be formed out of the same a province which shall be one of the provinces

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of the Dominion of Canada and which shall be called the Province of Manitoba."

That excludes all the special provisions relating to Ontario and Quebec or New Brunswick or Nova Scotia, but it takes all the clauses which I may say were common to all those provinces and grants them as a constitution to Manitoba, but it does not touch the question of representation which is dealt with in a separate section. It provides for representation in the Senate and it now provides for representation in the House of Commons in this manner:

"4. The said province shall be represented, in the first instance, in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor General into four electoral districts, each of which shall be represented by one member."

That Act was passed in 1870.

"Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the 51st section of the British North America Act 1867."

Therefore, it provides in the case of Manitoba, that its representation shall be readjusted according to the provisions of the 51st section; the 51st section as I am now arguing to be read as dealing with the original four provinces.

I am not at the clause giving representation to Manitoba. Follow me for a second if you please. There they say, that after 1881 the representation shall be readjusted according to the provisions of the 51st section of the British North America Act, 1867. That leaves the 51st section, as I read it, untouched. In the clause immediately but one before where they were giving a constitution to Manitoba they say this: "As

if the province of Manitoba had been one of the provinces originally united by the said Act". Why did they not add that on here with reference to the representation, if they meant to do it? Before I get through my argument I hope I shall be able to convince your Lordships, that there is no way in which section 4 is affected, except by what is presumed to be implied. Now, this gives Manitoba an absolute constitution and it says that it shall have the use and the right to all those powers as though Manitoba had been one of the provinces originally united by the said Act. Then the next clause but one to that says that the representation shall be readjusted according to the 51st section, but it does not go on to say, as though Manitoba had been one of the provinces originally united. That is absolutely left out. These Acts are instruments of government; they have got to be read absolutely and in express terms in accordance with what is laid down and so construed. You cannot by adding to the instruments of government imply ideas.

MR. JUSTICE MILLS: That Act was passed immediately after the disturbance in Manitoba, and it was made a subject of discussion in Parliament, as I remember very distinctly, as to whether the Parliament of Canada could by an Act of Parliament, give to a province a constitution under which it should come into the Dominion and which would be unalterable. And so Parliament by certain resolutions that are embodied in the Imperial Act of 1871 got over the *ultra vires* provisions of this Act of 1870.

Mr. Irving: Yes my Lord, but this Act of 1870 which I have been reading having been declared valid and effectual by the Imperial Act is exactly the same as though it were a part of the British North America Act.

MR. JUSTICE MILLS: Made so by the Imperial Act.

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Mr Irving: Yes. It is the Imperial Act that I am relying upon. The Acts which I have read to you, shall be and be deemed to have been valid and effectual for all purposes whatsoever from the day on which they respectively receive the assent in the Queen's name of the Governor General of Canada. Therefore, my Lord, I do not think that this can be explained away by my learned friends. Now, my Lords, I pass to the case of British Columbia. I come to the order-in-council of the 16th May 1871 relating to the admission of British Columbia and it is to be found in the volume of the Dominion statutes of 1872, in the order-in-council in the early part of the volume numbered, in Roman numerals, LXXVII. I refer to section 8 of that, and it is repeated in every one of the addresses so that it is not necessary to refer but to one. for they are all alike. It says:

"8. British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons, the representation to be increased under the provisions of the British North America Act 1867."

Now, with reference to that, the minimum of British Columbia was there settled to be six members to the House of Commons, but on a change of population such as the British North America Act would recognise, it would be liable to be increased. Now the 52nd section of the British North America Act made this provision:

"52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed."

Therefore in the case of British Columbia, starting with six members, the Dominion Parliament has power

to increase the representation of the number of members to the House of Commons provided the proportionate representation prescribed by this Act is not thereby disturbed. Therefore so soon as British Columbia had a population which in the ratio of Quebec would entitle it to an increase this section 52 would grant it to the province of British Columbia as a right.

I now take the case of Prince Edward Island and I refer to the order-in-council in that case. It is to be found in the Dominion statutes of 1873, in the orders-in-council grouped in the front part of the volume at page 12 in Roman figures. It provides as follows:

"That the population of Prince Edward Island having been increased by 15000 or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members, the representation to be adjusted from time to time under the provisions of the British North America Act 1867."

That again brings up the same provision, that it is to be readjusted under the provisions of the British North America Act. Now I believe that there is one other Act which I wish to bring to your Lordships' notice. Of course I am taking only the Imperial Acts which are the only Acts we are interested in. This Act is an Act passed in 1886, 49 & 50 Vic. ch. 35. It is an Act respecting the representation in the Parliament of Canada which for the time being formed part of the Dominion of Canada but are not included in any province. About the same period in the same month of June, there was an Act passed by the Parliament of Canada here respecting the representation of the North West Territories, and this Act that I am now about to read is merely an Act to validate that Act which was then being passed here or had been passed and it recites:

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"Whereas it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada but it is not included in any province.

"The Parliament of Canada may from time to time make provision for representation in the Senate and House of Commons or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof."

That is the general purview of the Act. Then it states that "any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be and shall be deemed to have been valid and effectual from the date at which it received the assent in Her Majesty's name of the Governor-General of Canada." That refers to the Act of the Dominion of Canada which was being passed in the very same month of June and which is chapter 24.

The Imperial Act refers to this Dominion Act although it was only passed a few weeks before and they probably had not official intimation of it having been passed. It says:

"2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act, shall, if not disallowed by the Queen, be and shall be deemed to have been valid and effectual from the date at which it received the assent in Her Majesty's name, of the Governor General of Canada.

"It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act 1871, has

effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of Members as the case may be, provided by any such Acts of the Parliament of Canada for the representation of any provinces or territories of Canada.'

HON. MR. JUSTICE MILLS: That Imperial Act was passed upon the address of the Governor General in Council of Canada to the Government at home.

Mr. Irving: Yes, my Lord. I have now referred to all the legislation or statutes bearing upon the question, and I can only reiterate that which I have stated from the beginning, is the view that I am laying before your Lordships. The word "Canada" in subsection 4 is to be construed as Canada at that particular period, and not the population of Canada as it may be enlarged from time to time.

Pugsley K.C., for the Province of New Brunswick—The question my Lords, which you are called upon to determine is, I think I may fairly say, one of the very greatest importance, not only to the smaller provinces of Nova Scotia and New Brunswick, but also to the province of Ontario. It is of special importance to the smaller provinces because, under the terms of confederation, we were granted representation relatively to our county boundaries, and New Brunswick went into confederation with a population of 250,000. It is proposed now, if the contention of my learned friend the Minister of Justice prevails with a population of 80,000 greater than at the time of confederation its representation shall be cut down from 15 members to 13 members. Starting as we did with a population of 250,000, it is proposed that now, when we have a population of 80,000 greater, the representation of the

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Province of New Brunswick shall be cut down from 15 to 13 members. That is the proposition, and we have only to look forward to the very rapid increase which is likely to take place in the Province of Quebec in view of the new territory which is being added to that province, and also of the rapid increase in the North-West; we have to look forward to the time coming, inside of 30 years at all events, when, if the view of the other side prevails, our representation in New Brunswick would be cut down to five or six members. Therefore your Lordships are called upon to deal with a question which is of very great importance indeed, looking to the future of this country.

Now, my Lords, it seems to me that there is a misapprehension as to the question of representation by population, as applying to the new provinces and the Territories. I submit that under the British North America Act there is no provision whatever for representation in Parliament of the Territories or new provinces, no provision whatever. You may search the British North America Act from beginning to end and you will find no provision with reference to the representation either of the Territories or of new provinces.

MR. JUSTICE ARMOUR: Except it comes in under the 4th clause of section 51.

Mr. Pugsley: But when any new province comes in it may or may not agree to come in under section 51. It was competent for the Imperial Parliament to provide, when Manitoba was created a province, that instead of her representation being readjusted from time to time she should have six members until her population reached 100,000 and after that she should have ten members.

MR. JUSTICE ARMOUR: If it comes in at all, it must come under the provisions of the British North America Act.

Mr. Pugsley: But not under section 51.

MR. JUSTICE ARMOUR: No, section 146.

Mr. Pugsley: I submit not, my Lord. I submit that Manitoba might have been given 50 members; that if Manitoba said: We won't come unless you agree that for all time we shall have at least 50 members in the House of Commons, she need not come into confederation unless she got that. British Columbia might have said we will not come unless you will agree that for all time we shall have ten members. She did stipulate that for all time she should have at least six members. But it was quite competent in the agreement to stipulate that she ought never to have less than twenty members, or that her representation for all time should have been 20 members, or 50 members. It seems to me, my Lords, that you will not find in the Act anything which prevents the Queen in Council, upon proper addresses being sent, providing for any representation or any mode of representation which might be agreed upon.

The Act says:

"On the completion of the census the representation of the four provinces shall be readjusted by such authority in such manner, etc."

But Parliament is not dealing with any other province and, my Lords, it is a curious fact if you look at the history of the matter, that in framing that section 51, the first draft contained the words "each of the provinces." Then it was changed to the representation of "the four provinces," then when you get to the third draft it was changed back to "each province," and finally when we get to the British North America Act it is put "the representation of the four provinces." Your lordship will find the drafts in Pope's Confederation Documents. It is rather curious to see the way in which that expres-

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sion was changed from time to time, showing that those who had the drafting of the Act were giving to it a great deal of thought, and one can very easily see how the words "each province" were put in. Some one may say: Well, that would imply that we are making some provision for the representation of new provinces and we want to avoid any possible interpretation of the Act in that way; we are making no provision for the new territories or provinces which may come in, we are leaving that absolutely as a matter of arrangement to be come to from time to time, and therefore in order that there should be no doubt about it, in the final draft and in the Act as it was passed by the British Parliament the words "each province" were left out and the words "the four provinces" were inserted. This shows that the intention of those who framed the Act, and the intention of the British Parliament, was that they should then legislate simply for the four provinces.

Any way, my Lord, should they not do that. They were legislating for provinces all of which were pretty well settled; provinces which had been established for a great many years and in respect to which the increase of population was likely to be, perhaps not exactly the same but pretty nearly the same. Then when they come to make provision for the possible entry of new provinces by section 146 they make that provision, so far as I have said, for representation. I would like to read to your lordships section 146 and I think section 147 has a bearing also on the subject. Section 146 is:

"146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfound-

land, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the union and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-West Territory, or either of them into the union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

Now, then my Lords, was it not competent for British Columbia to say: We will come into confederation but we will only come in on the terms that we shall have six representatives, or ten representatives, or twenty representatives.

MR. JUSTICE DAVIES: Quite competent, if you establish your first proposition: That section 51 only relates to the four provinces and does not lay down any rule for the whole.

Mr. Pugsley: It says:

"And the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

So that the moment the order-in-council was passed agreeing that British Columbia should have six representatives and that that should never be decreased, that order-in-council had the effect of an Act of Parliament, and I submit with all deference that the representation of British Columbia can never be reduced.

Under section 147 it is provided:

"147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each

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shall be entitled to a representation in the Senate of Canada of four members."

There is provision made here for representation in the Senate but none whatever for representation in the House of Commons.

Now my Lords, upon the ground of reason, subsection 4 should be construed as we are contending for, and I think that it is fair to look at what was the object of the framers of the union when they put in that saving clause. It is fair for me to call your Lordships' attention to the fact that if the contention on the other side prevails, that saving clause is not of the slightest benefit to the old provinces—you might as well not have it in there at all.

MR. JUSTICE SEDGEWICK: What is the saving clause?

Mr. Pugsley: Subsection 4. The saving clause is that the representation of a province shall not be reduced unless the proportion which its population bore to the aggregate population of Canada at the last readjustment of representation has been by the latest census diminished by one twentieth part or upwards.

Now the object of that was that even although the population of Quebec might increase more rapidly than the population of any one of the four provinces, yet that the population of the whole four must be taken together and unless one had gone back more than one-twentieth relatively to the whole it should not lose a representative. That is a departure to a certain extent from the principle of representation by population, but it was to enable these small provinces to maintain their representation. And if your Lordships look at the proceedings which took place in connection with the Quebec Conference you will see that it is put forward all the way through that subsection 4 was a safeguard which would prevent any decrease of

representation. That subsection was looked upon as an absolute safeguard. Well my Lords it is no safeguard at all if every ten years you can bring in a new province from the vast territories of the North-west. It is no safeguard at all if when you bring in a new province the whole population of that province is to be counted against you; not merely the increase but the whole population. It is argued on the other side that if, on the first of July, Assiniboia should be carved out of the North-west Territories and brought in to confederation we would be faced not merely with the increase of population in that territory since 1891, but with the total population and that that total population should count against us. It is argued upon the other side that if to-morrow Newfoundland were brought into the union, that we would not have to meet the mere increase in the population as compared to our own, but we would be met with the entire population of the Province of Newfoundland.

MR. JUSTICE GIROUARD: Suppose Newfoundland would come into confederation to-morrow and there should be a provision in the address that Newfoundland should be entitled to 25 members and that its representation should never be less than that number, do you mean to say that that would be within the provisions of the British North America Act?

Mr. Pugsley: I mean to say that it would be absolutely binding if that were agreed to by the King-in-Council, that it would have the force of an Act of the Imperial Parliament and would be binding.

Your Lordships have the right to look at the object of the saving clause. You have the right to look at the object with which that was inserted there, and if you find that the new provinces which may be brought in from time to time count against us not merely as to the increase but absolutely the whole population of

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these provinces as against our increase, why you would destroy the effect altogether of that saving clause and defeat the object with which it was put in

Now, my Lords, there are, it seems to me three questions which your Lordships are called upon to determine here. In determining the representation to which the Provinces of Ontario, Nova Scotia and New Brunswick—they being three of the old provinces—are entitled after each decennial census, you are to take the words "aggregate population of Canada" as meaning first the population of the four provinces; or secondly, the population of the seven provinces as they are constituted today; or thirdly, the population of whole of Canada.

These are the three questions which we would like your Lordships to determine because of course in the future it may make a material difference whether it means simply the provinces, or whether it means all the territories of Canada as well. Because if the territories are to be excluded then of course it would necessarily raise for the old provinces a very important question as to what should be done when it is proposed to bring in new provinces out of the territories; to carve out new provinces from the territories. Therefore it is a very material question whether—even if we are wrong in our view that the new provinces are not to be included, as to whether the territories should be included.

Mr. Fitzpatrick: That is not material in the present issue.

Mr. Pugsley: It is in the case as submitted. It is involved in the question. It is put in the case as to whether the aggregate population of Canada means the population of the four original provinces, or the population of the whole of Canada including the new provinces which have been admitted since. It therefore

necessarily involves the determination by your Lordships as to whether it means the four provinces; whether it means the population of the whole of Canada including the territories, organised and unorganised; or whether it is limited to the population of the new provinces.

Now, my Lords, I want to deal for a few minutes with the question as to whether you could by any possibility make "Canada" in subsection 4 mean the whole of Canada, both new provinces and territories organised and unorganised. And it seems to me that my learned friends upon the other side are driven to argue that in order to sustain their contention. If you take section 51 you will see that it is dealing with the representation of the four provinces, and when by subsection 4 it says:

"The number of representatives for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province, is ascertained at the then latest Census to be diminished by one twentieth part or upwards;"

when it says that, it seems to me that you cannot count in the population of the territories in respect to which no adjustment is to take place. How can you count in that, the population of Assiniboia and Saskatchewan and Alberta and the people living away up in the Peace River with respect to which there is to be no readjustment of representation; in respect to which this section has no application whatever. It seems to me therefore that you must give to the expression "Canada" a limited meaning in that subsection. I do not know whether it is proposed by the Government in this Redistribution Bill to take into account all the

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population of Canada or not, but it seems to me it would be a most absurd thing to say that you could do so; because you are only to take into account the population of that part of the country whose representation you are readjusting.

MR. JUSTICE SEDGEWICK: Why should the territories have representation at all?

Mr. Pugsley: They have, but it is not subject to readjustment. They will have ten representatives under the new bill but they are not entitled to that by virtue of their population.

Mr. Fitzpatrick: They are entitled to six by virtue of population.

Mr Pugsley: Therefore it is proposed that this Parliament shall add four members to the representation of the North West Territories not based upon population at all. And there is nothing in the British North America Act and nothing in any of these subsequent Acts which allows of any readjustment of representation of the North West Territories. There is no provision for it. My learned friend will not contend that the representation in the North West Territories could be readjusted.

Mr. Fitzpatrick: Of course it could and it will.

Mr. Pugsley: You will contend that it can be readjusted.

Mr. Fitzpatrick: And will; the statute provides for it.

Mr. Pugsley: Then if Parliament gives them four more members than they are entitled to, surely that would be *ultra vires*, if they are subject to the provisions of section 51.

In section 2 of the Act of 1886 (49 & 50 Vict. ch. 35) which is an Imperial Act, I find this provision:

"Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in

this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor General of Canada. It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect notwithstanding anything in the British North America Act 1867, and the number of Senators or the number of members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or Territories or Canada.

Mr. Fitzpatrick: We can give them whatever we like.

Mr. Pugsley: That is what I say; they can give them whatever they like. If Parliament thought fit to bring in Assiniboia it could give Assiniboia 20 members although the population would not entitle it to more than two. Parliament is supreme in regard to that and I am showing that there is nothing in the legislation which has been enacted by the Imperial Parliament which by fair implication can compel or induce your Lordships to take away the rights of the four original provinces.

You must find in the later statutes clear and express language to cut down the rights of the older provinces. That is our argument. I recognise of course that as to the new provinces there may be some anomalies, but while that is the case, and while, as has been said, there may be some stray sheep, yet in respect to British Columbia Parliament has made a different provision. Parliament may make different provisions as regards the other provinces but the reasonable thing to do is, as far as

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possible, to make the representation of them all subject to readjustment from time to time. They were not bound to come in under these terms and it does seem to me that your Lordships might fairly hold as to the original provinces, when you come to apply subsection 4, that the aggregate population of Canada means the four provinces which are there referred to, but having reference to the later Acts which say in respect to Manitoba, in respect to British Columbia, in respect to Prince Edward Island, that section 51 shall apply as to representation, you may very well say that in considering the representation which they will have, you will take into account the whole population of Canada. You have to give to "Canada" in subsection 4, if I am right, a limited meaning. You cannot say that "Canada" means the whole of Canada. You cannot say that it includes all the territories in respect to which there is no provision for re-adjustment.

MR. JUSTICE ARMOUR: You must contend that the word "province" in section 51 does not mean any province of Canada but means Nova Scotia and New Brunswick.

Mr. Pugsley: I do not mean in construing it generally, but only when you are construing it in reference to the rights of these four original provinces and with regard to their representation. What I contend is that then you must give to Canada the meaning of Canada as comprising these four provinces. It may be that when you are dealing with the representation of new provinces you will have to give to it a wider meaning and say that it means Canada including the new provinces which have been brought in.

MR. JUSTICE ARMOUR: I think that weakens the force of your argument.

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Mr. Pugsley: Possibly it does, but it is possible that construction might have to be given to it. I submit, my Lords, that the fair way to view the matter is this: That these four provinces constitute Canada under the British North America Act and it is expressly provided that their representation shall be readjusted in that way, and that therefore, seeing that that gives them very important rights which would be most materially altered if you are going to bring in new territories, you are not going to apply a rule in respect to which you have no basis so far as the provisions for readjustment are concerned. Suppose you were to bring in Assiniboia as a province you have no figures with respect to which you can compare our increase, because it never has been in the Dominion before and then you would have to set against our increase of population its whole population. Therefore it is that before your Lordships would hold that the rights of the older provinces shall be cut down, it seems to me that you must find very clear and very express words to that effect.

Allen K.C. follows for New Brunswick: My Lords, I have only one or two words to add to what my learned friends have said, because if I were to speak at any length I would be only going over the same ground. It seems to me perfectly clear that the original meaning of these words in sub-section 4 of section 51 of the British North America Act "population of Canada" must have been undoubtedly the population of the four original provinces. Now, unless the learned gentlemen on the other side can find equal authority in the British North America Act to change that meaning, we must still put the same construction on these words that would have been put upon them if we were now in the year 1867 instead of the year 1903. I do not think that this court will be very astute to take

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away the rights of the old provinces under some general words that may be possibly found in a statute which was passed not to affect the representation of the four provinces originally in the Dominion but passed for the purpose of giving representation to the new provinces. Unless the words are so express and so clear, in the Acts relating to Manitoba and British Columbia, that the court cannot possibly construe them in any other way than that they must affect the rights, the representative rights, of the original provinces as set forth in subsection 4 of section 51 of the British North America Act, I think the court will allow these rights to remain exactly as they were.

The particular doctrine that I wish to enforce upon your Lordships' attention, you will find in Maxwell on the Interpretation of Statutes, (3rd ed.) page 113:

"One of the presumptions is that the legislature does not intend to make any alteration in the law beyond what it declares either in express terms or by implication; or in other words beyond the immediate scope and object of the statute. In all general matters beyond the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have that meaning in their wider or usual or natural sense, would be to give them a meaning in which they were not really used. General words and phrases therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act and as not altering the law beyond."

Therefore I take it, may it please your Lordships, that when we undertake to construe the Acts relating

to the admission of British Columbia, Manitoba or any other province into this Dominion, we must construe them having in mind the purport of these Acts, which was not the cutting down of the representation of the old provinces but the admission into the Dominion of new provinces and the provision of representation for them.

Now, so much on that point. There is just one other point which I do not think any of my learned friends have touched upon and I would like to bring it to your Lordships' attention. It is a well known maxim in the construction of statutes that the meaning of all words in a statute are to be taken as of the very day on which the statute was passed, not as I have seen it stated somewhere or other as of the time in which you are going to put the Act in force.

Mr. Fitzpatrick: That is in the Interpretation Act.

Mr. Allen: You must find out what was the meaning of the words at the time the Act was passed.

Now I refer again to the same book Maxwell on Statutes, page 83:

"The words of a statute must be understood in the sense which they bore when it was passed."

And in the case of *Shape* v. *Wakefield* (1), the same principle is laid down. Now the rule that is there applied is that the words of the statute must be construed as they would have been the day after the statute was passed. Very well. The day after the passage of the British North America Act "Canada" unquestionably meant these four provinces, and the burden rests on the learned gentlemen opposite to produce some authority other than that of the British North America Act to change the meaning of this word Canada from the four provinces to the seven provinces, or to the whole of Canada whichever

(1) 22 Q. B. D. 239 at p. 242.

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they may happen to argue. I do not know which they will choose and under the authorities which I have read to your Lordships it is not enough to produce some other Acts which were passed for other purposes and affect this issue only by implication; there must be clear and unmistakable words to be found for that purpose. I will not take any more of your Lordships' time, because I feel everything has been touched upon.

E. M. Macdonald, for the Province of Nova Scotia. —My Lords, I would like to submit that having regard to the question as to what interpretation should be placed upon the meaning of this word "Canada," that there are three constructions that are open to a person who applies himself to the consideration of that subject. First, there is "Canada" as meaning the four provinces; then there is "Canada" made up of the seven provinces; and then there is "Canada" made up of all the provinces and the territories of the Dominion. It is open to interpret the word "Canada" in either one of these three ways.

On behalf of Nova Scotia I submit that the proper interpretation is the interpretation which my learned friends who have preceded me from Ontario and New Brunswick have submitted to the court. I may be pardoned if in the presentation of the few words I am going to say I have to repeat something that my learned friends have said before me. I point out to your Lordships that when we look at section 51 we find decidedly and distinctly that that section purports to deal only with the representation of the four provinces which were all parties to the confederation. In the preceding section they deal with the representation in the Senate, and the representation in the Senate is fixed definitely and positively as regards these four provinces. It then goes on to deal with the four

partners to the confederation. It makes Quebec the unit, it provides for the increase of members, it provides for the fact that each province will have as many members as it can have by comparison with the unit from Quebec, and then this fourth and saving clause comes in, introduced by common consent of all four members of this confederation, which said: There may come a time when one portion of this confederation may increase in population abnormally and we will provide a rule amongst ourselves which will apply to these four provinces alone. To shew that that is so, when we come to deal with section 146 we find that a clear line is there laid down. Section 146 anticipates the entrance into the Dominion of the colonies of Newfoundland, Prince Edward Island and British Columbia, and it says that these colonies can be admitted upon the presentation of an address to the federal Parliament and upon the passage of an order-in-council by the federal government these provinces become part of confederation upon the terms contained in the agreement. The very important question of representation was left out for the reason that that was one of the great stumbling blocks on account of which Prince Edward Island did not come into confederation. As in the case of Newfoundland it was left absolutely open to deal with it by agreement between the Parliament of Canada and the legislatures of these provinces in future. That this was so will be gathered from the fact that when we come to look at Rupert's Land and the method that was adopted in settling with that portion of the Dominion, permission was given for Rupert's Land to come into confederation upon an address from the Parliament of Canada. That address was presented to the Parliament of Canada and an order-in-council was passed, but it was held that the address did not cover all the

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terms and conditions necessary to make a proper government. So the Imperial Parliament passed in 1868 an Act called The Rupert's Land Act which gave to the Dominion Parliament the power to confer upon that portion of this country certain rights and privileges and all the machinery of government. The federal authorities here, in 1871, came to the conclusion that even under the original address and even under this special Act, there was no power of the federal Parliament to deal with the representation of that country. If representation was a matter that was to work in all these other provinces along the same lines as section 51, why should there be a necessity for all this legislation, why was this doubt-removing Act passed by the Imperial Parliament in 1871 which expressly stated as follows:

"Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces in territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

"Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

"1. This Act may be cited for all purposes as 'The British North America Act, 1871.'

"2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the

constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament?"

Now, if Rupert's Land was coming into confederation, and if this system under section 51 was the system that was to govern other provinces in coming into confederation where was the necessity for this express legislation? In dealing with British Columbia, that Province joined the confederation under agreement and under petitions from the Legislature of that province and from the Dominion Parliament, and one of the provisions of that agreement (I take it verbatim) is as follows:

"British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons, the representation to be increased under the provisions of the British North America Act, 1867."

Now I submit, my Lords, that if the representation of each new province in the confederation was to depend on section 51 there was no necessity for any special stipulation in any one of those agreements in regard to the matter. But in respect to British Columbia the order-in-council, which is the charter of its liberties as a member of this confederation, does not say that the representation of British Columbia can be decreased in accordance with section 51. It does not make that portion of sec. 51 applicable to all. It simply says that the representation of British Columbia can be increased in accordance with section 51. Therefore the whole of section 51 does not apply to British Columbia but only so much of it as provides for the increase of members in accordance with the subdivision of that section.

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I have been endeavouring to point out to your Lordships that the representation of each one of the provinces that came into the confederation after 1867 was a matter which was determined and fixed solely by the agreement in each particular case. These agreements specified the rights of the provinces and the rights of the Dominion, and set out in a general way that all the legislation which applied to the whole of the provinces of the Dominion should apply to each one of the provinces but when it came to the question of representation there was a specific arrangement in each case. I have ventured to call your Lordships' attention to the arrangement which was made in regard to British Columbia. In regard to Manitoba we find a general section in the agreement which made all the various portions of the Act which were common to the whole Dominion applicable to that province and, in section 4 of the Act relating to Manitoba, there is also an express provision in regard to representation where it says that, on the completion of the census in the year 1881 and of each decennial census afterwards, the representation of the province of Manitoba shall be re-adjusted according to the provisions of the 51st section of the B.N.A. Act 1867. That was a specific provision in regard to Manitoba. When we come to look at Prince Edward Island we find that the clause which was inserted in the agreement there, and which dealt with the future relations of the province to the Dominion, is contained in the following words: "The representation to be adjusted from time to time under the provisions of the British North America Act."

Now we submit that these provisions in each one of these agreements became the specific law as regards the representation of each province when these addresses were confirmed by the Order in Council; that

these orders-in-council had the effect of independent Acts of the Imperial Parliament; that each one of them stood on its own particular basis and dealt with the particular rights of a particular province, and that so far as representation was concerned it was deemed necessary to insert a clause in regard to representation in each case and it was not left to the British North America Act to work out this question alone.

I submit that section 51 applies only to these four provinces, and as one of your Lordships well said, you have to infer something in regard to that, in order to make that applicable to the new provinces and, when the charters of these new provinces were granted, Parliament dealt with this representation and treated section 51 as being the system that is worked out applicable to these four provinces, and when these new partners to confederation came in, in one case representation was to be increased and in another case the re-adjustment was to be made from time to time in each case using different language calling for different interpretation. That being so, where you have the British North America Act not dealing, as it does not deal, with the representation of the new provinces in any way, it is significant that section 147 proceeds to deal with the representation in the Senate in so far as Newfoundland and Prince Edward Island are concerned evidently on account of some special considerations, but it leaves the question of the representation of these or any of the different colonies mentioned in 146, so far as the House of Commons is concerned, as a matter to be adjusted by the agreement which may be arrived at. That being so, I submit that whatever agreement each one of these provinces made for itself, it cannot be held that they could interfere with or take away the rights of any one of the original provinces under section 51. That is a question of the construc-

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tion of statutes upon which I need not cite to your Lordships any authority.

But I want to submit further that that is the most natural interpretation to be placed upon the Act. As I have said, there are three interpretations that may be placed upon the word "Canada"; the four provinces, or the seven provinces, or Canada as it exists territorially or geographically. I submit with confidence that it cannot be argued that the computation of the aggregate population of Canada is to include the population of these territories as well because, within the purview of this Act and within the purview of the different provinces that were added to this confederation and which were in contemplation, there was no regard to territory in the position in which our North West Territories are to-day. If the other is to be taken it can only be that we must read into section 51—instead of saying the representation of the four provinces, you must say the representation of the seven provinces; and if that is so you have an unnatural condition of affairs. You reach out into the realm of uncertainty. It may be that it is wise from a certain standpoint to have regard to representation by population, but at the same time this Act must be interpreted in the light of the parties who were partners to it originally, and they might very well have said, and I submit they did say, that uncertain as they were as to the development of the rest of the country, and having regard only to certain provinces some of which had not come into confederation, they would observe this system of representation so far as the original provinces were concerned, and each province that came in afterwards was to be dealt with equitably. But the original partner said that if conditions later on arise by which representation by population under an increased immigration or anything of that kind would create new

conditions, then a new principle can be applied by the Imperial Parliament under the new conditions. I submit that if you take the total population of the four provinces and treat that as the aggregate and work out the proportion of each province alone, excluding the new provinces that come in, you have a fairer system than if you entered into the realm of uncertainty as to whether the territories or the new provinces have a right to be counted in. The territories cannot come in; they do not come in under the Imperial Act. The only representation the territories have in the Federal Parliament is by virtue of the permissive Act enabling Parliament to give them representation. They are not members of confederation. They do not work out their rights under section 92 or in any of the other ways in which provincial legislatures work out their rights. They have no status as members of the confederation at all, and it would be a violation of the original theory on which confederation was based if the Territories were to be permitted to be counted into the computation today, and by so doing deprive any one of the original provinces from the advantages which they gained under section 4.

I do not want to take up too much time and I submit my Lords, in conclusion, that if you take the population of the original four provinces of confederation as the total you have a clear and definite working of the statute which can give the re-distribution of representation for all times. Up to the present, and so far as we can foresee, it is fair and equitable all around. It is clear and definite. You preserve the integrity of the original four provinces unaffected by any legislation regarding new provinces and you will not affect the original four provinces in any way.

Cannon K.C. for the Province of Quebec: May it please your lordships, as the Province of Quebec fully

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indorses the position taken by the Dominion in this case, and shares the interpretation of the section which has been given to it by the Minister of Justice of Canada, it will be probably as well that I should wait until the Minister of Justice of Canada has submitted a case and, if I have any further case to make particular to the Province of Quebec, if it is agreeable to the court I might then be heard.

Fitzpatrick K.C. for the Dominion of Canada:—Perhaps at the outset my Lords, I ought to say there is no provision in the British North America Act with reference to the representation of the provinces except possibly section 37 which provides for the representation of the four original provinces, so that the question of the number of representatives given to a province when it comes into the Dominion is a matter of absolutely no concern. That which is important and that which is necessary because it is provided for by the Act is a re-adjustment of the representation on the occasion of each decennial census, and that is what we are called upon to deal with here. This reference comes before your Lordships as the result of the scheme of representation prepared under section 51 of the British North America Act. This section I submit respectfully to your Lordships is a section with the action of which we have absolutely nothing to do, which we can neither amend so as to extend nor so as to restrict its provisions. Section 51 is an enactment of the Imperial Parliament which is absolutely beyond our jurisdiction and control in so far as the Parliament of Canada is concerned, and the whole question with which we are concerned to-day is simply to see how, in the operation of this act, the re-distribution of the representation of the provinces is to be made. I may say my Lords that, so far as my knowledge goes, a question of this sort now

comes before your Lordships for the first time. You have had, no doubt, frequently to consider questions in which the relative powers of the Federal Parliament and the provincial parliaments were at issue, but in all my knowledge at no time have you been called upon to consider the question of the relative rights of the provinces as between themselves.

Now, it is not necessary for me to say to your Lordships that this is an exceedingly important matter. It is important because, on the solution of this question, depends the whole principle upon which the British North America Act is founded, that is to say, the principle of the relations which are to exist with respect to representation as between the provinces. It is a matter of vital importance to each province of course that it should be sustained, or maintained rather, in the enjoyment of those powers conferred by the British North America Act. But it is a matter of no less importance to the provinces that they should be maintained in the rights conferred upon them with respect to their representation. Now, I will proceed immediately to state the construction that it has been my duty to advise the Government to place on section 51 of the British North America Act. Section 51 provides:

"On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner and from such time, as the Parliament of Canada from time to time provides, subject and according to the following rules."

I take it, my Lords, to be a settled rule of construction that a word used in a statute is to have as far as possible the same meaning throughout the whole statute, and I say it is a rule of construction that the

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same word repeated in a section of a statute should undoubtedly have the one meaning. Now my Lords, what is the meaning of the word "Canada" in this section 51, first paragraph. The construction I put on it is this my Lords, that as the original Parliament consisted of 181 members as provided by the statute, the Parliament of Canada is a variable term which is to be construed at the time of each decennial census with respect to its representation and with respect to the area of country over which it has supreme legislative control. It is a term which is to be construed in one way in 1871, in another way in 1881 and in another way in 1891. But it is to be construed at the time you seek to put that section into operation.

Now I say, moreover, my Lords, that the words "four provinces" are to be construed also at the time of each decennial census and if in 1871 there were but four provinces in the Dominion, then of course the meaning of the term is clear. If to these original four provinces another province is added, then it means five provinces and so on at the time of each decennial census, it will mean the number of provinces at that time subject to the legislative control of Canada.

An Act speaks for the present; it is always speaking. I need not refer your Lordships to section 3 of the Interpretation Act "the law shall be considered as always speaking." I admit, my Lords, that there is no similar provision in the English Interpretation Act of 1889 but that is not a new rule That was an old rule of construction which has been laid down as a proper rule in the case of *Ex parte Pratt* (1), and your Lordships will find it adopted in Elbert on Legislative Methods and Forms, page 248. I shall not weary your Lordships with reading the clauses, I simply refer you to the authorities.

(1) 12 Q. B. D. 334.

Now, my Lords, my reason for stating that the word "Canada" in section 51 is applicable to Canada as we have it to-day, and for stating that the "four provinces" are not to be read as four provinces, but are to be read as seven provinces as we have it to-day, my reason for stating that is that the evident intention of the British North America Act was to include all the British provinces and territories in North America. That was the clear and evident intention of those who passed the Act and the provisions of that Act were to be made applicable to all these provinces and territories when they came within its operation. The British North America Act itself did not constitute the Dominion of Canada. The British North America Act made provision for a federation to be constituted a Dominion by statute, a Dominion that was to be brought into being as a result in the first instance of the Queen's proclamation, and the limits of which might be varied and extended at any time under the provisions of section 146 of the Act. The Act itself is so framed, the terms of it are so broad, that they are intended to apply to all these provinces and territories leaving it to time to work out the periods at which these provinces and territories would come within its operation. Now, that that is the construction to be put on it is apparent from the terms used in the Act itself. Your Lordships will find that the preamble of the Act provides:

"Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom."

That is the first part of the enactment. Then the fourth paragraph reads:

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"And whereas it is expedient that provision be made for the eventual admission into the union of other parts of British North America."

In the first instance four provinces were considered in this provision. It is provided in the preamble that it is intended that all the other provinces shall come in.

Then, my Lords, you will find that section 3 makes provision for the consolidation or rather the federating into one Dominion of the four original provinces. That is to be done by proclamation.

Then, my Lords, section 146 makes provision for the bringing into the confederation of the other provinces which were in contemplation at the time the Act was passed, that is to say, Newfoundland, British Columbia and Prince Edward Island, and the Act further makes provision for the bringing into the confederation of the territories so that there should be but one Dominion as referred to in the preamble of the Act, and this is provided under section 4 to which I shall have occasion later to refer.

Now section 3 to which I referred a moment ago, says:

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada."

"Under the name of Canada;" the name of the Dominion is to be Canada.

"And on and after that day those three provinces shall form and be one Dominion under that name accordingly."

So that until such time as the proclamation issued, this Act was not applicable to these provinces.

Then you have got section 4 in which the term "Canada" may be considered as having been defined. Section 4 says:

"The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the union, that is to say, on and after the day appointed for the union taking effect in the Queen's Proclamation, and in the same provisions, unless it is otherwise expresssd or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Not Canada as constituted under section 3, by authority of the proclamation. Thus, my Lords, you must not only consider the four original provinces as they are brought in under section 3 of the royal proclamation, but you have also to consider the other provinces and territories as they may be brought in under section 146 of the British North America Act.

If you take section 146, my Lords, you will find that it provides:

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or provinces, or any of them into the union."

That is to say, to bring them into the union which is provided for by section 4.

"And on addresses from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwest Territory or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the

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provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

Now, my Lords, it is outside the question to discuss this question as to whether British Columbia came in with the number of representatives that it ought to have had under the constitution or not. That is outside the question we are now considering. But my construction of section 146 is this, that the Queen had the right by order-in-council to legislate in the way and subject to the limitations contained in section 146. The order-in-council became and had the effect of an Imperial Act of Parliament so long as the powers conferred by section 146 were exercised subject to the limitations contained in section 146. Legislation by order-in-council is an exceptional legislation and can only be exercised subject to the limitations in the power authorising the legislation to be had in that form. An Act of the Imperial Parliament, might modify, alter or amend the British North America Act, might absolutely repeal the Act or alter any of the terms or provisions of it, but the order-in-council cannot do that. The order-in-council can only legislate in so far as its provisions are within the provisions of the Act, and it would not be competent with respect to the imperial order-in-council for them to pass an order-in-council which would have for effect the altering or the amending of the provisions of the Act. That order-in-council ought to be made subject to the provisions of the Act and under the control of all the provisions of the British North America Act, so that no order-in-council could be passed that could in any way affect this section 51 of the Act.

Now, my argument therefore is that section 4 must be construed as meaning Canada as it may be from

time to time constituted under the provisions of the British North America Act and the Canada of to-day is composed of the several provinces which form the Dominion of Canada.

If that is not the meaning of the word, if that is not the construction to be put upon it, take section 91 of the Act.

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada."

What is the meaning of the word "Canada" there? Does that not mean the provinces and territories subject to the legislative jurisdiction of Canada.

If your Lordships will look at section 8, it says:

"In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished."

According to the construction put on section 51 by my learned friends it would be necessary to construe that, as being the population of Canada restricted to the four provinces, and that you are under an obligation to distinguish between the respective populations of the four provinces but not to go any further, and as a result you would be forced to the conclusion that there is no provision for any census in Canada beyond the four original provinces.

MR. JUSTICE ARMOUR: Complaint is made that you are taking into consideration the territories that are not provinces at all, unless you read section 4 "a province" as covering "a territory."

Mr. Fitzpatrick: I may say to your Lordships that that is not a matter, as I shall have occasion to show,

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that is of importance. The method of distribution in regard to the territories is not of importance.

Mr. Pugsley: It is not now perhaps, but it might be ten years to come.

MR. JUSTICE DAVIES: The answer will determine it and it might be of immense importance.

Mr. Fitzpatrick: It is of importance for the future but dealing with it in a practical way as a practical legislator, I say, as I shall have occasion to point out when I consider the scheme now proposed, that whether you take the territories or not, the fact with respect to the numerical representation is not affected.

MR. JUSTICE DAVIES: At present.

Mr. Fitzpatrick: At present it is not, but of course it would be exceedingly interesting for the future that it should be considered and I submit, as far as I am concerned, that I want to take the word "Canada" in the sense in which it is used in the first paragraph of section 51. The Parliament of Canada means the Parliament having legislative jurisdiction over the whole of Canada including territories as well as provinces.

I submit that your Lordships have to read all the British North America Act together, the Acts of 1867, 1871 and 1886 ought to be read together and considered together, one amending the other, and your Lordships will find in the Act of 1886 provision is made for the representation of the territories.

MR. JUSTICE ARMOUR: Does it make any provision with regard to the readjustment?

Mr. Fitzpatrick: No, my lords, but it is interesting from this standpoint that the Imperial Act was passed in June, 1886, and an Act had been passed in the previous May, assented to on the 2nd of June, where provision was made and the subsequent Act confirms the Act of the Parliament of Canada. I shall have occasion to refer to that afterwards and your Lordships

will have to read all the Acts, Canadian and Imperial, to see the bearings of this issue.

With your Lordships' permission, I had perhaps better dispose of this question of the territories at once, with respect to its application to the question now before you. If we eliminate the territories, that is to say, eliminate the population of the territories in our estimate of representation, the position would be—I shall not weary your Lordships to take the figures, for I presume that your lordships will want me to submit to you afterwards the figures in written form—if you eliminate the population of the territories, in your computation of the representation of the provinces, the result would be that Ontario would very nearly escape a decrease but not quite.

The population in Ontario in 1891 was 2,114,321. The population of the Dominion eliminating the population of the territories exclusive of the population of the territories, was 4,734,272. Now, that would be expressed by the decimal fraction ·446.

In 1901, the population of Ontario was 2,182,946. The population of the Dominion in 1901, eliminating the population of the territories, was 5,159,666. That would be expressed by the decimal fraction ·423.

The result would be that the difference between the representation in 1891 and 1901 is the difference between these two decimals, which is 23/100, so you see that is a diminution.

Now we come to Nova Scotia. In 1891 the population of Nova Scotia was 450,396. The population of the Dominion was 4,734,272. That would represent the decimal fraction ·951.

In 1901, the population of Nova Scotia was 459,574, and the population of the Dominion 5,159,666. That would be expressed by the decimal fraction ·891.

That would be a diminution of 60 or more from the one-twentieth part of ·951.

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New Brunswick, in 1891, had a population of 321,263. The population of the Dominion was 4,734,272. The decimal fraction would be ·678. In 1901, the population of New Brunswick was 331,120. The population of the Dominion was 5,159,666. That would represent the decimal fraction ·642. That would be a diminution of ·036 and that of course would be more than a twentieth part.

Now with respect to Prince Edward Island, I shall not weary your Lordships with the details but in either alternative, whether you include the territories or not, and if you give to the word Canada in the fourth subsection of section 51 the construction contended for by my friends, or if you eliminate the territories, it is perfectly immaterial; Prince Edward Island loses in any case, so that your Lordships see with respect to the practical effect of this legislation, whether you include the territories or eliminate the territories, the result is the same. The provinces would lose their proportion of representation and the only point on which my learned friends can save Ontario, New Brunswick and Nova Scotia, the only point on which they can save the representation of these three provinces, would be that your Lordships would come to the conclusion that the word "Canada" in the fourth subsection of section 51 means exclusively the four original provinces. We may as well put the question clearly now. If your Lordships came to that conclusion the representation would be affected.

Now, as I said a moment ago, my Lords, we have section 146 which makes provision for a rounding off of the confederation or for including in the confederation the provinces that originally contemplated coming in. That is to say Newfoundland and Prince Edward Island. As your Lordships are aware, taking the matter up historically, at the conference at Char-

lottetown, Newfoundland and Prince Edward Island were represented as part of the Maritime Provinces. Therefore for the purpose of giving effect to the original intention of the parties, section 146 contains the necessary provisions but not only do they provide at the time for these two provinces, but they also make provision for the carrying out of the intention of the Act, the intention expressed by Sir John A. Macdonald at the time of the Quebec resolution, and which you will find expressed by Lord Carnarvon when he introduced the British North America Act in the House of Lords. That is to say, the same day in Canada would be included all the provinces and territories of North America that owed allegiance to the British flag, and for that purpose section 146 is extended beyond this and includes British Columbia which was then a Crown colony, and the North-West Territories and Rupert's Land, and it is provided that these provinces of Newfoundland and Prince Edward Island shall come in upon addresses of their legislatures and from the Houses of Parliament of Canada, that British Columbia shall come in upon addresses of the Legislatures of Canada and British Columbia, and that the territories shall be brought in upon addresses from the Houses of Parliament and Canada. Acting on the powers conferred by that section, 33 Vict., ch. 3 of the statutes of Canada, was passed in 1870. That statute provides by section 1 that:

"On, from and after the date upon which the Queen by and with the advice and consent of Her Majesty's most Honourable Privy Council, under the authority of the 146th section of the British North America Act, 1867, shall, by order-in-council in that behalf, admit Rupert's Land and the North-West Territory into the union or Dominion of Canada—"

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Here are the words of importance to which I wish to draw your Lordships' attention:

"There shall be formed out of the same a province, which shall be one of the provinces of the Dominion of Canada."

That is to say, you shall carve out of the North-West Territories and Rupert's Land a province that shall be one of the provinces of the Dominion of Canada. This is the legislation of 1870. That is the Province of Manitoba.

THE CHIEF JUSTICE: Previous to that Rupert's Land and the territories had been admitted into the Dominion.

Mr. Fitzpatrick: By order-in-council, not as a province merely as territories, my lord. They had no representation or anything of that sort. They simply came in for the purpose of being administered.

Section 2 provides that Manitoba:

"On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or only to affect one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act."

Acting under the powers conferred by section 146 of the British North America Act, this Province of Manitoba was carved out of the territories of Rupert's Land and the North-West Territories, and made a province of the Dominion and special provision is made

that the provisions of the British North America Act, with the exception I pointed out a moment ago, shall be made applicable to Manitoba as if Manitoba was one of the original provinces in the Dominion.

But that is not all my Lords. Your Lordships will find in section 4 this further provision with respect to representation, that is, the question now in hand:

"The said province shall be represented, in the first instance in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor General into four electoral districts, each of which shall be represented by one member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the fifty-first section of the British North America Act, 1867."

Now my Lords, when this Act was passed, doubts were expressed in the Commons here as to whether or not the Parliament of Canada had the power to infringe on the provisions of the British North America Act, to such an extent as to give this province with its limited population four members which was out of all proportion to the number of its population. That is to say it was an interference with the principle of representation by population, and when you come to look at the debates, if your Lordships would be interested in doing that, that is the point taken. Doubts were expressed and as a result a statute was prepared, passed by the Parliament of Canada and sent home to the Imperial Government and they were asked there to enact Imperial legislation for the purpose of getting rid of the constitutional objection urged against this Act. As a result of that, the Manitoba Act as it is familiarly called, the British North America Act of

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1871, was passed. I shall not worry your Lordships with a recital of the details of that Act, but you will find in that Act special provision made for the confirmation in its entirety of this Act of the Dominion of Canada. Therefore as the result of the British North America Amending Act of 1871, the provisions of this Act, 33 Vict. ch. 3, are incorporated in the British North America Act and the British North America Act is amended *pro tanto.*

Therefore, 33 Vict. ch. 3 gathers from the Act of 1871 the same force and effect as if it was an Imperial Act and if there is any repugnancy between the two this Act of 1871 shall be considered as amending the other.

With respect to Manitoba section 51 must be construed to read instead of "four provinces," "five provinces," and the Parliament of Canada must be read as including Manitoba Then in passing I will draw your Lordships' attention to the fact that not only the first paragraph of section 51 is amended, but section 8 which provides for the census is also amended, and in the general census of the population of Canada which is required to be taken in the year one thousand eight hundred and eighty-one and every tenth year thereafter, the respective populations of the *five* provinces are to be distinguished.

And your Lordships will have occasion to see the importance of that when I come to draw attention to the use of the words "population of Canada," the words to be construed here in subsection 4 of section 51; of the effort that must be made to give to these words "population of Canada" in subsection 4 an entirely different meaning from what they have in section 8 in respect to the census.

Then you will find that an order-in-council is passed at Windsor, on the 6th of May 1871, always

under the terms of section 146 of the British North America Act, which provides:

"Whereas by addresses from the Houses of Parliament of Canada and British Columbia respectively, of which addresses copies are contained in the schedules to this order annexed"

and so on.

And these are the words of importance:

"Her Majesty by and with the advice and consent of Her Majesty's Privy Council declares that on, from and after the 20th day of July 1871 the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada."

That is, become part of the Dominion which is established as one Dominion by the British North America Act.

Then your Lordships will see what are the terms and conditions under which British Columbia comes in It is provided that

"British Columbia shall be entitled to be represented in the Senate by three members and by six members in the House of Commons. The representation to be increased under the provisions of the British North America Act, 1867."

Section 10 provides:

"The provisions of the British North America Act 1867 shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only affect one and not the whole of the provinces now comprising the Dominion and except so far as the same may be varied by this minute), be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the Colony of British Columbia had been one of the provinces originally united by the said Act."

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Now, my Lords, I am not concerned at the present time with the question as to whether or not six members should have been assigned to British Columbia at the outset. But I ought to say in passing that the number of representatives which may be granted to a province when it originally comes in, is to be fixed arbitrarily. There is no means under the British North America Act to determine the number of members to which a province is entitled. The only means we have is the aid of the census, but you will find whatever may be the number of representatives granted to a province when it first comes in, provision is afterwards made that at the decennial census the readjustment is to take place, and that is the provision of section 51, which as I said operates automatically, and if there is any amendment made to the operation of section 51, as the result of the passing of the order-in-council under which British Columbia comes into confederation, I submit and it is not necessary to go further, that it is an exceedingly serious matter to say that British Columbia or any province could come in and, as the result of an order-in-council, have more favourable conditions than any province already in. At any rate the question is not up now. It does not affect the issue but is a mere matter of academic interest.

Now, you have British Columbia brought in in 1871, and when British Columbia comes in under the order-in-council for which provision is made by section 146, and when it is stated that British Columbia is to be one of the provinces of the Dominion and is to be considered as if it had been one of the provinces from the beginning, as if it had been one of the original provinces, entitled to all the rights, subject to all the obligations of the original provinces, what does that mean? If that is out of the proper limits, if that order-

in-council with the restriction I pointed out a moment ago has the effect of Imperial Legislation, the result is with respect to the British North America Act, that those portions of it which are repugnant are amended and instead of having five provinces we have six, British Columbia having come in, and then you have British Columbia forming part of the one Dominion, subject to the jurisdiction of the Parliament of Canada having all the rights of the other provinces and subject to have its representation readjusted under the provisions of that Act, that is to say, under the one provision which has reference to readjustment, section 51. I trust I have made my meaning clear as far as I have gone.

Then, if we have dealt with British Columbia, let us get down to Prince Edward Island which came in under an order-in-council of the 6th of June 1873. There you will find that the two first paragraphs are absolutely in terms the same as the paragraphs with respect to British Columbia, but there is a slight difference with respect to the question of representation With respect to Prince Edward Island, the words used are:

"That the population of Prince Edward Island having been increased by 15,000 or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members." The same as British Columbia:

"The representation to be re-adjusted" (instead of to be increased from time to time) under the provisions of the British North America Act, 1867.

Then, my Lords, the second next paragraph in it on page XIII is absolutely in terms the same, contains the same words as those to which I had occasion to refer a few moments ago in connection with British Columbia, and you will there find again the words:

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"Be applicable to Prince Edward Island in the same way and to the same extent as they apply to the other provinces of the Dominion and as if the Colony of Prince Edward Island had been one of the provinces originally united by the said Act."

The same argument applies here, and the position I take is the same, that is, up to the present time we have the four original provinces with the addition of Manitoba making it five, and of British Columbia making it six, and now of Prince Edward Island making it seven, and as a result the first paragraph of section 51 is to be amended so as to read "seven provinces" and the Parliament of Canada is to be construed as meaning thereafter the Parliament of Canada which includes the seven provinces and of course the territories which had come in before.

Now the order-in-council to which I referred with respect to the territories, is that of date the 3rd of June 1870.

Then on the 25th of June, 1886, you find the last amendment to the British North America Act passed by the Imperial Parliament which makes provision for the Parliament of Canada to provide for the representation of the territories.

Your Lordships will bear in mind that on the 2nd of June of the same year, an Act providing for the representation of the North-West Territories had been passed by the Parliament of Canada. Some doubts it appears had been expressed with respect to the right of the Dominion of Canada to pass such legislation and it was to give validity to that legislation that this Imperial Act was passed. But I draw attention to the last paragraph of this Act of 1886 which makes provision for all the British North America Acts to be read together. I do not know if it was necessary but as a matter of precaution the three Acts are to be read together, the

Acts of 1867, 1871 and 1886 so that they form but one Act thereafter.

MR. JUSTICE SEDGEWICK: Could you suggest any reason why they did not ask for Imperial validating legislation in respect to British Columbia, whereas they did in respect to Manitoba?

Mr. Fitzpatrick: There is something very curious in respect to that. I think that with respect to British Columbia the question of the representation was also discussed in the House. Your Lordships will find it, if you are interested, in the discussions in the House of Commons on the validity of this British Columbia Act and the same doubts with respect to its validity were expressed because of the fact that a disproportionate number of representatives were given to British Columbia. It was stated by eminent authorities, Sir Alexander Galt and Hon. Edward Blake and some others, that this was an infringement, but I want to draw attention to this. If your Lordships will remember in 1870 a memorandum was prepared by Sir John A. Macdonald, then Minister of Justice, to which reference was made by the Attorney General from New Brunswick, drawing attention to the doubts expressed with respect to the validity of the Manitoba Act of 1870, and asking for confirmatory legislation which resulted in the passing of the Act of 1871. In that Act, in the order-in-council then prepared, I would like to draw attention to this curious feature. Sir John Macdonald points out that:

"There is in the Act no provision whatever for the representation in the Senate or House of Commons of Rupert's Land or the Northwestern Territory or British Columbia."

He draws attention to the fact that the same difficulty might possibly arise with respect to British

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Columbia as has arisen with respect to Manitoba. and in his conclusion he says:

"Under these circumstances, as the question as to the constitutionality of the Act of the Canadian Parliament has been raised, and as the doubt may cause grave disquiet in the territories which have been or may hereafter be added to the Dominion; and in order also to prevent the necessity of repeated applications to the Imperial Parliament for legislation respecting the Dominion, the undersigned has the honour to recommend that the Earl of Kimberley be moved to submit to the Imperial Parliament at its next session a measure;

"1. Confirming the Act of the Canadian Parliament, 33 Vict. ch. 3, above referred to, as if it had been an Imperial statute, and legalising whatever may have been done under it, according to its true interests.

"2. Empowering the Dominion Parliament from time to time to establish other provinces in the North-western Territory, with such local Government, Legislature and constitution as it may think proper, provided that no such local Government or Legislature shall have greater powers than those conferred on the local Governments and Legislatures by 'The British North America Act, 1867," and also empowering it to grant such provinces representation in the Parliament of the Dominion. The Acts so constituting such provinces to have the same effect as if passed by the Imperial Parliament at the time of the union.

"3. Empowering the Dominion Parliament to increase or diminish from time to time the limits of the Province of Manitoba, or of any other provinces of he Dominion, with the consent of the Govrenment and Legislature of such provinces."

These are the things he asked for and they were all granted by the amending Act of 1871, the Imperial Act:

"Providing that the terms of the suggested Act be applicable to the Province of British Columbia whenever it may form part of the Dominion."

That was not granted in reference to British Columbia, and why? The reason is that it is perfectly obvious that it is provided under section 146 that British Columbia is to come in on an address and may be dealt with absolutely in the same way as Prince Edward Island or Manitoba, but there might have been doubt with respect to the territories.

I draw attention to this, I do not attach importance to it, that by implication the Imperial authorities did not consider it necessary to do what your Lordship sugggested might possibly be done.

Now, my Lords, my theory is that as a result of the issuing of the proclamation in 1867, and under section 3 of the order-in-council to which I have referred made pursuant to section 146 of The British North America Act, that all these provinces and territories came in and formed part of the Dominion, and that at the decennial census that took place after they came in, that is to say the decennial census of 1881, the Parliament of Canada then was the Parliament of Canada having legislative jurisdiction over all these several territories and provinces, and the words "four provinces" ought to read "seven provinces."

If that be not the law, if that be not the rule of construction to be applied to section 51, where do you get, where does the Parliament of Canada get, the authority to deal in so far as representation is concerned with the readjustment of the representation of any province? The provinces came in with a certain number of representatives, but where do we get authority to deal with the readjustment of that representation, and where do you find authority for this especially, that they should come in under the terms

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of the addresses and be subject to all the provisions of The British North America Act and, in the terms of the order-in-council, as if they had formed part of the Dominion of Canada from its inception and yet they are not to be subject to the control of section 51.

I am not dealing with subsection 4 but with the first paragraph of section 51. How do they come in? Are they to be dealt with under section 51 or are they to be exempt from it? I submit they are to be dealt with under section 51, because they come in subject to the provisions of the Act, and the stipulation is made on their behalf that they are to be considered as if they had formed part of the Dominion from its inception. If that be the case I say the Parliament of Canada means the Parliament of Canada having jurisdiction over all these provinces and if they do not come in under section 51 how is their representation to be readjusted, where does the Parliament of Canada get authority to deal with them?

It is important in a statement of this sort to see how you are going to give effect to these provisions. What does this provide. This section provides for a readjustment of the representation of the provinces after each decennial census. Not only is the readjustment of the representation of the provinces provided for on the occasion of each decennial census, but the mode of readjustment is provided for also. The statute provides how the readjustment is to take place, it makes provision as to when and as to how, for the time and the method.

How is it to be done my Lords? Here is the first rule of all:

"Quebec shall have the fixed number of 65 members."

That is the starting point. The principle is representation by population, that is the principle laid down

here, and it is to be ascertained by the aid of the pivotal province, Quebec. As the number 65 is to the population of Quebec, so is the number of representatives of any other province to x, the result, or rather to put the proportion properly the population of Quebec is to the population of any one of the other provinces, as the number 65 is to x.

The time when readjustment is to take place is fixed as a sequel to each decennial census, and the mode of operation is by Quebec having a fixed number of 65.

You then find section 2 of section 51 which says:

"There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained)."

That is the provision of the Act in relation to the provinces outside of Quebec, and you must remember, when it is proposed to depart from this principle, it is proposed to be done against the Province of Quebec; in favour of the other three of the original provinces, but against Quebec.

Now, my Lords, the rules laid down by section 51 for the readjustment of the representation is to take Quebec with the fixed number of 65 members. Then you assign to each of the other provinces such a number of members as will bear the same proportion to its population as the number 65 bears to the population of Quebec.

Let me put it to you in this way. Assuming the population of Quebec to be 1,600,000 and the number of representatives 65, then if you divide 65 into 1,600,000 the result is 25,000 and that would be the unit of representation. Then take that unit of representation and apply it to each of the provinces,

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that is to say assuming the unit of representation with respect to Quebec, the pivotal province, to be 25,000, then you take the population of any province, no matter what its population may be, and divide it by 25,000, and that quotient is the number of representatives to which it is entitled, an exceedingly simple method of finding out how the principle of representation can be worked out. You will see it is the most simple method by which this principle can be worked out. If your Lordships do that, and that is what the Act provides for, you will find that the result is that the population of Canada, taking the unit of population as we get it from Quebec, would entitle the people of Canada to be represented by 211.07 members.

On the other hand, if you take the principle contended for by my honourable friends, and apply it in the way I have done for Quebec, you get this result, First you get a unit of representation that varies according to each province. You get 25,367 for Quebec, 23,000 for Ontario, 22,000 as the unit for Nova Scotia, and 23,000 as the unit for New Brunswick. You got a unit of representation that varies for each of the provinces, and it would be unjust to Quebec that it should require to have a unit of 25,000 while Nova Scotia has a unit of 22,000.

More than that you have section 52 which you have to consider.

"The number of members of the House of Commons may be from to time time increased by the Parliament of Canada, provided the proportionate representation of the provinces, prescribed by this Act, is not thereby disturbed."

The number of members may be increased by the Parliament of Canada from time to time. That is what they are doing. The Maritime Provinces would

increase the number by their construction and in addition to that violate the proviso of sec. 52 which provides that the proportion of representation shall not be disturbed. They would increase the number of representatives and disturbe the proportion of representation. That is what their construction leads to. Now let me see how far it is possible to put that construction on subsection 4 of section 51.

Now, in the result my Lords, if my construction is correct, section 8, to which I would ask your Lordships' attention now, has a most important hearing upon the question at issue. In sec. 8 the words "population of Canada" mean the population of the old provinces and also the population of the new provinces and the territories.

That is the basis of it. Let that be granted and we have the basis of the whole question. Let us take up section 51 and you will find in section 51 that it is provided that the re-adjustment of the representation of the provinces is to take place after each decennial census which decennial census is provided for by section 8.

Now, with respect to the question in hand, your Lordships will see that a re-adjustment is to take place on the completion of the census, and is to be carried out by the Parliament of Canada subject to the rules that are laid down in section 51. If your Lordships admit that the word "census" means the census of the population of Canada, as we have it at the time of each re-adjustment; that the "Parliament of Canada" is the Parliament which has legislative jurisdiction over that territory inhabited by the population as taken in the census; it seems to me that we have the case in so far as section 51 is concerned.

Let us go on to deal with the other provisions of section 51.

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The first subsection, of course, there is no doubt about. Quebec is to have under that subsection 65 members. There is no discussion about that. But then let me ask your Lordships to look at subsection 2 of section 51 which provides:

"There shall be assigned to each of the other provinces."

That is to say, each of the provinces reading it at the time at which the British North America Act came into effect when the proclamation was first issued.

"Such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number 65 bears to the number of the population of Quebec (so ascertained)."

So that your Lordships will see that section 8 is the basis of the operation of section 51. It is "the population of the provinces ascertained at such census." Now my Lords, if the new provinces are not affected by section 8; if they are not part of the population of Canada within the meaning of section 8; how is their population to be ascertained? If they do not come within the operation of section 8; if they are not part of the population of Canada, their census cannot be ascertained and as a result, my Lords, they can get no representation at the time of the readjustment. Do your Lordships follow me?

MR. JUSTICE SEDGEWICK: I do not follow that.

Mr. Fitzpatrick: Well, my lord, let me put my argument in another way. Each province is entitled to have after each decennial census a readjustment of its representation; that readjustment to be made upon the following basis: Quebec to have 65 members, and the population of Quebec divided by 65 gives the unit of representation. That unit of representation divided into the population of each of the

other provinces gives as a result the number of representatives to which each province is entitled. Now, my Lords, how is the population of each province into which the unit of representation is to be divided to be ascertained? Is it not the population of each province as ascertained by the census under section 8? Does your Lordship follow me in that?

MR. JUSTICE SEDGEWICK: Yes.

Mr. Fitzpatrick: If it is the population ascertained by the census by what census is that population to be ascertained except it is by the census which is required to be made by section 8. There is no other census. Section 8 provides that the census shall be of the population of Canada, and therefore if the inhabitants of the new provinces are not part of the population of Canada within the meaning of that section then the basis on which the readjustment is to be made fails. If it is conceded that the words "population of Canada" for the purposes of the census include all the provinces and territories, then I submit that these words must have the same meaning in subsection 4 of section 51. The argument of my learned friends on the other side is that "the population of Canada" in subsection 4 of section 51 means the population of the four original provinces. It seems to me that it is impossible that you should give to the same words in different parts of the same statute a different meaning, but that is the position into which my learned friends are necessarily driven. I submit my Lords that to determine the representation in the Dominion Parliament to which all the provinces are entitled you must take the population of Canada as ascertained by the general census and then you have a definite meaning given to the words "population of Canada"; and that meaning is as I have so often repeated that "population of Canada" includes

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all the provinces and all the territories. My learned friends suggest that when the four original provinces constituted Canada under the Act by virtue of the proclamation, section 51 provided that they should have a representation proportionate to their population and that they then had in this respect acquired vested rights which could not be affected by the subsequent admission into the union of other parts of British North America.

Admitting that originally the union was limited to the four provinces, you cannot cut out of the statute section 146 which provides that on addresses from the Parliament of Canada, and from the Legislatures of the provinces in that section mentioned, those provinces may be admitted into the union upon such terms and conditions as are in the addresses expressed. Let us deal with the case of Manitoba in the first instance. The last lines of section 2, of 33 Vic., ch. 3 read "the provisions of the B N.A. Act shall apply to Manitoba in the same way and to the like extent as they apply to the several other provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act"; and the proviso of section 4 of the same Act is to this effect— "provided that on the completion of the census in the year 1881 and of each decennial census afterwards the representation of the said province shall be re-adjusted according to the provisions of section 51 of the B.N.A. Act 1867." Are we to assume that these words are not wide enough to include subsection 4 of section 51 and that Manitoba is not to have the benefit of that section to the same extent and in the same way as the four original provinces? Then what becomes of the argument as to vested or acquired rights. If they had such rights, were they not at liberty to waive them when they adopted this Act? Further if we remember that

33 Vic. ch. 3 has, as I have already pointed out, the effect of an imperial statute and must be read with the Act of 1867, is the consequence not that the first Act is amended by the second, and that Manitoba must be dealt with in all respects as if it had been one of the provinces originally united by the B.N.A. Act. ?

What I have said of Manitoba applies with equal force to British Columbia and Prince Edward Island. In the terms and conditions in each case provision is made that the representation is to be re-adjusted under the provisions of the B N.A. Act and that each province is to be dealt with as if it had been one of the provinces originally united by the B.N.A. Act. Therefore, impliedly, these other provinces when they came in were made subject to section 51.

But, my Lords, there is more than that. I will ask your Lordships to follow me while I read subsection 4 which provides :

" On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of population of the province bore to the number of the aggregate population of Canada at the then preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards."

You always get back to the census. Here you find that it is the aggregate population of Canada ascertained at the then latest census that is to determine the decrease, or the maintenance of the *status quo*. By which census is the " population of Canada " referred to there to be ascertained? It is the population of Canada referred to in section 8 my Lords. Therefore, as you always get back to the meaning of the words " population of Canada " in section 8, the construction I have contended for, that is to say, the population of

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Canada in its entirety, the matter is concluded, because it is that population of Canada ascertained by that census under that section that determines the meaning to be put upon subsection 4.

MR. JUSTICE SEDGEWICK: It is a great protection to the representation of the decreasing provinces, because there must be a decrease of more than one-twentieth during the ten years. It may be a little smaller decrease than the one-twentieth for the ten years, and the result may be that not a single one may be left in the province after a time, and still they would be entitled to their full representation.

Mr. Fitzpatrick: I have no desire to put forward a provincial view of this matter at all; on the contrary, so far as the Dominion Parliament is concerned, our desire and our duty is to see that the Act operates automatically without respect to consequences. One of the important features of this scheme of re-distribution is the consideration to be paid to the intention of those who formed part of confederation at its inception If your Lordships will consider it, you will see that Canada was originally formed of the four provinces, Quebec being one. The construction which my learned friends put upon this subsection 4 is a construction which is applicable to three provinces and not to four because it cannot affect Quebec.

Whether the population of Quebec be decreased by one-twentieth or not, her representation remains the same. It is only with respect to three provinces, and not to the four provinces that it is of importance. But my Lords Quebec consented to have 65 members with the understanding that these 65 members in proportion to the population of Quebec should determine the representation of the other provinces, so that a man in Quebec should have by reason of his vote, the same political influence in Canada as a man in any other part

of the Dominion. If this Act is construed properly, then every man in the Dominion of Canada will have the same amount of political influence as the result of his vote.

MR JUSTICE SEDGEWICK: That is emphasized by section 52.

Mr. Fitzpatrick: Yes my Lord. If you divide 65 into the population of Quebec, you find that the unit of representation is twenty-five thousand, three hundred and sixty-seven. You take that unit of representation and divide it into the population of the other provinces as ascertained by the last census, and you get a result which operates equitably between all the provinces and which gives a number of representatives to each province in proportion to the number of representatives which Quebec has in respect to its population and its number of 65.

And if my learned friends' construction of the statute should apply, the result would be that you will have 92 members for the province of Ontario; that you will have twenty members for the province of Nova Scotia; that you will have fourteen members for the province of New Brunswick, with this consequence that you would have one unit of representation for Quebec representing 25,367; that you would have another unit of representation for Ontario representating 23,727; that you would have another unit of representation for Nova Scotia representing 22,978, and another unit for New Brunswick representing 23,651. Now my Lords, what is the further result? It is that we would have for Canada 219 members of Parliament; whereas based upon the population, and upon the principle that Quebec is the pivotal province and that that province furnishes the unit of representation, there should be only 211 members.

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I shall conclude with this statement to your Lordships: That in order to give effect to the argument of my learned friends, it is necessary for you to give the same words in the same section different meanings; you will be obliged to give to these words different meanings throughout the Act; you will have to construe each clause of that Act by giving a different meaning to the same words, in different sub-sections even, and give to those words in subsection 4 of sec. 51, with respect to the census of Canada, a meaning entirely distinct and entirely different from the meaning which you give to the same words in section 8 which provides for the taking of the census. My learned friend is driven to that conclusion, and I say it is an impossible conclusion; it is a conclusion that your Lordships cannot adopt. It is a conclusion contrary to every principle of the construction of statutes.

Newcombe K.C., Deputy Minister of Justice. follows —My Lords, I have little to add to the very able and exhaustive argument of the Attorney General, and perhaps it would not be necessary for me to occupy your Lordships' time at all but that there are one or two considerations which it seems to me demonstrate the futility of the argument advanced by my learned friends on the other side and which show its fallacy so clearly, that perhaps I may be justified in adding a few remarks.

Now, my Lords, referring to section 4 which has often been quoted, that section does not say what my learned friends have submitted it does say, or what they appear to think. It says:

"Unless it is otherwise expressed or implied the name Canada shall be taken to mean Canada as constituted under this Act."

The whole basis of the argument of my learned friends proceeds upon the assumption that the union

of the British American provinces was consummated and brought into effect by the immediate operation of the British North America Act; and assuming the false premise to start with, they argue as if the words in section 4 were not as they appear in the statute, but that the name "Canada" should be taken to mean Canada as constituted *by* this Act. Now, my Lords, if it were as my learned friends contend, I submit they would not have much of a case, although they might have something to argue upon. The question might be arguable if the effect of the statute and the words of the statute were as assumed all along for the purpose of their argument; but when you consider what the words of the statute are, and how it was that this union came into effect, I submit that it is perfectly apparent that they have not a vestige of a case on which to base an argument here.

My Lords, you have to refer, as has been said, to section 146 in connection with section 4. I have not heard my learned friends contend, and I presume they would not venture to contend, that the terms of union, the terms of the addresses under which British Columbia, Manitoba, Prince Edward Island and the Territories were brought in, have altered the construction which is to be put upon section 51. They say that paragraph 4 of section 51, in using the expression "aggregate population of Canada" refers to Canada as comprising only the four original provinces, and that this is an inelastic clause which cannot be extended. Will your Lordships refer to section 146 with me for a moment. Let me read it in this way, because we are entitled to read it in this way for the purpose of arguing this point.

"It shall be lawful for the Queen to admit the provinces of Newfoundland, Prince Edward Island and British Columbia or any of them into the union and

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to admit Rupert's Land and the Northwestern Territory or any of them into the union, subject to the provisions of this Act."

And referring to clause 3:

"It shall be lawful for the Queen to declare by proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada."

It becomes apparent, my Lords, that it was an executive Act which constituted the Dominion of Canada and not a legislative Act. Her Majesty acted under a delegated power in bringing about the confederation of the provinces. The constitution was framed, adopted and sanctioned by Parliament and it was a hard and fast constitution which could not be altered by the executive; but there was a power delegated to the executive to bring in the members of that confederation by an executive Act, namely, by a proclamation so far as the three original provinces were concerned, and by orders-in-council so far as the others were concerned. Therefore when you speak of "Canada" as constituted *under* this Act, you must necessarily have regard to Canada as existing by virtue of the Acts of the Crown, authorised by the statute, and it makes no difference in the reading of section 146 that there are certain preliminary requirements to the passing of the orders-in-council. If the statute stood as I read section 146 to your Lordships a few moments ago, then it would have been quite competent for all these executive Acts to have come into effect at the same time; the proclamation might have issued, the orders-in-council might have issued and the seven provinces would have been united at the same time. I say, my Lords, if you leave out for the purpose of this

argument that which is quite immaterial in section 146, viz. the reference to the addresses of the Parliament of Canada and of the Legislature—leave them out for a moment (because I say that these addresses cannot and it is not contended by my learned friends that they do alter the construction of section 51) leaving these out, it is an Act of the Crown that brings in the original provinces; it is a similar Act of the Crown that brings in the other provinces. If these had been left out, I say that the seven provinces could all have come into the union at the same time, and if so, does any one pretend to say that under section 51 you would limit the aggregate population of Canada to four of the provinces rather than to the whole and if to four, then to what four do you limit it under these circumstances? There is no reason why you should limit it to Ontario, Quebec, Nova Scotia and New-Brunswick rather than to British Columbia, Manitoba, Prince Edward Island and one other of the four. My learned friends' case is like this, and their whole contention proceeds upon a basis to which this condition of things, which I mention for the sake of illustration, would be a parallel. If an Act were passed now providing that the West Indies should form part of Canada, and should come into the union on certain terms laid down by the Imperial Parliament, unless that Act expressly amended the British North America Act so as to make, for the purposes of section 51, the West Indies a part of Canada, they would have to be excluded in computing population because the West Indies under those circumstances would not be included in Canada as constituted under this Act. They would come in under another Act. But here, it is not *by* this Act as my learned friend said in his argument (whether he misread the statute or not I do not know; probably he thought the statute meant that but there

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is a most important distinction); it is not "by" this Act but "under" this Act that Canada is constituted. Canada is constituted under this Act, as to the provinces later brought in, in the same way precisely as it is constituted in respect to the earlier provinces.

That name "Canada" is used in at least 48 different sections of this Act and it would lead to the most absurd and impossible results if it should be construed for the general purposes of the Act as referring merely to the four provinces. It would no doubt be very confusing also if separate and distinct considerations have to be applied to each of these 48 sections for the purpose of determining whether "Canada" as therein used refers only to the four provinces, or to the whole Dominion, or to a portion of the Dominion.

Therefore, my Lords, I submit that there is no ground, according to the letter of the statute, for applying any restricted meaning to the word "Canada" as used in section 51, par. 4, and according to principle "Canada" for the purposes of that section must include the whole, or otherwise there is produced an absence of uniformity and equality.

There is no doubt, my Lords, that it was intended that these provinces should be represented upon equal terms. I would like to know what would be the result if the view of my learned friends was adopted with regard to par. 4 of sec. 51. You have got to deal with the expression "aggregate population of Canada" and that clause undoubtedly applies to all the provinces that have been brought in since 1867. Now with regard to Manitoba if you consider whether Manitoba's representation should be decreased, is Manitoba's representation to be compared with the aggregate population of the four provinces, or is it to be compared with the population of the five provinces of

which Manitoba is one? And so with regard to British Columbia?

MR. JUSTICE DAVIES: There are three possible contentions which have been submitted to us.

Mr. Newcombe: But I am showing my Lord that there are six possible contentions. I am showing that there are a great many more possible contentions than my learned friends have mentioned. You have the words "the aggregate population of Canada" and my learned friends say that means the aggregate population of the four original provinces of Canada. Now suppose you have to read just Manitoba under that and to ascertain whether the population of Manitoba has diminished more than one-twentieth, having regard to the aggregate population of Canada, are you going to compare the population of Manitoba with the population of the four provinces for that purpose, or are you going to compare it with the five provinces including Manitoba? Or having regard to the present condition of things are you going to take in British Columbia, and are you going to take in the Territories, and are you going to take in Prince Edward Island? My learned friend, Mr. Pugsley, felt that there was a difficulty about it when he said that there were three different constructions and no doubt he was anxious to limit the number of the constructions as much as possible, but when you come to look into it there are at least six different constructions, every one of which is quite as hopeful as the one my learned friend Mr. Pugsley put forth.

MR. JUSTICE GIROUARD: There is one for each province.

Mr. Newcombe: Nearly one for each province, my lord. Manitoba certainly could advance precisely the same argument when her population came to be readjusted, in regard to the aggregate population of

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Canada as constituted the moment that she came in. That would give us five provinces instead of four, and when British Columbia came in we will have six provinces instead of four, and when P.E.I. came in we would have seven provinces instead of four. The result of that would be, and the result of my learned friends' argument inevitably must be, that under the conditions which may arise, Manitoba, British Columbia or Prince Edward Island, say one or more of them, might lose a member on account of a decrease which would not justify the taking away of a member from New Brunswick, and therefore the result would be inequality and want of uniformity and all kinds of diversity under the provisions of the Act.

I submit, my Lords, that if it had been desired or intended to bring in provinces or territories upon such terms as my learned friends contend for, it would have been impossible to do so under the provisions of section 146. It is manifest, I submit, that the terms and conditions affecting the constitution of the union or Dominion are expected where it speaks of the terms and conditions mentioned in the addresses under which these provinces may be brought in. The terms and conditions are terms and conditions of union in one Dominion, subject to the provisions of this Act.

As to the territories, there is nothing in section 51, par. 4 with regard to the aggregate population of Canada, which makes that expression dependent upon those parts of Canada which have representation. It merely says that the population of each province shall be compared with the aggregate population of Canada for the purpose of ascertaining whether there is to be decrease, regardless of whether any of these portions have representation or not. Your Lordships must admit that there might be, as originally contemplated by the Act, parts of Canada which would not be repre-

sented, because according to the concensus of opinion, when this Act was passed and before any amendments, there was no authority to provide for representation of the unorganised territories of Rupert's Land or the North West. They had to get an amending Act for that purpose; and when they passed the British North America Act of 1867, they used the words "aggregate population of Canada" having regard to Canada as to be composed of provinces which must be represented, and as to be composed of territories which under the Act as it then stood (accepting the common view) could not have been represented.

MR. JUSTICE SEDGEWICK: Might or might not.

Mr. Newcombe: Could not, my Lord, if you assume that it was necessary for that purpose to amend the Act. On what principle then are you going to exclude the unrepresented portions of Canada when you have regard to the words "aggregate population of Canada" in section 51 par. 4? It seems to me, my Lords, that as my learned friend, the Attorney General said, Canada is a geographical term—Canada as bounded by so and so.

MR. JUSTICE GIROUARD: Whether represented or not.

Mr. Newcombe: Certainly, my lord, whether represented or not. It means the whole Dominion of Canada. I want to point out further that in the Rupert's Land and North West order-in-council, under which that territory became part of the Dominion of Canada, it says expressly:

"It is hereby ordered and declared by Her Majesty that from and after the fifteenth day of July 1870, the said North Western Territories shall be admitted into and become part of the Dominion of Canada."

Is that expression *intra vires* of the Queen in Council? It says in terms that the North West Terri-

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tories shall become part of Canada. If that was a declaration founded on statutory power, then it has the same effect as the statute, and the North West Territories are a part of Canada; but it does not stop there because it is expressly reiterated and affirmed by the British North America Act of 1886. You go to the British North America Act 1886 to get representation, and if it depends on representation, as Mr. Justice Armour suggests, then they have got representation.

The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons or either of them of any territories which for the time being formed part of the Dominion of Canada but are not included in any province thereof.

Mark the words "formed part". Now Rupert's Land and the North West Territories had been annexed to Canada when that Act was passed. They are the only territories which the Act contemplates or which could be by any possibility referred to in the words I have read, and they form part of the Dominion of Canada.

"And this Act and the British North America Act, 1867, and the British North America Act 1871 shall be construed together and may be cited together as the British North America Act 1867 to 1886."

Mr. Allen: Would you re-adjust their representation under section 51?

Mr. Newcombe: There is a special provision with regard to their representation, that it is regulated by the Parliament of Canada. Whether it should be re-adjusted or not, is quite aside from the point. The question at present is: Whether the territories form part of the Dominion of Canada geographically speaking, and you invoke there again section 4 which says

that unless it is otherwise expressed or implied Canada shall mean Canada as constituted under this Act. Canada as constituted under this Act included the territories; the territories are expressly referred to by the British North America Act of 1886 as a part of Canada. Then we get the expression "aggregate population of Canada" and how are you to import into that the exclusion of the territories. It says, unless it is otherwise expressed or implied, and there is not a single section in the whole Act that expresses or implies, with regard to the term "Canada", a meaning as including less than the whole, or shows the purpose of the qualification, except section 22 which refers to Canada in relation to the constitution of the Senate and provides that it shall be divided into three divisions. It is probably implied there that the word "Canada" is used in that section as relating only to the original provinces because three divisions could not be said to embrace the western provinces, but this is an exception which proves the rule.

Therefore, my Lords, I submit that the only meaning which you can give to this paragraph 4 consistently with the letter of the Act and consistently with the principle promoted by the Act, is that the aggregate population of Canada refers in all circumstances to the territoral area of Canada defined as school boys learn in their geographies.

Cannon K.C., for the Province of Quebec: May it please your Lordships. On behalf of the Province of Quebec which I represent on this reference, I beg to say that Quebec concurs entirely in the opinion of the Dominion of Canada as expressed by the learned Attorney General and the Deputy Minister who have preceded me. We concur with them as to the interpretation of the words "aggregate population of Canada." It will therefore be unnecessary for me

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to repeat any of the arguments which have been so forcibly placed before your Lordships by the Minister of Justice and his deputy. I would merely wish to refer to section 51 of the British North America Act, if your Lordships would allow me, and briefly to point out in what way I consider the interpretation to be put upon sub-clause 4 of section 51 by my learned friends from New Brunswick and Nova Scotia is illegal, and would operate injuriously to the Province of Quebec, and destroy that proportion of representation which was prescribed by the B.N.A. Act. It has been admitted on all sides by the counsel who have preceded me, that the system of representation which was given to Canada by the British North America Act was representation by population. Upon that point there is no question. Now, representation by population being the accepted principle in the B.N.A. Act section 51 goes on to state how this representation by population will be readjusted. This readjustment is to take place under section 51 every ten years, after each decennial census, and subsections 1 and 2 fix the unit of representation under which the redistribution shall take place. Subsection 1 says:

"Quebec shall have the fixed number of sixty five members."

And subsection 2 says:

"There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty five bears to the number of the population in Quebec (so ascertained)."

As to these two subsections, may it please your Lordships, there is no difficulty whatever. The learned counsel who preceded me on both sides interpreted these two subsections in the same manner, namely, that the unit of representation is one 65th of the population

of Quebec at a given census, and that the proportion of one 65th of the population of Quebec to the population of the other provinces, gives these provinces the right of representation in the Parliament of Canada. There is, I say, perfect accord as to the interpretation of the clauses which fixes the manner in which the representation may be increased after a given census. Subsection 3 deals with fractions of the unit of representation that is fixed by section 2 and states that fractions of such a unit will give the right to an additional member. Then we come to subsection 4 upon certain words of which the present reference has been made by His Excellency the Governor General in Council, as to how the words "the aggregate population of Canada" are to be interpreted. Two interpretations of this subsection 4 are given, one by my learned friends representing New Brunswick and Nova Scotia, and the other by the learned Attorney General of Canada and Deputy Minister with whom I concur on this point. It struck me, in listening to the argument of my learned friends from Nova Scotia and New Brunswick, that they seem to give a double interpretation, if I may so express myself, to the words "aggregate population of Canada," in this subsection 4. If I understood their argument rightly I think that in so far as the new provinces and the territories are concerned, they admit that the aggregate population of Canada means all Canada including all the provinces and the Territories. But when it comes to the three old provinces of Ontario, New Brunswick and Nova Scotia—and this seems to me a very singular legal pretension—then they say that the same words in the same subsection of the Act shall be given another interpretation, and they say that these words "aggregate population of Canada" which for the new provinces and the territories means the population of

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all Canada as geographically constituted at a given time has another meaning for the three old provinces, and only means then Canada as constituted at the time of the passing of the B. N. A. Act, and applies only to the four old provinces of Canada. As I say, at first sight, this pretension seems to me rather singular from a legal standpoint, since in order to put it before the court they are obliged to interpret the words in one sense for a certain number of tho provinces and the territories, and in another sense for the four old provinces.

We contend that these words "aggregate population of Canada" apply to all Canada as constituted at the time that the re-adjustment takes place. Now, may it please your Lordships, I think that is the natural interpretation conformable to the wording of the British North America Act. As I have said, this Act gave Canada representation by population and section 51 fixes the unit of representation and made the Province of Quebec the pivotal province as to the unit of representation. As to the increase, we all agree that the increase at a given census to any province whatever is the increase which is equivalent to one 65th of the population of Quebec at that same census over and above the number of members which it already has; this increase will give it the right to an additional representative in the House of Commons of Canada. Of course the decrease or reduction in the number of members is not treated in the same proportion as the increase. The B. N. A. Act has provided, and very wisely I think, that once a given province has obtained additional representation, it will not lose that representation by the mere loss of the same number of population which gave it the representation, but it must sustain a heavier loss in its population to be

deprived of the additional member which was given to it by the preceding census.

When it comes to making a province lose one of its additional representatives which it had a right to by the preceding census, then the B. N. A. Act requires a larger decrease in the population than the increase that was required to give it an additional representative. But still I claim may it please your Lordships, and that is the point I wish to put before your Lordships as forcibly as I can; I claim that this proportionate decrease required by subsection 4 in order that the province should lose a representative must be on the proportion of the same population which is taken into consideration in order to give an increase to the representation of the province. Although the proportion is not the same amount still I say the proportion is based upon the same population for the decrease as for the increase, and that must necessarily be so in order not to interfere with the system of representation by population which is established by the British North America Act.

On the other hand, it is argued that although Quebec is bound to accept the increased representatives in the western provinces under section 51 on account of increase in population still the other provinces who have a decrease in population would not lose representation in proportion to the decrease of their population, the proportion being taken upon the same provinces. I must submit that if that were held it would be an unjust and illegal consequence under section 51. Quebec is obliged to accept the increased representation which the increase of population gives to the western provinces, but on the other hand the older provinces. if they have undergone a decrease of population which causes them to lose, taking into consideration the proportion of the whole population of Canada at the last

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preceding census, the old provinces I say must submit to that decrease if we wish that proportionate representation which is enacted by section 51 to remain in existence.

I think my Lords that if the interpretation put upon subsection 4 by my learned friends from New Brunswick and Nova Scotia were accepted, then this interpretation would be absolutely against the provisions of section 52 of the B. N. A. Act, and that proportionate representation of the provinces which is absolutely and peremptorily ordered by section 52 would be destroyed. It seems to me that we cannot come to any other conclusion on that point. Now, my Lords, I would merely wish to mention that it seems to me very clear that in this subsection 4 of section 51 the word "Canada" should be read and understood to mean Canada as it exists to-day. My learned friend the Attorney General of Canada cited the section of the Interpretation Act (Revised Statutes of Canada ch. 1, sec. 7 subsec.3) which if the court will allow me, I will read:

"The law shall be considered as always speaking and whenever any manner or thing is expressed——

THE CHIEF JUSTICE: That does not apply to the B. N. A. Act.

Mr. Cannon: I do not pretend that it applies to the B. N. A. Act which is an Imperial statute. But I submit that this is a rule of the English common law. It is a rule which applies in England also and it is a rule which will be found in Elbert as cited by the Attorney General of Canada. I think that rule is very concisely put in that subsection of the Interpretation Act. Now, my Lords, I would merely wish to say in conclusion that the British North America Act 1867 appears to me to be a kind of treaty or articles of partnership between certain possible partners who are

mentioned therein, and that the different clauses and articles of this treaty or deal of partnership must be applied equally to all the parties who have since that date come under this treaty or deed of partnership. I think that in the interpretation which the Government of the Dominion is giving to these words "aggregate population of Canada" it is acting within the true letter and spirit of the British North America Act and I hope that this opinion will be upheld by your Lordships. With these remarks may it please your lordships. I leave the matter in your hands.

Pugsley K.C., in reply—It seems to me, my Lords, that the argument which the learned Attorney General for Canada addressed to your Lordships, having reference to the result of yielding to our contention, was an argument that might rather have been applied some thirty odd years ago when the British North America Act was being framed, than to-day; because that saving clause was inserted in the British North America Act in order to bring about the very result which he says would be brought about if our contention prevails. The object was, that even though a province might fall slightly below its proportion relatively to the province of Quebec, yet it should not lose a representative if, taking the aggregate population of the four provinces, its proportion had not fallen below the one-twentieth. One can readily understand that the smaller provinces might have refused to have entered into confederation unless that safeguard was provided. And if your Lordships should have the curiosity to read Pope's Confederation Documents you will see how strongly that was dwelt upon as a safeguard which was held out to the Lower Provinces. It was said by reason of that saving clause contained in sub-sec. 4: You need never fear that there will be a decrease in your representation.

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Now, my learned friends representing the Province of Quebec complain that we, representing the other provinces, insist as strongly as we can upon this provision of the constitution being recognised. We do not ask that there should be any violation of the terms of the compact of union. All we ask is that these terms shall be carried out and what we say is that when by the British North America Act it is provided that the representation of the four provinces shall be readjusted in the mode which is thereby described, that the statute means what it says and that is all we ask your Lordships to determine.

Mr. Fitzpatrick: Without regard to any amendment.

Mr. Pugsley: Without regard absolutely to any amendment made for another purpose and which only professes to relate to the new provinces and which does not profess to take away or to alter or to interfere with the rights of the old provinces. We say that this compact, this treaty which we entered into, ought not to be altered by any agreement to which the legislatures of the provinces were not parties; to which the people of the provinces were not parties.

My learned friends it seems to me, are seeking to have the British North America Act interpreted as if instead of the words "the four provinces," in section 51, the words were "the representation of each province." They are seeking to have it interpreted just as if the British North America Act had remained as it was in some of the drafts of the bill which your Lordships will find, if you desire to look at them, in Pope's work to which I have referred. I find in the Confederation Documents by Joseph Pope on page 164 that the third draft of the bill provides as follows:

"There shall be a general census of the people of the Dominion of Canada taken in the year one thousand eight hundred and seventy-one, and decennially

afterwards; and immediately after the said census, and immediately after every decennial census thereafter, the representation from each province in the House of Commons shall be readjusted by such authority, in such manner, and from such time as any Act of the Parliament of Canada from time to time directs."

That expression is contained in two of the drafts but when we come to the final draft however the words "each province" are omitted, and so that there can be no doubt as to what is meant the words "the four provinces" are inserted instead.

In *St. Catherines Milling and Lumber Company* v. *The Queen* (1) Mr. Justice Strong used this passage:

"In construing this enactment (the British North America Act) we are not only entitled, but bound, to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject matter dealt with, and to construe the enactment by the light derived from such source, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work."

In the case just referred to, Mr. Mowat, who was counsel in the case said: "In various cases it has been decided, I am not quite sure whether in this court or in other courts, reference has been made to the resolutions upon which the British North America Act was founded. What degree of importance should

(1) 13 Can. S. C. R. 577 at p. 606.

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be attached to them has not been stated but at all events it is reasonable for judges to look at them, and if they do find that they throw any light on the subject they should avail themselves of that light." I have the impression that in the Supreme Court of New Brunswick, the late Mr. Justice Fisher thought it was quite proper to look at the proceedings of the Quebec Conference, and he claimed it was his duty to do so in order to get such light as they would throw upon the matter with a view of enabling him the better to construe the statute.

In Pope, page 126, the words are "the representation from each province shall be readjusted." As I have said my Lords, you will find these words changed back and forth. In the first draft it is the "four provinces." I do not know what it was in the second draft, but in the third draft it was "each province," and I think it was in the fourth draft also; but when you come to the final draft and to the Act as it was passed by the Imperial Parliament the words are "the four provinces."

MR. JUSTICE GIROUARD: You attach much importance to the difference of the wording.

Mr. Pugsley: I do my Lord, because if those who were drafting the bill were looking forward to future provinces coming in under that section no better words could have been used than "each province," but as they were introducing a safeguard, and as they were providing for provinces which were comparatively old, they thought it better not to use any words which would be open to doubt and therefore they inserted the words "the four provinces," so that it would clearly appear that in respect to representation it was with those four provinces and with those four provinces alone they were dealing, leaving the question

of representation in the other provinces to be considered in the future.

MR. JUSTICE GIROUARD: Do you mean to say that the words "four provinces" excluded the new provinces?

Mr. Pugsley: They do so as far as section 51 is concerned, and I say you have to look to the orders-in-council in reference to other provinces to see what their rights are and they cannot in any way alter the rights which were given to the old provinces under this section.

MR. JUSTICE MILLS: By sections 91 and 92 you have the terms and conditions as to the division of power. Would the order-in-council override that?

Mr. Pugsley: No my Lord and for this reason; that the order-in-council and the Imperial Act both provide that the various sections of the statute that are not particularly applicable to the provinces shall apply to the new provinces. It is quite consistent for me to admit that, and yet argue that the right in respect to representation has not been affected so far as the old provinces are concerned, because representation in respect to new provinces is not dealt with at all.

MR. JUSTICE MILLS: Your contention would go this far: That the terms and conditions of union would embrace the distribution of powers and that it would be from the terms and conditions yon would have to ascertain what the powers of the new provinces were in the union.

Mr. Pugsley: I would say my Lord, that by necessary implication these words would extend to the new provinces, but it does not at all follow that the provision with regard to representation in respect to which no provision is made so far as a new province is concerned is not entirely different.

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Your Lordships can see that in order to provide a proper safeguard you might have to have, and you would have to have, a very different proportion if you were considering new provinces and new territories in respect to which the increase of population would necessarily be much more rapid than in the old provinces. You can very well see that the framers of confederation would recognise, that if the population of new provinces and territories had to be considered it would be no safeguard at all to put it at one-twentieth, and it would be utterly useless to have it there. It seems to me that my learned friends upon the other side must be entirely wrong in their statement that provision could be made under section 146 by order-in-council in respect to the representation if it were at all at variance with the provisions of section 51, and their whole argument seems to be based on that. I submit my Lords that if you read section 146 you will, I think, agree with me that any order-in-council which they chose to pass providing any terms of union that they pleased to agree to, the moment that was assented to by the Queen in council it had all the force and effect of an Imperial statute.

MR. JUSTICE DAVIES: You do not consider at all the words "subject to the provisions of this Act."

Mr. Pugsley: No my Lord because it would not be necessary to put them in. Let me read section 146. Surely it will not be denied that the Imperial Parliament can make any provision it likes. Section 146 reads:

"It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit

those Colonies or any of them into the Union on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

MR. JUSTICE ARMOUR: That is all controlled by "subject to the provisions of this Act."

Mr. Pugsley: A complete answer is, that the Act makes no provision with respect to these new provinces.

Now my Lords, just consider how unreasonable it would be to construe the British North America Act or section 51 in the way in which my learned friends think it should be construed. The Dominion originally consisted of four provinces. The idea of the safeguard in subsection 4 is that a reduction of representation shall depend upon the proportionate increase in these four provinces. Now if the contention of my learned friends is correct, the moment you brought in British Columbia you would have introduced an element which was not taken into consideration and could not have been taken into consideration upon the previous readjustment because it was no part of Canada, and therefore so far as the older provinces are concerned you would have to be placing their increase merely against the whole population of the new province which is brought in. And therefore, even although the increase of New Brunswick might have been greater than the increase of the five provinces including British Columbia, yet we would still lose our representative because you could not take into account the increase, but you would have to take into account the whole population of British Columbia as it did not form part of Canada previously.

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I have one reference to make and I shall not trouble your Lordships further, because the case has been exhaustively argued and there is nothing I can say further to aid your Lordships. The report which the learned Attorney General for Canada mentioned yesterday, the report which was made by the then Minister of Justice, Sir John Macdonald, on the 28th day of September 1870, under which the Imperial legislation is enacted absolutely confirms, it seems to me, the position which we take. I find in Hodgins Dominion and Provincial Legislation page 10, that Sir John Macdonald reported:

"The general purview of the British North America Act 1867 seems to be confined to the three provinces of Canada, Nova Scotia and New Brunswick, originally forming the Dominion."

That is our view, my Lords.

MR. JUSTICE MILLS: That was due to the way in which that territory was brought into Canada. There were no conditions stated.

Mr. Pugsley. But the view of the Minister of Justice was that the British North America Act makes no provision whatever in regard to and does not have in view representation from the territories, and that was why Sir John Macdonald thought it necessary to have additional legislation on the subject. Now my Lords, the Deputy Minister of Justice when he referred to section 22, held that "Canada" must not always receive the same interpretation so far as the British North America Act is concerned. He admits that Canada in section 22 only means a part of Canada. He admits that "Canada" there does not mean the whole of Canada because it says:

"In relation to the constitution of the Senate, Canada shall be deemed to consist of three provinces, namely Ontario, Quebec and the Maritime provinces of Nova Scotia and New Brunswick."

MR. JUSTICE GIROUARD. That is an exception made by the statute but whenever there is no exception you must take the other view and give a large interpretation to the word "Canada."

Mr. Pugsley: I think your Lordship does not quite understand. What I understood to be admitted, and what I would say as to that is, that in interpreting that section your Lordships must hold that "Canada" only means there Ontario, Quebec and the Maritime Provinces.

MR. JUSTICE GIROUARD: The statute says so.

Mr. Pugsley: That is true, and so in section 51 it says the "four provinces," and where can be the difference. Here it gives in detail what the four provinces are, namely, Ontario, Quebec, New Brunswick and Nova Scotia, and in the other case it says the four provinces which are the provinces which are being constituted into a confederacy. It seems to me my Lord that if my learned friends here have to contend as they have that in construing subsection 4 you are to take the population of the territories as well as the new provinces, they are driven into a very great difficulty because the result of their contention is that in applying this saving clause you will have to bring in a portion of Canada which is not represented in the House of Commons at all. You would bring in the Peace River country, you would bring in the district of Ungava; you would bring in all the unorganised territories which contain a population of 75,000, the organised territories containing a population of 150,000. The unorganised territories form a part of the Dominion of Canada. You would therefore not only be obliged to bring in a portion of the territories in respect to which there is a representation but which is not to be readjusted at all under section 51, but you would also bring in a large population of the unorgan-

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ised territories which has no representation in Parliament which contains about 75,000 people, and in respect to which there will be a very rapid increase of population in the near future; because judging by the way that western country is filling up population is not going to be confined to the organised territories.

GIROUARD J.—This Order of Reference involves the interpretation of clauses 51 and 146 of the B. N. A. Act which, it seems to me, are capable of only one construction. As I read them, they mean the aggregate population, as ascertained at the latest census, of all the provinces and territories then constituting Canada. Sec. 51 lays down the principle to be applied to the readjustment of the representation of the four original provinces, and sec. 146 and the Imperial statutes relating to the territories; 34 & 35 Vict. ch. 28, and 49 & 50 Vict. ch. 35, provide for the admission of other provinces into the union, and that these new provinces, whether formerly independent of Canada, like Prince Edward Island and British Columbia, or created out of the territories, like Manitoba, shall be subject to the provisions of the B. N. A. Act. They and the territories—not only the four original provinces—constitute Canada and the Dominion of Canada, and are governed by the same constitution, in so far as it may not be inconsistent with the terms of their union respectively.

I am therefore of opinion that subsection 4 of section 51 of the B. N. A Act means the whole population of Canada; that is not only the aggregate population of the four original provinces, as ascertained at the latest census, but also the territories, whether represented in Parliament or not, and all the provinces which have been created or admitted into the union subsequent to the passage of the B. N. A Act, 1867.

DAVIES J.—This reference is made for the purpose of obtaining the opinion of this court as to whether in determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled, after each decennial census, the words aggregate population of Canada, in subsection 4 of section 51 of the British North America Act of 1867, should be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of the new provinces which have been admitted to the Confederation subsequent to the passing of the British North America Act.

The question we are asked to answer involves the proper construction to be given to sec. 51 of the B. N. A. Act. It is contended on behalf of the Provinces of Ontario, Nova Scotia and New Brunswick, that the section in question applies in terms only to the four provinces which were declared to comprise the Dominion when the B. N. A. Act came into operation and that it was only intended to have such limited application excepting in so far as subsequent orders-in-council, under the 146th sec. of the Act admitting other provinces into the union, might extend to these new provinces the principles and benefits of the section. It was strenuously contended, however, that the extension of the operation of the section in question to new provinces could not take away from any of the four first provinces comprising the Dominion rights which the section gave and was intended to give them.

There is no doubt a good deal to be said for the argument thus presented arising from the use in the section under review of the language "the representation of the four provinces shall be re-adjusted" by

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Parliament after each decennial census in manner therein provided. I have, however, after careful consideration of the whole Act and its amendments, reached the conclusion that the argument of the Attorney General for Canada must prevail and that the expression "four provinces" means, and must be read as "several provinces" comprising the Dominion. Any other construction gives rise to incongruities and difficulties which would render the operation of the section different in different provinces of the Dominion and would defeat what appears by the 51st and 52nd sections of the Act to be the basic principle intended to govern the representation of the people in the House of Commons, viz., "the proportionate representation of the provinces." The B. N. A. Act is an instrument of government and must be read and construed in the light of its declared objects. Its preamble, while declaring the desire of the three provinces of Canada, Nova Scotia and New Brunswick to be federally united into one Dominion under the Crown, further declared the expediency of providing for "the eventual admission into the union of other parts of British North America" and its enacting part made provision for carrying out these objects. These two main objects of the Act must at all times be borne in mind while construing any of its sections. The union was not consummated by the act itself, but by an executive Act of the Crown authorised by the 3rd section of the statute, and in like manner the extension of the Dominion by the admission of other parts of British North America whether provinces or territories from time to time took place by similar executive acts (sec. 146).

The 4th section provides that in construing the provisions of the Act unless otherwise expressed or implied "the name Canada shall be taken to

mean Canada as constituted under this Act." I think the contention submitted on behalf of the Dominion is correct, and that this means Canada as constituted *from time to time* under the Act And so applying this principle to the 8th section requiring a decennial "census of the population of Canada" to be taken, I think it obviously meant Canada as it was constituted at the time appointed by the statute for the taking of each decennial census. Any other construction involving a partial census only would seem absurd and calculated to defeat the object Parliament must have had in view. It is true the same section requires the respective populations of the four provinces into which Canada was first divided to be distinguished, but again I adopt the reading of the Attorney General that this means, and by virtue of subsequent amendments of the Act must necessarily mean, the several provinces comprising the Dominion from time to time, and whose subsequent admission was either expressly contemplated originally or subsequently authorised by Imperial legislation. The scheme for the decennial readjustment of the representation of the people in the House of Commons of Canada contained in secs. 51 and 52 is, as I have said, expressly declared to be the "proportionate representation of the provinces," and is based upon the well known principle of representation by population. It is to work automatically. Quebec is selected as the pivotal province and has an arbitrary number of 65 members assigned to it. The division of that number into its population after each decennial census gives the unit of representation on which the readjustment for the whole Dominion is to be based, and subsec. 2 accordingly applies it to "each of the other provinces." Subsec. 3 directs fractional parts of the unit less than a half to be disregarded, and subsec. 4

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around which the main argument revolved and which in the argument at bar was called the "saving clause" provided against a province losing any of its representation unless the proportion which the number of its population bore "to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province as ascertained at the then latest census should be found to be diminished by [1] or upwards."

I am of opinion that this section is a general provision applicable and intended to be applicable to all the provinces forming part of the Dominion from time to time. It is obvious that no reduction in the representation accorded to any one of the newly admitted provinces could be made under this subsection, until that province had been made part of the Dominion for two decennial periods because the standards or proportions fixed by the subsection and by virtue of the existence of which alone the reduction could be made could not be found till after that. But apart from that limited and special period the provision was intended to cover the cases of all the provinces for which the previous section had provided there should be a decennial census and the general words "the number of the aggregate population of Canada" are to be given their proper and plain meaning, and read so as to include the population of the provinces and territory added from time to time as well as that of the four original provinces into which Canada was first divided. These words are not to be limited, even when working out the application of the section to the other provinces, to the population of Canada as it existed territorially when confederation was first formed. The Attorney General for New Brunswick admitted that with respect to Prince Edward Island and British Columbia, each of which joined the union

some years after it was originally constituted, and also with respect to Manitoba which was created as a province by subsequent legislation, a larger construction than the one contended for by him with respect to Ontario, Nova Scotia and New Brunswick must necessarily be given to the words in question. The result would follow that two or more different constructions must be given the same phraseology in the same subsection and instead of the same section working automatically after each decennial census as between the population of a province and the aggregate population of Canada, as I think was intended, it would have to be worked out on the basis that there were three or four different "aggregate populations of Canada" dependent upon the several times when the different provinces whose union with the Dominion was contemplated actually became part of it. This certainly is a conclusion and a result which only the clearest and strongest language would justify us in reaching, and so far from the language of this section being clear and strong enough to justify a construction so opposed to ordinary rules I am of opinion it is perfectly consistent with the larger and better construction which, excepting in the special cases where a meaning territorially limited is expressly given or is necessarily to be implied, requires the general sections of this instrument of government, the British North America Act and its amendments, to be construed as embracing as well the territory and people subsequently admitted to the union as those originally constituting it.

Subsequent Imperial legislation in 1871 confirming the Dominion legislation constituting a part of Ruperts Land and the North-West Territory a province of the Dominion under the name of Manitoba, and afterwards in 1886 empowering the Dominion to provide for the

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representation in the Senate and Commons of Canada of any territory which for the time being formed part of Canada but was not included in any province thereof, declared that the original Act and its amendments should be construed together. This legislation of 1871 as confirmed by the Imperial Parliament provides that the provisions of the British North America Act, 1867,

> except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more of the provinces now composing the Dominion

shall be applicable to the new province of Manitoba,

> in the same way and to the same extent as they apply to the other provinces of the Dominion and as if the Province of Manitoba had been one of the provinces originally united by the said Act.

Secs. 51 and 52 do not certainly come within the above exceptions and even if reasonable doubt did exist as to the true meaning of the sections under review this subsequent imperial legislation would seem to remove them.

Upon the whole, after careful consideration, I am of the opinion that after the admission of new provinces and territory into the union, the expressions "Canada" and "Province" throughout the Act of 1867, must unless specially restricted by the context be necessarily given an interpretation different from that which they respectively bore before these provinces or territory were admitted, and must be taken after such admission to apply to and include these subsequently admitted provinces; and the words "aggregate population of Canada" in the 51st sec. of the Act held to mean the population of Canada as it is constituted under the British North America Act at each decennial census.

MILLS J.—In my opinion the subsection referred to must be held to mean the whole population of Canada according to its last decennial census. It is important,

in considering this question, to ascertain whether the British North America Act, 1867, and the amendments made thereto, place the provinces which are now included within the Dominion, upon a footing of equality in respect to the representation of the people of those provinces in the House of Commons of Canada; whether each province is entitled, as nearly as may be, to representation in proportion to the population of all Canada, as it exists after the last census taken, under the authority of the Act, or whether the four provinces which constituted the Canadian confederation at the outset, are exceptionally dealt with and are entitled to have their representation under subsection 4 of section 51, remain undiminished, if the population of each province, compared with the population of the four taken together, is not diminished by one-twentieth part or upwards. In order that this question may be clearly understood, and the Act correctly construed, it is necessary to briefly refer to the constitutional discussions which took place in old Canada, now Ontario and Quebec, before the act of confederation was adopted, and out of which this provision of the British North America Act grew. When we look at the terms of the union agreed to at the conference of Quebec, between Canada and the Maritime Provinces, and which constituted the basis of the terms submitted to the Colonial Secretary and which are contained in the British North America Act, they will aid us in more clearly understanding what the framers of the Act sought to accomplish.

The Imperial Parliament, in the preamble of that statute, state that Canada, Nova Scotia and New Brunswick have expressed a desire to be federally united under a constitution similar in principle to that of the United Kingdom; so that, in passing the Act, they are meeting the views of the delegates of the provinces

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mentioned, and they also declare that such a union would conduce to the welfare of the provinces, and promote the interests of the Empire. In this statute, the Imperial Parliament is giving effect to the wishes of the provinces mentioned, but it is well known that it was not the ministers and other prominent men of the provinces named in the Act, alone, that met in the city of Quebec in 1864 to agree upon a plan of union, —to that plan prominent public men in Prince Edward Island and in Newfoundland were also parties They discussed the terms upon which the union was to be brought about; they agreed that it should be a Federal union; they agreed upon the distribution of legislative jurisdiction to be made between the Provincial Legislatures that then existed, and the Parliament of Canada, which was yet to be created; they agreed that there should be a Senate and a House of Commons in which all the provinces were to be represented; they agreed that the Federal Government should be called into existence under a constitution similar in principle to that of the United Kingdom, that is, with ministers responsible to the House of Commons, and with a Parliament Supreme in the Government of the Dominion. In passing the Act, the Imperial Parliament were meeting the views of all the provinces that had taken part in settling the terms of union. In passing into law this plan of union, the Imperial Parliament sought to give effect to the wishes of the people whose representatives had taken a part in settling the terms of this instrument of Government. They agreed that the basis of representation in the House of Commons should be population, as ascertained by the official census to be taken every ten years. They agreed that the number of members for the House of Commons should be 194, distributed among the pro-

vinces whose delegates had settled the plan of union, as follows:

Upper Canada, 82.
Lower Canada, 65.
Nova Scotia, 19.
New Brunswick, 15.
Newfoundland, 8.
Prince Edward Island, 5.

This was to be the representation based on the population of each province, as nearly as it could be ascertained at the time. It was further provided, until the official census of 1871 could be made up, that there should be no change in the number of representatives to be returned from the several provinces. It was also provided that the communication of the Maritime Provinces should be promoted by the general government securing without delay the completion of the Intercolonial Railway from the Rivière du Loup, through New Brunswick, to Truro in Nova Scotia. This was thought a work essential to the union. The delegates looked to the extension of the Dominion to the westward, so as to include ultimately the whole of British North America, and to this end they further agreed that the communications with the North-west Territories and the improvements necessary to that end, which were also required for the development of the trade of the great west with the sea-board, were subjects of the highest importance to the Federated Provinces, and should be prosecuted at the earliest period that the state of the finances would permit. The Quebec conference was largely made up of the advisers of the Crown in the five provinces of British North America, to the eastward of the territories, and which became six provinces by the dissolution of the incorporate union between Quebec and Ontario.

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All the provinces of British North America, except British Columbia, were represented in the Quebec conference, and they were all that it was thought possible to embrace at once in the union. They all assisted in framing the constitution, and they agreed, without dissent, that each province after entering the union, should be represented in the House of Commons according to its population.

Quebec was to have 65 members and the number of representatives to which each of the other provinces would be entitled could be ascertained by dividing the whole population of each by one sixty-fifth of the population of Quebec. It was agreed that the census should be taken every ten years, beginning with the year 1871, and the number of representatives mentioned, with which a province entered the union, was to continue to be the number by which it was entitled to be represented in the Commons of Canada until its population was ascertained by the taking of the census, after which a readjustment was to be effected, if this was found necessary. If the population of a province bore to the aggregate population of Canada a less proportion by one-twentieth than it did by the previous census its representation was to be diminished, but if the relative diminution was less than one-twentieth it was not thought desirable to necessitate the disturbance of its electoral districts by requiring readjustment. It was also provided that the number of members in the House of Commons might be, from time to time, increased by the Parliament of Canada provided that a proportionate representation of the provinces prescribed by this Act was not thereby disturbed.

This plan of union marked out by the Quebec Convention and ratified by the legislatures of the several provinces was further discussed by the delegates from

the various provinces that assembled in London, and since known as the London Conference, where an Act was finally prepared and introduced into the Imperial Parliament by Lord Carnarvon, the then Secretary of State for the Colonies.

Two of the provinces that were parties to the conference were not prepared, at once, to join the union and so the union of the remaining four provinces was proceeded with. The whole scheme was not allowed to stand over because two of the provinces that had taken part in settling the terms of the union hesitated afterwards to enter it.

When we examine the terms of the British North America Act with those facts before us, we shall be better able to understand its scope and bearing, and the provisions that were made with the view of bringing into the union those parts of British North America that were not, in 1867, included.

In the preamble of the Act it is stated that the Provinces of Canada, Nova Scotia and New Brunswick have expressed a desire to be federally united in one Dominion, under the Crown of the United Kingdom, with a constitution similar in principle to that of the United Kingdom,—similar in principle as respects the relations of the constitutional advisers of the Crown, to the Sovereign and to Parliament. The British North America Act is largely taken up with providing a plan of government for Canada. The system of government that prevailed in each of the four provinces was continued. The only change made was in the diminution of the legislative authority of each, and in supplementing what remained of the constitution of Ontario and Quebec, so as to give to each a separate provincial organisation. The executive authority being in the Sovereign of the United Kingdom, the executive government was declared; but there being no Fede-

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ral Parliament, the constitution of the legislative authority in the Dominion had to be provided for. The preamble of the Act declares that it is expedient that provision be made for the eventual admission into the union of other parts of British North America. So that, although but four provinces were embraced when the British North America Act, 1867, first came into operation, it was expressly declared in the preamble that it was expedient that provisions be made for the eventual admission into the union so proclaimed of other parts of British North America. It was the declared intention that all parts should be embraced and the Act was so framed that this intention might be carried out without further Imperial legislation; and we are called upon to so interpret and construe the Act that this intention may be accomplished.

I think, if we give full effect to the reason and spirit of the terms employed in the Act, it will not be found difficult to carry out the intentions of Parliament. In construing the British North America Act we must examine it in the light of the surrounding circumstances at the time it became law. It rests upon agreement. It is the result of compact. It is the outcome of a treaty between the provinces that were represented in the Quebec Conference in 1864, and in the London Conference at a later period. Lord Carnarvon assigned this origin as a reason, in addressing the House of Lords upon the bill, for not treating it as an ordinary bill, and for asking Parliament to accept its terms as it had come from the hands of the parties that had given it their sanction. They were representative men in self-governing provinces, that had agreed to surrender a portion of that authority which they had previously exercised to bring about a strong and durable union which was intended to embrace the whole of British North America. We must inter-

pret the Act as a public instrument of government, so as to secure its effective operation The word Canada at the outset meant the four provinces that constituted the Dominion under the Act; since then, the intention stated in the preamble of the Act of admitting other parts of British North America into the union has been carried out, and the provisions for this purpose which the Act contains have been brought into operation. By section 22 Canada as it first existed, for the purpose of determining the representation in the Senate, consisted of three divisions, Ontario, Quebec and the Maritime Provinces of Nova Scotia and New Brunswick. This was the extent of its territorial limits; but section 147 provides that in case of the admission of Newfoundland and Prince Edward Island, "each of them shall be represented by four Senators in the Senate of Canada." Prince Edward Island when admitted is to be deemed to be comprised in the division of the Maritime Provinces, but Newfoundland is not embraced in that division.

Section 146 provides for the admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-west Territories. These were to be brought in on such terms and conditions, in each case, as are in the addresses expressed, and as the Queen thinks fit to approve, "subject to the provisions of this Act." British Columbia and Prince Edward Island were so brought in after stating in the addresses various terms and conditions, some of which are necessary and some are surplusage, as the British North America Act assigned to the proper authority the matters referred to without any agreement.

Article 10 provides

that the provisions of the British North America Act, 1867, shall, (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only affect

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one and not the whole of the provinces now comprising the Dominion, and except so far as the same may be varied by this minute), be applicable to British Columbia in the same way and to like extent as they would apply to the other provinces of the Dominion and as if the Colony of British Columbia had been one of the provinces originally so united by the said Act. *The Attorney-General of British Columbia* v. *The Attorney-General of Canada* (1).

In the terms and conditions by which Prince Edward Island is admitted into the union, beside many other things, it is provided, article 14, that the provisions in the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only to affect one and not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island in the same way, and to the same extent, as they apply to the other provinces in the Dominion, and as if the Colony of Prince Edward Island had been one of the provinces originally united by the said Act.

In the case of these two provinces they were brought into the union under the power bestowed by section 146 of the British North America Act. And they are to exercise the legislative power bestowed under sections 92 and 93 of the Act, and to stand towards Canada in exactly the position they would have stood had they been originally united by the British North America Act. Can it then be said that they are not to be, after entering the union, enumerated in section 5, in section 8, in sec. 22, and in sec. 51 of the Act as if they had been included when the Act passed the Imperial Parliament? In the judgment of the Privy Council in *The Attorney General of British Columbia* v. *The Attorney General of Canada* (1), their Lordships say

(1) 14 App. Cas. 303, 304.

they do not think it admits of doubt, and it was not disputed at the bar, that sec. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration it enacts that all lands, mines, minerals and royalties, which belong to British Columbia at the time of the union, shall for the future belong to that province and not to the Dominion. In order to construe the exceptions in that enactment which is created by the eleventh article of the union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties."

And on the previous page of the same judgment their Lordships say, in speaking of the eleventh article (1)—

> It is part of the 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 interest assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of the provincial property and revenues between the provinces and the Dominion, the 11th article being nothing more than an exception from these provisions.

So upon the authority of their Lordships the name of the Province of British Columbia should be inserted in those sections in which the provinces are named, such as sections 5, 37, 51, 102, 129 and others of like character.

In the case of Manitoba, a difficulty was created by the manner in which it was brought into the union. The mistake was pointed out in the discussion which took place in Parliament, and is referred to in a memorandum submitted to Council by Sir John Macdonald on the 2nd of January, 1871, as Minister of Justice. In the addresses for the admission of Rupert's Land and the North-West Territories into the Dominion of Canada, no provision was made for the future creation of provinces out of the territory under the authority bestowed by the British North America Act. The territory was acquired and placed under the jurisdiction of Canada,

(1) 14 App. Cas. 303.

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with no power for the creation of provinces out of it, without further imperial legislation. Manitoba received her constitution from Canada. Her powers of local self-government were professedly bestowed by an Act of the Canadian Parliament; so that it was a province whose powers might be enlarged, restricted or abolished by the Parliament of Canada. The relation existing between it and Canada was not federal, and so Imperial legislation was subsequently sought to validate what had been done and what might have been legally done under section 146 of the British North America Act, when the North-West Territories and Rupert's Land were being included within the Dominion of Canada. The Imperial Confederation Amendment Act of 1871 was passed to provide for the establishment of provinces out of the territories, and to secure their federal union with those already in Canada. This Act was necessary, because no provision had been made for the formation of provinces out of the territory acquired in its terms of admission.

It is too plain to call for discussion that the three provinces now included in the Dominion of Canada, but which were not in when the Dominion was proclaimed, stand towards Canada in exactly the same relation as the four provinces that were first embraced. They are in the union, under the authority of the imperial statute —as much so as if they had been in the union from the beginning. They are entitled to be enumerated along with the four provinces wherever that enumeration is employed to indicate the number of provinces embraced in the Dominion when the confederation Act was first enacted, and as if they had then been included. It is clear that a limited and specific power is bestowed under sec. 146 upon Her Majesty to legislate upon the receipt of addresses from the houses of the provincial legislature, and the two Houses of the

Parliament of Canada; and the proper exercise of that power, amends the British North America Act wherever the number of provinces is mentioned, so as to make that number correspond with the number of provinces embraced in Canada at the time after the last admission to the union is made. At the outset there were but four provinces, and but four were in consequence mentioned in the Act, wherever it became necessary to refer to the number of provinces included in the union. At the present time there are seven, and seven should be now substituted in the British North America Act for four, wherever the word four is used, and when additional provinces are admitted into the confederation, the number of provinces in the union should be correctly stated in sections 5, 8, 51, and wherever the word four may be employed in the Act, as correctly stating the number of provinces within the Dominion. It follows from the provisions made for ultimately embracing the whole of British North America into the union, that the people of the different provinces were intended to stand, in respect to their representation in Parliament, upon a footing of perfect equality, and that the provisions of the 51st section of the British North America Act were intended to apply to the population of every province that might thereafter be admitted into the union, as well as to the population of each of the four provinces that were first included. I think this is reasonably clear from the provisions made for the admission of other provinces in North America, until the whole of British North America was included within the Dominion of Canada. A fair construction of sec. 146 makes it possible to carry this avowed intention into effect on lines consistent with the provisions of the Act. The policy of uniting all British North America under the constitutional Act of 1867 certainly contemplated a confed-

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eration that, when completed, would consist of many more provinces than those originally embraced. And sec. 146 makes provision for the admission of other provinces without the necessity of further legislation by the direct act of the Imperial Parliament. As these proceedings were to be taken under the authority of the Act, and without any interference with the terms and conditions already settled, and the distribution of power already made between the Dominion and the provinces, the legislature of the province to be admitted, and the two Houses of the Dominion Parliament, were entrusted with settling the terms and conditions of admission of such province in the Dominion in each case, which, when embraced in the imperial order-in-council, were to have the same effect after Her Majesty's approval, as if they had been enacted by the Parliament of the United Kingdom; so that the terms and conditions of that order-in-council are to be read as if they were a part of the British North America Act. This is not a strained, but an obvious construction of the Act alike called for by its letter and spirit. Were it necessary to do so, it would be our duty to make the words of the statute yield to its reason and expressed intention. In adopting this construction we are giving effect to the intention of Parliament, and following a rule necessary to carry into effect the provisions of our constitution. The courts of England have, on more than one occasion, preferred to follow the reason rather than the exact letter of the law; *Fowler* v. *Paget* (1); *Rex* v. *Banks* (2); *The Queen* v. *Tolson* (3); *Reg.* v. *Prince* (4); but in this case, in giving effect to the declared intention of Parliament, we are not required to give to the word any unnatural

(1) 7 T. R. 509, 514.
(2) 1 Esp. 144.
(3) 23 Q. B. D. 168.
(4) 2 C. C. R. 154.

construction, for we have in our judgment adhered to the letter and spirit of the Act of Confederation.

We concur in this opinion.

(Sd.) H. E. TASCHEREAU C.J.
R. SEDGEWICK J.
J. D. ARMOUR J.

The formal report by the court to the Privy Council in answering the question submitted by the reference was as follows:—

In the matter of a reference to the Supreme Court of Canada by the Governor General in Council, under the provisions of the Act 54 & 55 Vict. ch. 25, sec. whereby the following question was submitted to the court for hearing and consideration:

In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words "aggregate population of Canada" in subsection four of section fifty-one of the British North America Act, 1867, be construed as meaning the population of the four original Provinces of Canada, or as meaning the whole population of Canada including that of provinces which had been admitted to the confederation subsequent to the passage of the British North America Act?

The court having heard counsel on behalf of the Dominion as well as on behalf of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, and having considered the question submitted as aforesaid certifies to the Governor in Council, that in its opinion the words "aggregate population of Canada" in subsection four of section 51 of the British North America Act, 1867, should, for the reasons contained in the documents hereunto annexed, be construed as meaning the whole population of Canada including that of provinces which have been admitted to the confederation subsequent to the passage of the British North America Act.

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*June 2.
*June 8.

IN THE MATTER OF THE REPRESENTATION OF PRINCE EDWARD ISLAND IN THE HOUSE OF COMMONS UPON THE LAST DECENNIAL CENSUS.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—B. N. A. Act, 1867—*Representation of P. E. I. in House of Commons.*

The representation of the Province of Prince Edward Island in the House of Commons of Canada is liable to be reduced below the original number of six under s. 51, s.s. 4, B. N. A. Act, 1867, after a decennial census.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration.

The case so referred was in the following terms:

"Extract from a report of a Committee of the Honourable the Privy Council approved by His Excellency on the 16th May, 1903.

"On a memorandum dated 12th May, 1903, from the Minister of Justice, submitting that in connection with the proposed readjustment of the representation in the House of Commons of the Provinces of the Dominion consequent upon the last decennial census, the Province of Prince Edward Island contends that its representation in the House of Commons is not liable to be reduced below six, although the application of the provisions of section 51 of the British North America Act, 1867, would, in view of the census returns result in a reduction.

"The Minister states that he does not agree with the view advocated by the Government of Prince

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

Edward Island and the province has asked that a reference be made to the Supreme Court of Canada for a determination of the question in difference.

"The Minister therefore recommends that the following question, suggested by the Government of Prince Edward Island, be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of the Supreme and Exchequer Courts Act as amended by the Act 54 & 55 Vic. ch. 25, intituled 'An Act to amend Chapter 135 of the Revised Statutes intituled An Act respecting the Supreme and Exchequer Courts,' viz:

"Although the population of Prince Edward Island, as ascertained in the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada, liable under the British North America Act, 1867, and amendments thereto and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?

"The Committee submit the same for approval.

"JOHN J. McGEE,

"*Clerk of the Privy Council.*"

The following counsel appeared:

For the Province of Prince Edward Island: *A. B. Aylesworth, K.C.*; *The Honourable Arthur Peters, K.C.*, Attorney General of Prince Edward Island, and *Mr. E B. Williams.*

For the Dominion of Canada: *E. L. Newcombe, K.C.*, Deputy Minister of Justice for the Dominion of Canada.

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Aylesworth K.C.: If your Lordships please, Mr. Attorney General Peters and Mr. Williams, of Charlottetown, are also of counsel for the province in the case, and unless it is contrary entirely to your Lordships' traditions to hear more than two counsel, I have no doubt that each would be very pleased if your Lordships would allow him to address the court.

THE CHIEF JUSTICE: Of course, this is not a usual case. We do not even give a judgment; nothing but an opinion. It binds nobody, and we did hear a good many counsel on the reference the other day but of course they were representing the different provinces. You are asking now that three be heard on one side; is that it?

Mr. Aylesworth: Yes, my Lord.

THE CHIEF JUSTICE.: I do not think there would be any objection to it under the circumstances of the case. We will hear the learned gentlemen.

Mr. Aylesworth: We shall endeavour to present the considerations which it appears to us affect the matter, as briefly as may be. Of course everything depends, for disposal of this question, upon the provisions of our constitution, the Act or instrument of Government, the British North America Act. Under the British North America Act, as your Lordships will be aware, there was provision made by section 146 for the subsequent admission into the union of Prince Edward Island as well as of British Columbia, Newfoundland and such portions of the territories from time to time as it might be desirable to take in. As to Prince Edward Island, the provision of the British North America Act was that upon addresses from both Houses of the Parliament of Canada and both Houses of the Provincial Legislature, the Queen might, by order-in-council, upon such terms and conditions as are expressed in the addresses, subject

to the conditions of the Act, admit the province into the union. Addresses were passed by the respective legislatures and the terms and conditions of union agreed upon and incorporated in an order-in-council, by which on the 26th of June, 1873, it was provided that Prince Edward Island should be admitted into confederation

Our position is that, under the terms of that compact and agreement, Prince Edward Island was given six members in the House of Commons and that that representation was then fixed for the island; not as a matter of right, not as a matter of giving representation by population in accordance with the provisions of the British North America Act itself, but because of the peculiarly isolated position of the province, and because, unless there had been an arrangement of that sort it would, as the delegates to the conference from the Island stated, have been quite impossible to have carried in the Island the terms of union.

We have it then in the first place: That by agreement, by compact between the Dominion then an established Government on the one part and the provincial legislature of the Island on the other part, it was a term of the union that the representation of the island should be six members at least, and it was never contemplated that that number should at a future time be reduced.

THE CHIEF JUSTICE: Prince Edward Island came in, in 1873?

Mr. Aylesworth: Yes my Lord. At that time the population of the Island would not according to the unit of representation have entitled it to more than five members, but from the first it had been the position taken by those representing the island in the various conferences, that with regard to confederation five members would not satisfy and that unless a larger

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representation than five members could be secured it was idle to propose terms of union which it could be expected would be acceptable to the people of the Island. Your Lordships will find in the Quebec resolutions, that at that time it was proposed that Newfoundland and Prince Edward Island should join the union, and that the House of Commons should consist of 194 members of whom five should represent Prince Edward Island. Now, the debates on the resolutions in the conference at Quebec, and especially the attitude taken by the delegates of Prince Edward Island at that time, demonstrated that it was just because of that small representation which the resolutions proposed to allot to Prince Edward Island, that the Island refused at that time to enter confederation. The Island and Newfoundland not joining in confederation, the statute provided by section 37 that the House of Commons should consist of 181 members. The resolutions had contemplated 13 more or 193 members altogether; five for Prince Edward Island and eight for Newfoundland, but as those colonies were not joining in the pact of confederation the number was reduced to 181 when the Act itself came to be passed. The position taken by the representatives of the Island at that time as detailed in the debates, leading to the passage of the Quebec resolutions, demonstrates that the feature of union amongst others, that one at all events particularly, was one in regard to which the delegates felt strongly and by reason of which among other things the Island at that time was unwilling to enter confederation. It is put in that way in the most distinct manner by the different representatives of Prince Edward Island. Mr. Palmer speaking at the conference puts it this way:

"(*a.*) When a colony surrenders the right to self-government she should have something commensurate

in the federation. Why give up so great certainties where we have only a feeble voice."

Mr. Whalen says:

"Our people would not be contented to give up their present benefits for the representation of five members. It may be said that confederation will go on without Prince Edward Island and that we shall eventually be forced in. Better however than that we should willingly go into confederation with that representation."

Colonel Grey says:

"The provision of five members is unsatisfactory, Prince Edward Island is divided longitudinally into three counties. We cannot divide three counties into five members."

Mr. Galt had proposed six members and Mr. Coles said.

"I approve that rather than Mr. Brown's motion because it allows us to give to our counties two members each."

And finally on this subject Mr. Pope said:

"The circumstances of Prince Edward Island are such that I hope the Conference will agree to give us such a number as we can divide amongst our three constituencies. Nature as well as the original settlement of the Island has made three counties and it would give rise to much difficulty if we had to adjust five members to the three counties. I cannot ask it as a matter of right, but as one of expendiency, as one without which it is impossible for us to carry the measure in Prince Edward Island"

That being put distinctly before the members of the conference at Quebec none the less the resolutions were passed, and by the seventeenth resolution the proposal was, that Prince Edward Island should have but five members if it entered confederation. Prince

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Edward Island declined to do so and confederation became accordingly an accomplished fact under the statute, with the representation of the other of the four combining provinces fixed by section 37 of the Act at the figures which the conference proposed. Then the authorities both in this country and in the old country continued to urge that whether Newfoundland came in or not, Prince Edward Island should at all events be admitted upon some terms. We have a notable letter from Lord Granville to the Governor General on the 4th of September 1869 (which will be found in the Journals of the Prince Edward Island House of Assembly, 1870 page 15Y in which Lord Granville urges upon the Governor-in-Council that in settling the basis of arrangement between the provincial and Dominion governments, the Dominion Government should deal with the Island;

"I trust that in settling the claims proposed as the basis of this arrangement the Government of the Dominion will deal liberally as well as justly with the Island."

At this stage, when it was a matter of negotiation between a great commonwealth such as the union of these provinces extending from the Gulf of St. Lawrence to the Pacific Ocean had made, there was on the one hand the large contracting party, the Dominion, which could afford to be generous in the matter of representation with its small sister who was considering the advisability of entering into the federal pact.

There had been, as your Lordships may see from the attitude taken at the Quebec Conference, just that line of division, just that very circumstance, that the representation of so few as five members out of a house of 194 was felt to be entirely inadequate; would have given to the island as a constituency so feeble a voice in

the councils of the nation that there was no return offered for the manifest advantages of self that the Island would by entering confederation be giving up. The House had now by lapse of time and by the admission into confederation of the new provinces of Manitoba and of British Columbia, come to have a representation of 200 members by the statute of 1872; and there being a slightly larger representation in the whole House of Commons than there had been at the origin of confederation in 1867; there being this emergency; it was suggested from the Colonial Office that the Dominion could afford to deal generously and to deal liberally with the Island in the matter of representation. It came to be a matter of agreement between the Dominion on the one part and the Island on the other, and it was settled that there should be six representatives, and upon that footing and basis these addresses were passed by the provincial houses at Charlottetown and by the Dominion Legislature here and incorporated in the Queen's order-in-council admitting the province.

Now according to representation by population there was no such right. If one had divided the population of Prince Edward Island as it stood in 1873 by the unit fixed in section 51 of the statute in reference to the population of Quebec, the Island would not have been entitled to six members at all; it would have been entitled to barely five; and that circumstance coupled with the fact that the province had been, from the time of the original proposal for confederation, standing for better terms, so to say, standing out for larger representation; now that the terms of union were being arranged it was stipulated on their part and agreed to by the Dominion that they should have a representation larger than their population entitled them to. That seems to us one of the very strongest circum-

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stances as then demonstating that the intention of both sides at the time was that Prince Edward Island should never have less than the number of six representatives.

MR. JUSTICE DAVIES: Do I understand you to say that when the Island was admitted in 1873, the population at the previous decennial census, with the addition allowed for the years between 1871 and 1873, would not have entitled them to six.

Mr. Aylesworth: Not according to the Quebec unit. As a matter of fact I think they would have scarcely five, but it would have been so near to five that if Prince Edward Island did come in upon the strict basis of representation of population they would have been awarded five only. It is recited in the resolutions clause 12:

"That the population of Prince Edward Island having been increased by 15,000 or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members."

The population in 1861 had been 80,857 and in 1871 it had come up to over 95,000, the actual increase being that 15,000 as recited in the resolution. The population of Quebec in 1871 being 1,191,516 the unit of representation as fixed by that population for the decade of the seventies was 18,331, and your Lordships will see that that would not entitle Prince Edward Island with a population of even 95,000 to the representation of 6 members.

MR. JUSTICE DAVIES: The point I want to take is this—making a proportionate allowance for the two years from 1871 to 1873 which of course must be estimated, would that give them the six members.

Mr. Aylesworth: I think it manifestly would not, but of course under the statute we are dealing with the decennial census and at that time in 1873 the returns of the census of 1871 were probably not finally received.

If under these circumstances we find, as we do, that the resolutions called for a representation of six members in a house of 200, it seems to us that we find the strongest grounds for the confidence that it was a matter of compact and arrangement, and that it was intended to be a fixed minimum below which the representation of that province was never to fall. Your Lordships of course see the alternative. We have now as a result of nearly thirty years of confederation an increase in our population over the number when we entered the union of nearly 10,000. But, by reason of there being a much larger increase in population in the province of Quebec, although our people now number nearly 104,000, we are not according to the present unit of representation entitled to more than four members. Quebec has grown from 1,190,000 in 1871 to 1,650,000. and the unit of representation has accordingly advanced from 18,000 to 25,000. Our 104,000 people are now entitled to a member for each 25,000 souls and that would give us four members. And as Quebec increases its population in the decades to come, Prince Edward Island, limited in area, even though it advanced at the same rate per cent that it has advanced in the past, must gradually be over taken, and it is a mere matter of arithmetic to compute how long it will be until Prince Edward Island can have no member at all, and until its population would fall below the unit of representation. The unit of representation is growing, and each decade there is an advance of 2,000 or 3,000; it was 18,111 in 1871; it was 21,000 in 1881; it was 23,000 in 1891, and it is 25,000 now. It advances by 2,000 or more each decade, because the population in Quebec increasing as it does and its representation being fixed at 65, we have a greater number of individuals each decade to be represented by the one member. At that rate of advance,

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even granting to Prince Edward Island its increase in population upon the same percentage basis as in the past, with 2,000 square miles of area circumscribed as it is, by natural conditions, it is bound to be overtaken and unless there is an actual decline in the population of Quebec, in the course of three or four decades more Prince Edward Island will have been reduced to one member and finally to none at all, because their whole population will not entitle them to one member.

Now, can such result ever have been contemplated by those who framed this statute on the terms of union between the Island and the Dominion. We think not. We think it is not a question of representation by population in that sense. There are other circumstances that are to be taken into account. The principle of representation by population is just enough as between the larger provinces; as between the different sections of the different provinces. That principle could very well be employed in such a case, but when you have a community isolated as Prince Edward Island is, you have it circumscribed and limited so that it cannot expand and grow. Its voice in the Parliament of the country will be feeble indeed unless you adopt some other principle than the strict one of representation by population in fixing its representation in the House.

The next step in the argument is, on our part: That there is no provision in the British North America Act for any reduction in representation unless it is in the case where there has first been an increase. Our position is that the British North America Act never contemplated Quebec, of course, having less than 65; equally it never contemplated Ontario being reduced below 82.

MR. JUSTICE SEDGEWICK: Why not?

Mr. Aylesworth: Because section 37 of the Act provides for a Parliament of 181 members for the four

provinces that were then in the union and for no less; and it would be no Parliament at all if it had, we would say, 175 members. There is no provision in the British North America Act for a reduction below 181. That never was contemplated, and no matter what the population might be, no matter what the readjustments might be, there were never to be, our submission is, less than 82 for Ontario; less than the number fixed by section 37 for New Brunswick and Nova Scotia respectively.

Before discussing in a little more fullness the position under this clause of the union, let me point out or emphasize the further considerations that I have already alluded to. We were, as of course any province is that enters into confederation, surrendering something of our independence of government. We were of course entering confederation necessarily subject to the provisions of this Act, as section 146 declares, and we could not have validly stipulated—even if we had so desired—that after that we should have control over any of the matters mentioned in section 91 of the Act. The Island Legislature was necessarily giving up its control over these subjects of legislation. What was it getting in return? What else but a right to a voice in the passing of such laws by means of at least six representatives from the province.

Then we have the circumstance that is adverted to and made the ground for, as it were, pressing the claim. At all events the insistence on six members by the Prince Edward Island delegates in respect to the natural and geographical subdivision of the island into three sections, is a circumstance of some importance in that connection. The British North America Act fully recognised the subdivision of the country into counties, and the representation of different sections in the Parliament of the Dominion by counties.

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That is the scheme of representation provided by section 40 of the statute, and the schedule to the Act annexed. We hear of three counties on the island, and these three counties were set beyond and separate, each from the other, by deep indentations into the coast line, and sea gulfs separating one of the three subdivisions from each of its fellows. It was marked out for the representation of some multiple of three.

I cannot pretend to say that that was by any means to be a governing consideration, but that was certainly in the minds of those who were framing these resolutions as demonstrated by their remarks upon that occasion and that consideration certainly influenced the matter at the time. It is just as impossible to-day as it was forty years ago to distribute proportionately five members or four members among three counties. That consideration was advanced and urged by the delegates of the island at the Quebec conference. It has been relied upon in their subsequent negotiations in regard to these matters, and it is a circumstance of importance, as it seems to us, in the consideration of the matter still.

As I say, there are these circumstances in the discussion of the Quebec resolutions and of the terms of union in 1873, which demonstrated the views of those who debated the terms under which the island should join the Dominion. But aside altogether from any such question, upon the nature of the terms and conditions themselves it can be readily seen that the idea of those who framed, and the idea on the part of the provincial representatives, was that for which we contend when they introduced the language of clause 12.

"That the population of Prince Edward Island having been increased by 15,000 or upwards since the year 1861, the island shall be represented in the House of Commons of Canada by six members; the represent-

ation to be readjusted from time to time under provisions of the British North America Act, 1867."

I do not know what the fact may be as to whether the census returns of 1871 had been completed at the time of the framing of this resolution; the reference to the approximate increase, that the population had been increased by 15,000 or upwards, seems to indicate lack of absolute certainty as to the figure. But the reference to the figures of 1861 seems important. Why word the resolution in that way? Why preface it by that consideration? We interpret that as simply meaning this: The population of the Island is increasing, and inasmuch as it had increased by 15,000 in the last decade, inasmuch as it is an increasing thing, we will give a representation of six subject to re-adjustment.

Now, our population at that time as I have said would have given us but five and one-eighth or barely over five members. We are then given six members because of the fact that we are of an increasing population. Then I refer further to the provisions of clause 14 of the resolution:

"The provisions of the British North America Act 1867 shall, except those parts that are referable to one province only——"

which does not apply here—

"and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island."

That is possibly in view of the provisions of section 146 which authorised the Queen in council to define or to approve the terms of union expressed in the resolutions "subject to the provisions of this Act." That perhaps is a provision to which if it in any way conflicted with the expressed terms of the statute no effect could be given, but treating it as a provision which is not opposed, as we hope to convince your Lordships it

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is not, to anything contained in the statute, it seems an additional guarantee to Prince Edward Island in this minimum representation.

The provisions of the British North America Act 1867, except so far as the same may be varied by these resolutions, shall be applicable to Prince Edward Island in the same way and to the same extent as they apply to the other provinces of the Dominion and as if the Colony of Prince Edward Island had been one of the provinces originally united by the said Act.

Your Lordships will remember the wording of section 51 of the British North America Act in its terms applies to only four provinces. The language is:

"The representation of the four provinces shall be re-adjusted."

I do not overlook the circumstance—of course I may not do so—that the other day, in assigning reasons for the disposal made of the questions submitted as to the interpretation of section 51, Mr. Justice Mills, at all events, of your Lordships' bench, expressed the view that the word "four" ought to be read as if it were "seven" and that section 51 would in that view be applicable to all the provinces of the Dominion however few or many they might be from time to time.

The point I was seeking to make—if it is open to me at all—on section 51 was as I have indicated, that it does not profess to apply to any but the four provinces that were then united. That at all events is the language, and if that be a correct view of its scope, then reading it with this 14th resolution you have nothing in conflict, but you have as one of the terms of the compact of union with Prince Edward Island the stipulation that the provisions of the British North America Act, except to the extent that they are varied by this resolution, shall be applicable to Prince Edward Island. Now, one of the variations—the principal one so far as

one can see in the whole series of resolutions—is this on the matter of representation, and that representation having been fixed by resolution 12 we think it immediately followed as one of the articles of the treaty, that the British North America Act, except so far as it might be varied by these resolutions, was to be applicable.

MR. JUSTICE GIROUARD: The opinion of the court is that section 51 should be construed as meaning the whole population of Canada including the provinces which had been admitted into confederation subsequent to the passing of the British North America Act. Now yon are asking us to decide the very reverse.

Mr. Aylesworth: No my Lord; let me point out. The court has undoubtedly declared that under subsection 4 of section 51, the phrase "the population of Canada" means the population of seven or of eight or of all the provinces. But that is quite a different thing my Lord from the question I am submitting; whether the representation of any province except the original four is to det rmined by that rule of proportion based upon the aggregate population of the whole Dominion. Your Lordships were not asked anything in the other case by the reference, as to whether section 51 was applicable to the provinces that have joined Confederation since 1867. The court was asked merely with reference to the words "the aggregate population of Canada", and the court answering what was meant by "the aggregate population of Canada", declared that it meant the whole population of the whole Dominion, seven or eight provinces. Now, that might well be the basis of representation in each one of the four original confederating provinces and not be the basis in a specially admitted province such as Prince Edward Island.

MR. JUSTICE SEDGEWICK: But the Queen's order-in-council admitting Prince Edward Island into the

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union provided expressly that after 1873 the subsequent representation of the province should be readjusted according to section 51.

Mr. Aylesworth: No my Lord. The only thing we have in that regard is in resolution 12 which I have referred to; that the population having been increased by 15,000 since 1861 the Island should be represented in the House of Commons of Canada by six members, the representation to be re-adjusted from time to time under the provisions of the British North America Act, 1867.

MR. JUSTICE NESBITT: The opinion of this court on the former reference says that these four provinces are in the same position as others coming in afterwards.

Mr. Aylesworth: No; all that this judgment says—at least the only answer that goes formally from the court is that as far as re-adjustment is necessary under 51 you must take the population of the whole Dominion as the basis.

MR. JUSTICE NESBITT: Is it not the same thing?

Mr. Aylesworth: I do not think so. If your Lordship had the clause before you, you would see what I am contending for. By section 51 it is provided that after each decennial census the representation of the four provinces shall be re-adjusted. These four provinces were of course the two Canadas, New Brunswick and Nova Scotia. The representation of these four is to be re-adjusted in the following manner: Quebec shall have a fixed number of 65. There shall be assigned to each of the others—I read that, each of the other three—such a number of members as will bear the same proportion to the number of its population as the number 65 bears to the population of Quebec. That will provide a house of say 185 members. Then there is no change as to the remainder of the House. Of course that is unfair representation to Quebec I grant. It is equally unfair representation to Ontario, and New Brunswick

and Nova Scotia, but while it is so it is comparatively a little thing; it is over-representation at most to the extent of two or three or four members, a trifle in the whole; a large thing to the small province, but a thing of small consequence to the other members of confederation.

Upon the terms of our union there is just a further reference I wish to make. By clause 6 your Lordships will find the provision for paying annual subsidies to the island:

"In consideration of the transfer to the Parliament of Canada of the powers of taxation, the following sums shall be paid yearly by Canada to Prince Edward Island for the support of its Government and Legislature; that is to say: $30,000 and an annual grant equal to 80 cents per head of its population as shown by the census returns of 1871, namely, 94,021; both, by half yearly payments in advance. Such grant of 80 cts. per head to be augmented in proportion to the increase in population of the Island as may be shown by each subsequent decennial census until the population mounts to 400,000, at which rate the grant shall hereafter remain, it being understood that the next census shall be taken in the year 1881."

That recites that the population is now 94,021 and provides that 80 cts per head of that population shall be paid it annually, and then that that grant of 80 cts. per head shall be augmented in proportion to the increase of the population of the Island as may be shown by each decennial census. Now, it happened that the population of the Island increased from 94,000 in 1871 to 108,000 in 1881; increased again to 109,000 in 1891 and fell off in 1901. That is to say, it was larger in 1891 than in any other period since the Island entered into the union. Does this grant of 80 cts per head fall off? No. The provision is that this grant

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of 80 cts. per head shall be augmented in proportion to the increase of the population of the Island, and having once gone up to 80 cts. on 109,000 it never comes down no matter how much the population of the island falls off decade after decade.

MR. JUSTICE NESBITT: Is not that against you on the rules of construction?

Mr. Aylesworth: Because it is expressed in the one clause and not in the other? I do not think so, I am not going to argue that there is anything in the British North America Act itself inconsistent with the contention that we are putting forth, but rather the reverse. There is on the face of these resolutions what constitutes the terms of our union with the Dominion, a clear expression in clause 6 which I read, that decrease in the population was not to affect our rights in that regard. As a matter of fact the authorities of the Dominion acquiesced in this interpretation of that clause.

MR. JUSTICE SEDGEWICK: There is nothing in the British North America Act to prevent the original four provinces from giving any amount of subsidy to British Columbia or Newfoundland or Prince Edward Island.

Mr. Aylesworth: Certainly, and clearly there is nothing in the British North America Act to prevent them from giving undue representation to any of the outlying district—I mean representation greater than the population would warrant.

MR. JUSTICE DAVIES: There is nothing to prevent you granting it when the province comes in, but is there not everything to prevent excepting that province from the readjustment which applies to the whole?

Mr. Aylesworth: Of course that is the point I am arguing. Let me ask your Lordships to permit a brief reference to Gray's Book on the History of Confedera-

tion page 58., upon this very question of whether representation by population was the governing principle of the statute. He says:

"Thus at the first inception on entering into the union, population was not intended to be held as the only rule for representation. Though taken as a guide the apportionment must be more or less arbitrary. Existing arrangements, territorial and other considerations must be taken into account, and modifications to suit circumstances necessarily made; but, after entering the union, future changes of the entire representation were to be governed by that principle. Such seemed to be the views on this subject. The principle itself was affirmed simply and explicitly in the 17th resolution in the conference at Quebec; but in the constitution as subsequently settled at Westminster and enacted by the British North America Act, 1867, while the re-adjustment made by the Quebec resolution is adhered to, the principle explicitly laid down 'that the basis of representation in the House of Commons shall be by population,' is not re-declared. So marked a distinction, it must be presumed, was intentional to remove any doubt that the confederation of the four provinces then formed should have free scope for terms that might be necessary thereafter to bring in other portions of British North America."

That is exactly the principle upon which we submit the Dominion, under the invitation or at the suggestion of the Home authorities, acted in regard to the admission of Prince Edward Island. They were invited to be generous and to deal liberally with their small sister. They did so and it would be a most illusory thing if granting that in the terms of the original compact, they are entitled to take it away at the expiration, it might be, of a couple of years.

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MR. JUSTICE DAVIES: Where would be the distinction from the illusory standpoint in Prince Edward Island losing a member under the terms it came in on and New Brunswick losing a member under the terms it came on.

Mr. Aylesworth: I have to say—unless I am precluded from saying it by your Lordships' view as expressed the other day—that my admission of the true construction of section 37 is that Nova Scotia could never have less than 19.

MR. JUSTICE NESBITT: What do you make out of the words "subject to the provisions of this Act" in section 51?

Mr. Aylesworth: My interpretation of section 51 is this: Wherever you increase above the original representation as fixed by section 37, you may re-adjust that increase by wiping it out altogether, but there is no provision in the statute from start to finish for a house of less than 181 members. Would it be any Parliament at all with 160 members under the British North America Act? By section 52 there is a careful provision that the number may be increased. There is no provision that it may be decreased and surely one may say that a provision for decrease would be more necessary than one for increase. No matter how much you increase you still have at least 181 members and one would have thought no express provision for increase would be necessary, But in abundance of caution, by section 52 it is provided that you may increase. Surely the inference is the strongest that you should not cut down; you may not make a house smaller than the minimum fixed by the Act itself in section 37. If then you have a minimum house of 181 for the four original provinces, upon the basis of proportion you cannot cut any one of these four provinces below the numbers fixed by the statute.

MR. JUSTICE NESBITT: Suppose one of the provinces by constant influx of population or the growth of manufacture should become very populous. Take Nova Scotia; it cannot go below 19 but it can go to 70.

Mr. Aylesworth: Yes, and so increasing in population that increase beyond 19 might be re-adjusted and according to the terms of the statute might to up and down. It may be that the position was not contemplated of a province ever falling below the figures fixed by the original compact, by the statute. It may be that was not thought of, but however that may be there is certainly no provision for it here and the absence of such a provision is very marked, in the presence of such a very careful provision for increase.

MR. JUSTICE DAVIES: There is no provision if we give to the word "re-adjustment' the limited meaning you suggest. But giving it the ordinary meaning which it bears in the English language there is a provision for reduction. I do not quite catch the meaning of your argument or the full force of it on section 37. The statute does not say arbitrarily there shall be 181 members of Parliament, but "subject to the provisions of the Act" evidently contemplating the possibility of less.

Mr. Aylesworth: But what are the provisions of the Act in that regard? Section 52 provides for increase not decrease. Does section 51 provide for any decrease of the aggregate? Not that I am able to see.

MR. JUSTICE DAVIES: It provides for the operation of the rule, the result of which may be a decrease.

Mr. Aylesworth: To re-adjust; not to decrease.

MR. JUSTICE SEDGEWICK: If you re-adjust an account between two merchants that means that you have to add to one and subtract from another. Re-adjustment must be capable of only one meaning.

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Mr. Aylesworth: Let me ask your Lordships to look at at it as I have just been putting it. We have three sections defining the number of members in the House of Commons of Canada; sections 37, 51 and 52. Section 37 gives us a certain number to start with, namely 181 members, and the House of Commons shall consist of that number subject to the provisions of the Act. That must mean subject to these other two clauses; subject to 51 and 52. Now 52 says that the number of 181 may be increased. Then under sections 37 and 52 together, the number shall be 181 or more, and that number is to be readjusted by section 51.

Let me take it piece by piece. If we have a given number of 181 you could readjust 181 by subsection 4 in any different way you please from the particular way stated in section 37. You have the fixed number of 181, and you could readjust that among the four constituents which make up the 181. Similarly you could re-adjust 194 or you could re-adjust 213 or any number you like. Now there is not a hint anywhere in the statute as to reducing the aggregate membership of the House of Commons.

MR. JUSTICE NESBITT: "Subject to the provisions of this Act."

Mr. Aylesworth: Which is not a reduction of the whole.

MR. JUSTICE NESBITT: Why not?

Mr. Aylesworth: Because by section 51 subsection 4 it is a re-adjustment not a reduction; it is a re-adjustment by reducing one province and increasing another province. You have a fixed number.

MR. JUSTICE SEDGEWICK: Section 52 will allow the Dominion Parliament giving Quebec 100 members, so that instead of dividing the population of Quebec by 65 you will divide it by 100 and then re-adjust the representation of the other provinces accordingly.

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Mr. Aylesworth: That may be what is contemplated by section 52, though I would not have thought so, and I have considered that possibility. I thought that section 52 meant simply this: That from time to time as re-adjustment demanded an increase above 181, which section 37 had fixed as the minimum, that increase could be given to the whole membership of the House of Commons, but that increased membership must proceed according to the provisions of section 51. Now if there had been in clause 52 any provisions for decreasing, if it had said the number may from time to time be increased or diminished preserving the proportion, the argument I am now presenting would have no place; but when you have by section 37 such a careful provision for 181 members distributed among the provinces there mentioned, it seems to me that the intention of the framers of the statute was a minimum House of Commons of 181, increasing as section 51 calls for increase from time to time, but never going below these figures.

MR. JUSTICE NESBITT: That would be if it were not subject to the provisions of this Act

Mr. Aylesworth: This much is certain, that unless that construction is the true one, our province is liable to be deprived absolutely of its representation and that never could have been contemplated.

MR. JUSTICE NESBITT: The word "re-adjust" seems to be wide enough as we find it in the dictionary.

Mr. Aylesworth: No doubt, but I read "readjust" in section 51 in the light of 37 and 52. Your Lordships will observe in section 51 that while there is the provision by subsection 2 of assigning to each of the other provinces a number proportionate to the representation of Quebec,—that is the phrase,—there is in subsection 3 the provision that one-half of the unit is to count as a whole, and that less than one-half is to be ignored, and

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by subsection 4 there is a provision preventing reduction of any province unless the falling off in the population is one twentieth of the whole. But that is the whole scope of that section. There is nothing in clause 2, which is the only section that deals with the aggregate membership, indicating a reduction in the whole number. There is re-adjustment by assigning to each of the other provinces a proportionate number of the whole whatever that whole may be. Where then do you find any idea of reducing? You can reduce a province but it does not follow that you will reduce the whole below the original number."

I have just one or two considerations to urge looking at the matter from the standpoint of the opposite party to the compact or arrangement under which we came in. Certainly the view of the representatives of the island is abundantly manifested by the course they have taken and by the language they have used. Is it not equally clear that the same view obtained on the other side? We have in the first place the circumstance that nine years after the admission of the island into the union the re-adjustment of 1882 took place, and at that time upon the unit of population or the representation as it then stood, the Island would have been entitled to only five and one-fifth members; slightly greater than it had been entitled to at the time of its entrance into the union which was barely five and one-eighth, it being five and one-fifth in 1882. There was no reduction from six to five in 1882

MR. JUSTICE NESBITT: That could not be. A decennial census must occur twice before you could make a reduction.

Mr. Aylesworth: That is of course if subsection 4 has application. But if that clause had application, as certainly its words state, to the four provinces, it would have to, and did not, touch the represen-

tation of Prince Edward Island in 1882. At all events, the figures of the census in 1882 show as I said that Prince Edward Island was then entitled only to one-fifth over the five members. Its representation remained unaltered. We point to that circumstance as one of significance, and it seems to have peculiar significance in this that at that time the first Minister of Canada, Sir John A. Macdonald, was the very statesman who had presided in the conference in 1873 under which the terms of the admission of the island had been settled. He must have been distinctly aware of what the intention was under which these resolutions had been framed, and if we find no alteration made in the representation of Prince Edward Island although the falling off in population or the variation of population would have called for it—if we find no variation made in the representation of the island until after Sir John A. Macdonald's death, it certainly seems a circumstance indicating the understanding of the terms upon which the Island was admitted into confederation.

MR. JUSTICE NESBITT: Did not a reduction take place in 1891?

Mr. Aylesworth: Not until after the death of Sir John A. Macdonald. He died in June, 1891, and the redistribution was by statute 55 & 56 Vic. in 1892.

MR. JUSTICE DAVIES: The census returns could not have been in to enable the re-adjustment to be made before Sir John A. Macdonald died.

Mr. Aylesworth: Certainly not, but in the re-adjustment of 1882 the Island is certainly untouched. There is a still further consideration upon the statute that I present in the same regard. By section 147 of the statute the representation of Prince Edward Island, in case it is admitted, in the Senate of Canada shall be four members. Prince Edward Island when admitted

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shall be deemed to be comprised in the third of the three divisions into which Canada is divided in relation to the constitution of the Senate provided by this Act, and accordingly after the admission of Prince Edward Island (whether Newfoundland is admitted or not) the representation of Nova Scotia and New Brunswick in the Senate shall if vacancies occur be reduced from 12 to 10 members respectively, and the representation of each of these provinces shall not be increased at any time beyond ten except under the provisions of this Act for the appointment of six additional senators under the direction of the Queen. It is quite evident that there is going to be no reduction in the Senate representation. We have the statute saying so and saying so plainly. The constitution of the House of Commons was fully as important as the constitution of the Senate. We have an express enactment as to the circumstances under which the representation of the Senate may be diminished as well as may be increased. We have provision for increase in the House of Commons under section 52; none for decrease. But with regard to Prince Edward Island, my point is this. You find four senators defined as the representation of the Island in the Senate. That is a fixed number. Now then from first to last the scheme of the British North America Act is that the representation of each and every province in the Commons shall be somewhat in excess of its representation in the Senate. That is so as to Quebec, so as to Ontario, so as to each and every province. Would it not be a most anomalous thing; could it ever have been in the contemplation of the framers of this Act that the day should come when Prince Edward Island should have four senators and only one member in the House of Commons.

Mr. Peters: Or none at all.

Mr. Aylesworth: Or none at all. We must not forget that the day is within sight when Prince Edward Island may only have one member or no member unless our contention prevails or the British North America Act is amended.

We have a limited area and we cannot increase as the other provinces. Then we submit that upon the construction of the British North America Act which I have endeavoured to argue, that section 51 in terms applies only to the four provinces so far as the readjustment is concerned. That, as I have pointed out, does not conflict with the decision of this court the other day, and full effect may be given to all the answers made by the court to the questions submitted by the Government by giving to the words in subsection 4 the meaning which the court assigned to them without in the least militating against the argument I present that section 51 applies only to the four provinces so far as representation is concerned, and that we in Prince Edward Island are not governed by section 51 at all, but on the other hand are governed by the stipulation of the terms on which we entered into the union. But if I am wrong in that, even though section 51 applies to Prince Edward Island as well as to the other provinces, full effect can be given to this provision as to readjustment by reading that in the way I have submitted, that it is applicable to any increase that may ever be awarded to any particular province. We submit that as a true interpretation of section 51. We read it in the light of sections 52 and 37. One other consideration, and I have presented all that I am able to. I call your lordships' attention to the statute 61 Vic., ch. 3 with respect to the boundaries of the province of Quebec, in which it is declared that the northern and north western and north eastern boundaries are thereby

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declared to be the following, and there is a description of these boundaries. While that statute takes the place of a declaratory enactment its preamble recites the power to pass it under the British North America Act of 1871; under that statute power was conferred upon the Parliament of Canada from time to time with the consent of any legislature of any province to increase, diminish or otherwise alter the limits of such province. Now then, there being power under the British North America Act, 1871, to increase, diminish or otherwise alter these limits, there certainly was no diminution of the territorial area of Quebec under this statute. It must have been and it necessarily was as we submit an increase. It was not any mere definition of boundaries but it was the fixing of the territorial area of the province within the limits prescribed by that statute, and its effect was to increase the territorial area of Quebec which had been in 1864 at the time of the Quebec resolutions, understood to be an area of some 118,000 square miles of territory. There is in that area room for a most enormous extension of population within the provincial limits of Quebec. What is the effect upon the small members of the confederation if you fix as the British North America Act does the Parliamentary representation of Quebec at 65, and double, treble, quadruple or multiply its present population. At once the unit of representation goes up correspondingly, and at once the representation of the province consisting of perhaps 100,000 population goes down. Is not that a variation in the condition of things existing at the time we entered into confederation in 1873; a variation of such character as to emphasize the argument we present; that the minimum representation was intended to be fixed on our request, naming six as the number of members from the Island. Unless you have such a fixed minimum representation

for the smaller provinces, they are necessarily face to face with the situation I have described. Ontario has its fertile belt known to exist and about to be penetrated by a railway in contemplation to connect the city of Quebec with the Pacific. Look at the influx of population that is all but certain to follow the building of another transcontinental road through these fertile lands. If there were room for all the other provinces to extend the case would not be so bad, but there is no room for Prince Edward Island, and if the Province of Quebec is going to grow and quadruple its population, the unit of representation would be enlarged and you would destroy at a stroke the representation of the small province. Unless the construction of the statute which I am contending for obtained and unless you hold that there is by section 37 implied, in the absence of any provision for decrease, a fixed minimum for the provinces that entered confederation originally, or that have come in on some compact of union since, you have to face the difficulty which we present, and which in the case of Prince Edward Island has come to be a very real grievance, for there is a very imminent prospect of that province losing altogether her representation in the House of Commons.

Peters K.C., Prime Minister and Attorney General of Prince Edward Island:—May it please your Lordships. The very able argument made by my colleague, Mr. Aylesworth, leaves very little for me to say; but still there are one or two points that strike me as being of some importance in connection with the case and to which I shall refer briefly. Your Lordships will doubtless recognize the vital importance of this question to the Province of Prince Edward Island. As Mr. Aylesworth has well put it: If the Province of Quebec increases, as it is likely to increase, the day may come and the day may not be far distant, when

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we shall have no representation at all from Prince Edward Island in the Canadian House of Commons. That is a condition of things we have to guard against.

At the very outset I submit most humbly to your Lordships, that so far as your Lordships' judgment of the other day is concerned, as to whether "Canada" meant the whole of Canada or only "old Canada", with that judgment I entirely agree. I have not a word to say against that judgment. I do not think that that judgment touches at all the question that your Lordships have now before you. The question which we have taken some trouble to get before your Lordships, and which your Lordships have to decide here, is whether or not at the time we entered confederation we entered on terms which entitled us to a representation of not less than six members in the House of Commons. I ask your Lordships to carefully consider the correspondence and the entries in the Journals of the House bearing on this subject. I submit most strongly that old Canada—that is Ontario, Quebec, Nova Scotia and New Brunswick, went into confederation under the British North America Act alone; they walked in under that Act in a body. The Province of Prince Edward Island refused to come under that Act. We refused time and again to be bound by that Act. Our delegates went to Quebec and they repeatedly refused to agree to confederation on the terms of this Act, and finally they had to make an alteration in the resolutions before we did come in. Take the resolutions that Mr. Aylesworth has so ably placed before you, and I submit that Prince Edward Island entered confederation not on the same basis as Ontario, Quebec, Nova Scotia and New Brunswick. We entered on terms that are actually provided for and which are special to ourselves and I say that if these terms have a reasonable construction given to them as a matter of contract, then

the contention of Prince Edward Island before this court will be sustained by your Lordships.

MR. JUSTICE DAVIES: The difficulty is section 146 which provides for the island entering into confederation on terms and it explicitly says that such terms must be "subject to the provisions of this Act."

Mr. Peters: And what do these words mean in that section. That section only applies to new provinces, and I say that when your construe "subject to the provisions of this Act" in that section it means subject to the provisions of the Act with regard to the matter they are talking about. It does not mean with regard to four senators, which section 147, the section immediately succeeding, expressly provides for. If your Lordship will look at the authorities on the construction of statutes you will find that "subject to the provisions of this Act," when found in a section like that, mean subject to the matter you are talking about.

MR. JUSTICE DAVIES: Would your contention go to the extent of saying that you could have made terms of union inconsistent with the general provisions of the British North America Act?

Mr. Peters: No my Lord, I will not go to that extent, but I say we have the right and we exercise that right when it is not inconsistent with the British North America Act. The provisions of the different sections of the British North America Act can be reconciled with what we did. For instance British Columbia came in under express terms and she had so many members given to her for all time to come. Why should not we do the same thing? I am not going to weary the court by repeating the argument of Mr. Aylesworth. The whole point is that the terms of the contract or the agreement or whatever you like to call it show that we went into confederation on specific terms. If your Lordships should hold that this was

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ultra vires, then I ask your Lordships; Of what was it *ultra vires?*

MR. JUSTICE DAVIES: Which is the section which you say expressly gives you this right because it would appear from the terms that you came in and expressly assented to the re-adjustment under the Act. So it goes back to the question Mr. Aylesworth argued; what is the meaning of the clause which provides for re-adjustment.

Mr. Peters: What is the meaning of the word "re-adjustment"? I am glad your Lordship called my attention to that. I say that when these four provinces were formed into a confederation, Canada framed a constitution, just as the Chief Justice said the United States framed a constitution. Canada framed a constitution and section 37 of that constitution says that the House of Commons shall contain 181 members and when the constitution said that they were talking about the four provinces only. Then they had to make some arrangement for getting in the other provinces if these provinces wanted to come in, and so they sat down and very wisely, or unwisely, they said: We will arrange this: We will give Ontario 82 members, we will give Quebec so many, we will give Nova Scotia so many, and we will give New Brunswick so many. That was the original formation of the constitution if you like to call it that. They afterwards said they would give Prince Edward Island six members. I say my Lords that if you are going to upset that constitution; if you give a decision by which the 181 members which formed the original constitution of Canada can be decreased; then it is striking very hard at the constitution of Canada.

Then the framers of the constitution said: Now we have these four provinces agreeing to come in under these terms but Prince Edward Island and the others

will not come in under these terms but if they do want to come in we will make a regulation by which they can come in; we will give them a certain representation. We will divide the population of Quebec by 65 so that we will get a unit of representation and fix the representation of these provinces. But Prince Edward Island refused to accept that and we said: We want you to give us a fixed representation just as you have given British Columbia. After fighting the matter out for a number of years, the Government of Canada as it then was thought fit to give us a fixed number of members as they had power to do and they made that contract with us and we entered confederation on the understanding that we would have six members and no less.

Now my Lords, I have read your Lordships' judgment very carefully. As I said I have nothing to find fault with in that judgment except for one statement made by Mr. Justice Armour who said that it might happen that the population of our province would disappear altogether.

Mr. Justice Girouard: Mr. Justice Armour did not write the judgment.

Mr. Peters: It was a statement made in the course of the argument. Mr. Justice Armour said: "Suppose the population of the province should disappear altogether and nobody was left there; would you contend that Prince Edward Island should still have its full representation?" And Mr Pugsley said: "Certainly my lord." And you can put the converse of that supposition. Quebec has increased its territory by 118,000 miles and suppose the population of that province should increase to a large extent then it might turn out that the unit of representation would be such that Prince Edward Island should have no representation at all. We might have in Prince Edward Island

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a population of 200,000 in one of the most fertile provinces of the whole Dominion, but the population of Quebec might so increase that we would have no representation at all from Prince Edward Island in the House of Commons. That is what might come about if the contention of the Attorney General for Canada is upheld. I want your Lordships to take that into consideration. We entered confederation on the term that we should have six members and no less. Is it not fair that that understanding should be maintained. We are an island completely surrounded by water; we cannot increase as the other provinces of Canada can increase. That was all taken into consideration at the time we entered confederation. The framers of the constitution said: We are dealing with a province that cannot increase its population; cannot grow larger, and so we will give it special terms

Now my Lords before I close, I would like to very strongly impress upon your Lordships what we deem to be the true intent of the arrangement that was made between the province of Prince Edward Island and Canada. I have no doubt at all that if your Lordships will take the trouble to read the Journals of the House of Commons and the debates in our own Local House you will find that we absolutely refused to come in to confederation at all unless we had a fair representation in the House of Commons.

MR. JUSTICE GIROUARD: Did not you change your mind.

Mr. Peters: We changed our mind because we got six members as we wanted.

MR. JUSTICE NESBITT: Subject to re-adjustment.

Mr. Peters: Yes, if we ever got to having ten members we might be re-adjusted down; but we were never to have less than six. That is our contention.

MR. JUSTICE NESBITT: Suppose your population ran up to 400,000.

Mr. Peters: Will you show me one provision in the British North America Act or in our terms of confederation by which we were to be subject to a decrease below six members.

MR. JUSTICE NESBITT: Section 37 read in connection with the other clauses looks very like it.

Mr. Peters: No my Lord, section 37 does not hold that.

MR. JUSTICE NESBITT: It depends on what you mean by "subject to the provisions of this Act," and what provisions of the Act govern.

Mr. Peters: But have you not to take that with the other provisions that went before when they formed this compact and got us to come into confederation and said: We will give you so many members, and then they said "subject to the provisions of this Act." Subject to what provisions? Is it subject to the next section which provides for four senators?

MR. JUSTICE NESBITT: If you look at section 22 the same argument would apply to that. Section 22 provides for a fixed number of senators in Nova Scotia, and yet Nova Scotia may under subsections 2 and 4 of section 51 be reduced below the fixed number of members.

Mr Aylesworth: We think not below the number mentioned in section 37.

Mr. Peters: We believe we cannot go below the number of six.

MR. JUSTICE GIROUARD: Your argument is that you cannot get the aggregate under 181, but you admit you could get one province below.

MR. JUSTICE NESBITT: Probably they never contemplated a reduction below six.

Mr. Peters: We certainly never did.

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Mr. E. Bayfield Williams follows: My Lords, there are just a few observations I have to make with reference to some matters that seem to me to have been but slightly touched upon by my learned friends Mr. Aylesworth and the Attorney General, and which when touched upon did not seem to impress your Lordships in the way we think they might. These matters may be looked at, to my mind, in at least a little different way or at all events in a way that would make them more clear. Before starting into these matters of fact I would like to call your Lordships' attention to what we are really here for. We are here to-day construing the constitution of the Province of Prince Edward Island for all time to come as part of the confederation, and in construing the constitution of the Province of Prince Edward Island under the British North America Act and the terms of union we are really construing the constitution of the whole Confederation with reference to certain points. It is laid down by Lefroy and in all books on Constitutional Law:

"That the constitution above all things is to be construed in a liberal manner and in such a manner as will give perfect harmony to all sections at the time the question arose."

I submit my Lords that as a matter of fact your Lordships might have given a construction to the constitution in 1867, and if it were possible to admit of two constructions you might in justice construe it differently to-day. It is laid down as Lefroy put it:

"That special restrictions which at present might seem salutary might in the end prove the overthrow of the system itself."

We are coming to the time when the restrictions, if such there were—and I claim there were none in the British North America Act—if applied to our pro-

vince would, in the words I quote, prove the overthrow of the system itself. We have now after 20 years experience of confederation arrived at such a state as to make it possible that in a comparatively short time, although we are recognized as a distinct province of the confederation; given the machinery of a province with all the responsibilities of section 92 of the British North America Act upon us and with other responsibilities given by our own terms in addition to section 92; we have now arrived at a stage when it can be foreseen that we will have no representation in the popular chamber of the House of Commons. To my mind that would be an absurdity that could never have been intended when we entered confederation. When the constitution of Canada was framed it was not framed for a day. Mr. Justice Sedgewick said: "Sufficient to the day is the evil thereof" I submit my Lords that that evil day has come so far as the Province of Prince Edward Island is concerned. In dealing with the constitution I claim above all things that the constitution, whether it be a statute or whether it be in the nature of the English constitution, must be dealt with so as to give it a construction that will last for all time to come and such as would have been intended when it was made to last for all time to come. The construction that your Lordships seem to suggest with reference to the constitution of Canada will not last for all time to come because if what are now normal conditions should prevail for the next 50 years, then Prince Edward Island will have no representation in the House of Commons at all, and that my Lords cannot last. I submit also to your lordships that in Clements, Canadian Constitution, and every other constitutional authority you will find the construction advocated which I am contending for. I want to impress upon your Lordships that the constitution must

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be construed so that there will be no absurdity in it and I submit that the construction we are putting upon the different sections of the Act is the only construction that will not lead to absurdity.

Lefroy page 469; numbers 38 and following:

"The constitution is entitled to a construction as nearly as may be in accordance with the intent of its makers."

THE CHIEF JUSTICE: That is different from our British North America Act, which is a statute.

Mr. Williams: But at the same time it is a constitution.

THE CHIEF JUSTICE: You cannot read it as you would the constitution of the United States.

Mr. Williams: That is true my Lord but to a certain extent we combined the benefits of it with the benefits of the British constitution.

THE CHIEF JUSTICE: The Privy Council has alluded to that.

Mr. Williams: The Privy Council did allude to it, I think even in *The Fisheries Case* (1).

I claim that although the British North America Act is a statute and an imperial statute it is also a treaty with us Notwithstanding that the British North America Act is a statute, it is at the same time a constitution and should not be construed according to Maxwell on Statutes, but with regard to the construction of constitutions in a broad and liberal view which will last for ever.

THE CHIEF JUSTICE: It seems to me the question is plain. Section 146 says that you must read this Resolution 12 as if the British Parliament had passed an Act and had said in so many words: Prince Edward Island shall have six members subject to readjustment according to the British North America Act. If the

(1) 26 Can. S. C. R. 444.

British Parliament had passed an Act of that kind how should we interpret it.

Mr. Williams: We should interpret that as a constitutional Act.

THE CHIEF JUSTICE: As if it were a new Act passed by the Imperial Parliament in 1873, saying among other things: Prince Edward Island shall come in but they shall have six members subject to re-adjustment as provided for in the other provinces by the British North America Act.

Mr. Williams: That is perfectly correct and I am leaving that point to ask what does readjusted mean in the light of what I have said.

THE CHIEF JUSTICE: It might be that it was the impression of Prince Edward Island at the time, in the minds of the public men when they consented to this, that they did not expect a decrease, but that is not a consideration in the interpretation of a clear Act of Parliament.

Mr. Williams: It is not entirely an impression. If we can give you the express wording of the Act to show what was the meaning of it in the minds of the Conference.

THE CHIEF JUSTICE: The framers of the Act may have intended a different meaning from the mind of the British Parliament.

Mr. Williams: The framers of the Act might have a different mind from the wording of the law?

THE CHIEF JUSTICE: We must take the Act as it reads. The history that preceded the confederation Act may be more or less enquired into for the interpretation of the constitution. That I believe has been decided in the Privy Council. Mr. Justice Mills did it the other day in giving the opinion of the court in the last reference.

Mr, Williams: He did.

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THE CHIEF JUSTICE: Rather more extensively than I would have done it myself; however it seems to have been admitted. Though you cannot refer to debates in Parliament it seems to have been admitted that you can refer to the history of the times not only for the interpretation of the constitution but for the interpretation of any Act.

Mr. Williams: And more so for the interpretation of the constitution.

THE CHIEF JUSTICE: The same thing—study of the state of the law as it was before and all that kind of thing.

Mr. Williams: Yes my Lord. I would like to mention a word in connection with the observation made by Mr. Justice Davies as to why we were reduced in 1882. Mr. Justice Davies supposed that in 1882 we could not have been re-adjusted because we had had no previous decennial census.

THE CHIEF JUSTICE: Of the Dominion.

Mr. Williams: Yes my Lord. If that is a construction that must carry with reference to 1882 then section 51 says that there shall be a re-adjustment in 1871 and that re-adjustment would not be possible because there was no previous census on which to make that re-adjustment.

MR. JUSTICE DAVIES: The standard to enable you to make a re-adjustment did not exist; it could not exist until there was a decennial census.

Mr. Williams: In 1871 there was not a decennial census, but still they did re-adjust.

MR. JUSTICE DAVIES: They re-adjusted of course so far as it was possible to re-adjust.

Mr. Williams: Subsection 4 is the only section in the whole Act relating to reduction either in positive or negative terms but it could not apply in 1871 because there had been no last preceding re-adjust-

ment of the number of members and consequently that must be read out of section 51.

THE CHIEF JUSTICE: I do not see how it affects the question at all.

Mr. Williams: I will show in one moment. That section relating to reduction not having applied to any province in 1871, it was not part of section 51 in 1871, but in 1871 there had to be readjustment. I am confining that argument to a great extent to what Mr. Aylesworth spoke of namely that the aggregate House of Commons shall be 181 members and I am giving a meaning to the word "re-adjusted" in the light of the fact that in 1871 the reduction clause did not apply. In 1871, the reduction clause not having applied there must be a re-adjustment and there could not possibly be a re-adjustment of the number of members in the way of reduction without reducing the number below 181. Therefore if our contention is correct that the number of 181 cannot be reduced then the word "re-adjusted" did not mean reduction in 1871. It meant re-adjustment upon the number given in section 37 and if it meant that in 1871 it must mean the same thing now. Now, section 37 "subject to the provisions of this Act" refers to the House of Commons, that is the aggregate House of Commons. The only other section that refers to the House of Commons is section 52 and as my learned friend says the constitution of Canada is 181 members plus or otherwise there is no meaning to that section. Why is it so? They could be increased by subsection 2, according to the contention that your Lordships seem to put forward, and they could be increased by section 146. But the wisdom of the framers of the constitution seemed to point to the fact that they wanted a specific clause saying that you could be increased—they were just as much in need of a clause

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saying they should be decreased because subsection 2 refers to increase and decrease.

MR. JUSTICE NESBITT: Do you find anything throwing light on your argument in the introduction by the Imperial Parliament of section 37?

Mr. Williams: I have little to assist me in that as to the meaning of "subject to the provisions of this Act.'

MR. JUSTICE NESBITT: I mean as to the fixing of the number of members.

Mr. Williams: I have nothing except the opinion given by members of the bar.

MR. JUSTICE NESBITT: But as to the introduction of the British North America Act in the Imperial Parliament.

Mr. Williams: There is absolutely nothing. I went over that and there is nothing except one speech of Lord Carnarvon and that did not go to the merits or demerits of the Act at all but only the great possibilities that would result from it.

MR. JUSTICE DAVIES: It is explained by Lord Carnarvon that the Imperial Parliament should not make any material alteration—not even to the dotting of an "i" or the crossing of a "t".

Mr. Williams: I would draw attention to the fact, which Mr. Justice Davies' remark has brought out, and it is that the Quebec resolutions are materially changed by the British North America Act in this very matter.

THE CHIEF JUSTICE: Certainly.

Mr. Williams: And as against the conclusion of representation by population.

MR. JUSTICE SEDGEWICK: If you read the Memoirs of one Mr. Vansittart you will find what an important thing representation by population was before you were born.

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Mr. Williams: Well my Lord I will read Vansittart for your Lordship. I have his Memoirs open before me and here is what he says:

"On the 19th, Mr. Brown at length had the proud satisfaction of moving a resolution which carried into effect the principle of representation by population which he had been fighting for in Upper Canada for fifteen years or more. The resolution provided, that the basis of representation in the House of Commons shall be population, as determined by the official census every ten years, and that the number of members at first shall be two hundred, distributed as follows: Upper Canada, eighty nine; Lower Canada, sixty five; Nova Scotia, nineteen; New Brunswick, fifteen; Newfoundland, seven; Prince Edward Island, five; and that for the purpose of re-adjustments Lower Canada shall be the unit of population, with sixty five members. This resolution was vigorously opposed by the Prince Edward Island delegates, who said their province would not go into oonfederation if this motion was concurred in as it would have no status whatever. Other members pointed out that it had been well understood at Charlottetown that the principle of representation in the popular chamber should be representation by population, and it was idle to raise the question now. The resolution carried, all concurring except Prince Edward Island. Next day the subject was again informally discussed, but the view of the Prince Edward Island delegates was that this clause would preclude their province from joining the union."

That is Vansittart my lord. I want to refer particularly to what Mr. Justice Nesbitt said with reference to "subject to the provisions of this Act". I claim that when you say in any Act subject to the provisions of this Act, you mean subject to such provisions of the Act as relate to the very same

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subject matter. The reference in section 37 is to the House of Commons as an aggregate and to nothing else. That is in the first part. There is only one other clause in the whole Act referring to the House of Commons as an aggregate when we are considering the question of representation and that is section 52. Therefore section 37 can read perfectly clearly; The House of Commons shall under the provisions of section 52 of this Act consist of 181 members because section 51 is only a re-adjusting clause; with the representation in the House of Commons. The representation in the House of Commons is provided for by section 37 plus section 52. The future readjustment does not relate to the representation of the House of Commons and consequently subject to the provisions of the Act are subject to such provisions as relate to the House of Commons and its representation.

MR. JUSTICE NESBITT: They are not quite the same subject matter. "The number of members of the House of Commons:" Is that not in section 52?

Mr. Williams: Let me point your Lordship's attention to another matter in connection with that supporting my contention and I will quote a case to your Lordship. If it meant that the 82 for Ontario, the 65 for Quebec, the 19 for Nova Scotia and the 15 for New Brunswick, were at any time to be reduced below the original number given, which I claim is the constitution of Canada, and cannot be disturbed, as section 52 says; if it meant that it would read: The House of Commons shall subject to the provisions of this Act consist of 181 members of which 82 shall be elected for Ontario subject to the provisions of the Act; 65 for Quebec, subject to the provisions of the Act, and so on. But they do not do that. They put subject to the provisions of the Act with regard to the House of Commons as a House of Commons and as to the origi-

nal House of Commons. I hope Mr. Justice Nesbitt follows me.

MR. JUSTICE NESBITT: I follow your argument.

Mr. Williams: I quote in support of that the case of *Ormerod* v. *Tod Morden* (1) which is the only case I can find which puts a construction on these express words "subject to the provisions of this Act."

MR. JUSTICE SEDGEWICK: What are you citing from?

Mr. Williams: From the Weekly Reporter, vol. 30, page 808. The judgment of Lord Justice Brett. The decision of Lord Justice Brett there defines the meaning of these words as being confined to the subject matter spoken of in the section in which the words occur. And putting that construction on it you should confine "subject to the provisions of the Act" to the House of Commons in section 37 and consequently it means section 52. I may say also my Lords that the view that 181 could never be reduced was mentioned by Mr. Dalton McCarthy as a legal opinion, and also by the late Hon. A. R. Dickie, at one time Minister of Justice. They gave that opinion in the House of Commons if your Lordships will permit me to give you the official debates

THE CHIEF JUSTICE: You cannot cite such things as authorities.

Mr. Williams: But as your Lordships are only giving an opinion and not a judgment it might be allowed.

THE CHIEF JUSTICE: I cannot see why your own opinion is not as good.

Mr. Williams: That may be my Lord and I thank you, but I would like to point your Lordships to the opinion of these eminent lawyers. Mr. Dalton McCarthy's opinion is contained in the House of Commons Debates, 1892, page 3412, and Mr. Dickie's opinion is to be found on page 3419, at the top. I may

(1) 30 W. R. 808.

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say, as Mr. Justice Davies knows, that it is almost impossible for Prince Edward Island to increase rapidly in population because our province is composed of farming lands; we have no manufactures and we cannot extend very much.

Newcombe K.C. for the Dominion of Canada: May it please your Lordships; what I would have had to say in reply to my learned friends has been so far anticipated by the observations which have fallen from your Lordships, that I shall necessarily be very brief. In the first place I suppose we may eliminate from the discussion those things which have been decided by this court in the opinion recently delivered upon the New Brunswick reference. The decision of Mr. Justice Mills which was concurred in by the Chief Justice, by Mr. Justice Sedgewick and by Mr. Justice Armour, seems to set at rest a number of points to which my learned friends have referred. The late Mr. Justice Mills in his opinion said: (1)

"So upon the authority of their Lordships, the name of the Province of British Columbia should be inserted in those sections in which the provinces are names such as sections 5, 37, 51, 102, 129 and others of the like character * * It is too plain to call for discussion that the three provinces now included into the Dominion but which were not in when the Dominion was proclaimed stand towards Canada in exactly the same relation as the four provinces that were first embraced. They are in the union, under the authority of the imperial statute, as much as if they had been in the union from the beginning. They are entitled to be enumerated along with the four provinces whereever that enumeration is employed to indicate the number of provinces embraced in the Dominion when the confederation Act was first enacted, and as if they had then been included."

(1) 33 Can. S. C. R. at pp. 589, 590.

MR. JUSTICE GIROUARD: What are you quoting from?

Mr. Newcombe: From the judgment of the court as pronounced by Mr. Justice Mills.

THE CHIEF JUSTICE: You could hardly call it a judgment.

Mr. Newcombe: No; but it represents the reasons for the answers given by the majority of the court.

MR. JUSTICE GIROUARD: The whole court.

Mr. Newcombe: I presume so, but Mr. Justice Davies and your Lordship gave separate reasons.

MR. JUSTICE GIROUARD: We came to the same conclusion, but I would not say that the reasons are different.

Mr. Newcombe: Not necessarily different reasons, but you gave reasons, whereas three of their Lordships concurred in the opinion of Mr. Justice Mills which I am reading: (1)

"It follows from the provisions made for ultimately embracing the whole of British North America into the union, that the people of the different provinces were intended to stand, in respect to their representation in Parliament, upon a footing of perfect equality, and that the provisions of 51st section of the British North America Act were intended to apply to the population of every province that might thereafter be admitted into the union as well as to the population of each of the four provinces that were first included. I think this is reasonably clear from the provisions made for the admission of other provinces in North America until the whole of British North America was included within the Dominion of Canada. A fair construction of section 146 makes it possible to carry this avowed intention into effect, on lines consistent with the provisions of the Act."

(1) 33 Can. S. C. R. at p. 591.

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Therefore, it is manifest that in the construction of section 51 of the British North America Act, under present conditions, you are to substitute the word "seven" for the word "four" and to read it as saying: "The representation of the seven provinces shall be re-adjusted by such authority, in such manner and from such time as the Parliament of Canada rovices, subject and according to the following rules."

That disposes of the contention that there is any difference, so far as Prince Edward Island is concerned, between her situation and the position which she would have occupied had she come in with the original four provinces. My Lords, I do not propose to refer at all to the debates or the Journals, or the Quebec Conference, or any of these documents which my learned friends have invoked to show the intention of this Act, as they contend. The letter of the Act itself is very plain and very clear, as I conceive. And that being so I deny the right of my learned friend to refer to or to read any of these papers, and I submit that your Lordships cannot refer to them for the purpose of construing the Act. I need not quote authorities to your Lordships on that because you are familiar with them. It has been laid down time and again by the highest courts, by the Judicial Committee in Appeal which is directly binding upon this court, that documents of that sort cannot be invoked to modify, affect or throw light upon the construction of an Act of Parliament. Therefore, it is that in approaching this question we have to be governed by the letter of the Act and only by the letter of the Act so far as it is possible in construing the words to give a reasonable interpretation to them.

It would be a very singular thing if the question which my learned friends have propounded could be answered in their favour consistently with the result

in the New Brunswick case recently referred to your lordships. The Province of New Brunswick, supported by the Provinces of Ontario and Nova Scotia, framed a question which was before your Lordships a few days ago, with the view of having a determination upon the point as to whether they were liable to have their representation decreased. It was supposed by the advisers of these Governments that that depended upon the construction which is to be given to the words "aggregate population of Canada" as used in paragraph 4 of section 51. That question was answered by your lordships favourably to the contention that it included the population of all Canada, and the result as accepted by the governments concerned is that so far as the opinion of this court so delivered could govern, they are liable to have their representation diminished as is proposed by the Redistribution Bill now before the House of Commons.

Supposing that judgment to stand, my learned friends say, or it is involved in their argument and I presume they will say it in terms: That it is neither here nor there so far as the point is concerned which they are now presenting to the court. It would be rather a curious result if New Brunswick and Ontario and Nova Scotia have so far mistaken the point upon which the whole thing depends as to submit a question which is really irrelevant to the inquiry. However that may be the question has been answered by your lordships and I do not propose to re-open anything that was decided upon that question.

My learned friends have referred to section 37 which provides:

"That the House of Commons shall, subject to the provisions of this Act, consist of 181 members; of whom 82 shall be elected for Ontario, 65 for Quebec, 19 for Nova Scotia and 15 for New Brunswick."

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In 1873 come the terms of union with Prince Edward Island and one of these terms is:

"That the population of Prince Edward Island having been increased by 15,000 or upwards since the year 1861, the Island shall be represented in the House of Commons by six members; the representation to be re-adjusted from time to time under the provisions of the British North America Act 1867."

I take it in view of what I have said, and particularly with reference to the opinion already given by the court, that we must now, for the purpose of considering the present question, add to section 37 the words: "Six for Prince Edward Island."

And my learned friends' case cannot stand upon any higher ground than that. Then you will have it read:

"Six for Prince Edward Island subject to the provisions of this Act."

You have to go to section 51 to find provisions of this Act subject to which Prince Edward Island is to have six members, and subject to which the House of Commons is to consist of 181 members.

"51. On the completion of the census in the year 1871 and of each subsequent decennial census the representation of the seven provinces shall be re-adjusted snbject to the following rules: Quebec shall have a fixed number of 65 members. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to its number of population ascertained at such census as the number 65 bears to the population of Quebec so ascertained."

It necessarily follows from the reading of these two sections together, that you may have an increase or you may have a diminution of the members forming either the aggregate of the House of Commons or the aggregate of any province. I think that follows, my Lords. But it is not necessary in the present circumstances to

determine whether or not the aggregate membership of the House of Commons may be reduced or not. That question is not before the court and is not involved in this inquiry, because it may very well happen that the representation of a province may be reduced and the representation of another province may be correspondingly increased, and the total representation in the House of Commons remain the same. I submit that section 52 has no office whatever so far as the present inquiry is concerned; section 52 has never yet been invoked by Parliament. The power given under that section has never been executed, but it may be executed and only in one way—that is, by increasing the number fixed for the Province of Quebec. If Parliament were to provide that Quebec shall have 75 members and that the representation of the other provinces shall be increased accordingly, that would be an enactment quite within the authority of the Dominion Parliament and referable solely to the authority conferred by section 52.

MR. JUSTICE DAVIES: Is not the increase of members in the North West referable solely to this also?

Mr. Newcombe: We have a special Act with regard to the North West Territories.

MR. JUSTICE DAVIES: You have a special Act, but it is under this section that your power to make an Act giving increased representation surely lies. I may be entirely mistaken, but that was always my assumption. The number of members in the House of Commons can only be increased by a statute. That statute can only be passed pursuant to the power contained in the 52nd section, and when additional members were admitted from the North West and the number of members in the House of Commons was increased to 215, surely it was by virtue of the power in section 52 they did that.

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Mr. Newcombe: In 49 & 50 Vic. ch. 35 we have: "The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or either of them, of any territories which for the time being form part of the Dominion of Canada but are not included in any province thereof."

MR. JUSTICE DAVIES: That was an additional Act to remove the doubts that existed.

Mr. Newcombe: That was passed in 1886.

MR. JUSTICE DAVIES: It is not necessary for your argument I suppose, but I assume that there were doubts expressed and these doubts were properly removed by an Imperial Act. I assumed that the Parliament of Canada have the power under section 52 to increase the number of members from the North West.

Mr. Newcombe: I had supposed, my Lord, that that power came under the amending Act. However, so far as are concerned the provinces that are constituted as forming the Dominion, that section is quite unnecessary to authorize the increase which may come about in case every province had increased relatively to Quebec, so as to require a representation in the House of Commons of say 200 members instead of 181. You have all that provided for in section 51. My learned friend's argument is no doubt very ingenious and his whole point comes to this: That under section 51 and under the terms of the union with Prince Edward Island, the representation of the province may be re-adjusted, but he says that the word "re-adjusted" excluded any idea of diminution or increase so far as the whole is concerned. He would perhaps say that it is like a puzzle which we may make by cutting up a sheet of card paper into various figures and mixing them up together. These may be re-adjusted as often as you like for the purpose of making one re-constituted

whole, but you can not take away one of these pieces and you cannot add one to these pieces because that is not re-adjustment. It is diminution or increase. But that very argument, it seems to me, works against my learned friends. We are not here on the question as to whether the House of Commons can consist of less than 181 members, but as to whether one of these provinces mentioned in section 37 may upon any readjustment have less than the number there assigned to it. I have shown that Prince Edward Island does not stand upon any higher ground than Ontario, and I ask your Lordships whether it does not follow plainly and obviously that upon the first re-adjustment, when the provisions of section 51 might be invoked after the Confederation, it may not be necessary to take away two members from Ontario and add these two members to Nova Scotia. If that may be done then the representation of Prince Edward Island which is now five members must on the present occasion be reduced to four; and you decide that, without touching the question at all as to whether under any circumstance the House of Commons may decrease below 181 members. My submission would be—if the court held that that inquiry were material—that the House of Commons could be reduced below 181 members. Either that, or you have a very important case entirely unprovided for by the Act; because it might happen that Nova Scotia, New Brunswick and Ontario had each decreased, so that the application of the unit of Quebec after any decennial census to their population would have given them much less than the number of members stipulated by the British North America Act. Then, Quebec must remain at 65, Ontario might have 50, Nova Scotia 10 and New Brunswick 10, and there you have a total of 135 members. That would be the result if no other province had come in and if

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that condition of population had resulted after any decennial census you would have a House composed of 135 members, unless it be that this provision about readjustment has not gone far enough and has left that case entirely unprovided for. I understand my Lords that that question has not arisen and probably can never arise, so that I do not invite your Lordships to consider it, but rather that we should leave it as many other things are left to be determined in case it ever becomes necessary to determine it.

MR. JUSTICE DAVIES: Has it not arisen in the case of Nova Scotia? The totality of members of Parliament and the totality for the province specified in section 37 will remain on the same basis as if they are not controlled by the words "subject to the provisions of this Act," and the opinion of this court being that they were, then Nova Scotia would be properly reduced.

Mr. Aylesworth: Not Nova Scotia but New Brunswick; Nova Scotia is still at the original 19 members.

MR. JUSTICE DAVIES: One or other of these provinces would be reduced below the number.

MR. JUSTICE SEDGEWICK: Nova Scotia loses two members now.

Mr. Aylesworth: But still they have the original 19.

MR. JUSTICE DAVIES: It brings it down to 18 and it is 19 in the statute. Therefore, in the rule which is laid down in the opinion of this court the crisis has arisen. There must be a construction to maintain that opinion of the court in favour of the view we expressed that subject to the provisions of this Act it is not an arbitrary assignment of so many members for all times, but it is an arbitrary assignment of members for each province and the whole House of Commons, until the making of the re-adjustment provided for under section 51.

Mr. Newcombe: Yes my Lord. The question as to whether you are reducing the aggregate representation below 181.

MR. JUSTICE DAVIES: Or the special representation of the provinces named in the same section, below the number assigned to each of them respectively. You see I am agreeing with you.

Mr. Newcombe: I thought that was not involved because there was no proposal to make any decrease in the aggregate representation of the House of Commons but only with regard to one particular province, and other provinces are getting the benefit of that; we decrease one province and we give an increase to another province. Under the present condition of affairs if you determine this question in my favour, the aggregate representation of Canada is not thereby decreased below 181, or the corresponding number whatever it is having regard to the introduction of the various other provinces. A member is coming off Prince Edward Island and he is going to Manitoba; a member is coming off Ontario and he is going to British Columbia and so on, so that the very thing is working out which, on the most limited construction, section 51 was intended to provide for. My learned friend says that you cannot decrease the number of 181. Granted for the purpose of this point that you cannot decrease the 181, but, you could take your 181 and 65 of them would go into the Quebec space entirely, and the balance might be shuffled back and forth as much as you like.

MR. JUSTICE DAVIES: That is not his argument. He says you cannot reduce Quebec below 65, Nova Scotia below 19 and New Brunswick below 15, and when you come to apply the section of clause 51 and reach that point, you must stay your hand.

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Mr. Newcombe: If he says that, admitting that 181 must have been a fixture and admitting that 65 for Quebec must remain a fixture, then he would say that you cannot take one out of Ontario's 82 and add it to Nova Scotia's 19?

MR. JUSTICE DAVIES: That is what he does say.

Mr. Newcombe: If he says you cannot do that, then my Lord he is giving no effect whatever to the plainest words which could be used to confer authority to do that very thing. It is said that Lord Thring draughted this Act and I assume he was a very eminent draughtsman. If the draughtsman had had any instructions or had any intention of providing that the aggregate of 181 could not diminish; that Ontario's 82 could not be diminished, and that the members assigned to the other provinces could not be diminished; would he not in all conscience have added to 51 and stated "provided however that the total representation mentioned in section 37 for the Dominion and for each province is not in any case to be reduced."

THE CHIEF JUSTICE: What object would there be for the Imperial Parliament to take away from the Dominion Parliament the right either to increase or diminish at will so long as they went on the principle of representation by population.

Mr. Newcombe: No object my Lord.

MR. JUSTICE DAVIES: Excepting of course that it might be argued that the smaller provinces might have insisted that applying your rule of representation by population they would prefer to have an arbitrary number that they would be sure of in any event. I suppose that would be the argument. But the words "subject to the provisions of this Act" are very strong.

Mr. Newcombe: My learned friend says that the Dominion Government can afford to be generous to Prince Edward Island because it is a small province,

because it is circumscribed by the sea, because it is an agricultural community and its population can never increase beyond a certain limit and because of its broken coast line and deep indentations and everything of that sort. But I submit with all deference to that view that the power of the Dominion to be generous is circumscribed and limited by the British North America Act.

THE CHIEF JUSTICE: You need not allude to that. We cannot force the Dominion Parliament to be generous or parsimonious.

Mr. Newcombe: Very well my Lord. If they did give Prince Edward Island a larger representation by her terms of union than she would have been entitled to if her population were taken at that time under the rules laid down in section 51 it was, as I understand it laid down here the other day, that when you bring a province in you have to start with an arbitrary number of representatives. It may be more or it may be less than the province is entitled to, but if the province comes in by agreement it is within the power of the contracting governments to fix that number and then that number will stand by force of the Queen's order until the period of the first re-adjustment comes around and down it goes or up it goes.

MR. JUSTICE DAVIES: The second re-adjustment.

Mr. Newcombe: Quite so my lord. I quite agree that there must be a second decennial census before you can get a standard from which to judge. It is plain that they supposed at that time that Prince Edward Island was increasing rapidly in population and there was the suggestion—and it is in effect nothing more than a suggestion—to the public as justifying the giving of six members to Prince Edward Island:

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"That the population of Prince Edward Island having increased by 15,000 or upwards since the year 1861, the island shall be represented by six members."

The word "re-adjusted" in these terms of union with Prince Edward Island must be taken to have been advisedly substituted for the word "increased" which was used in the terms of union with British Columbia two years before, and it seems to be indicative of the intention that the representation should be subject to increase as well as diminution under the provisions of the British North America Act. The reason why Prince Edward Island was given more than its due proportion of members to start with (so far as appears from the terms of union themselves) was that its increase of population since 1861 had been rapid, having increased by 15,000 or upwards and it was no doubt supposed that the increase would continue to be rapid in the future, and so it was thought that it would be better not to tie the province down to five members until the next re-adjustment. But there is nothing in the language of the terms of the union suggesting any other reason for this provision, or pointing to the existence of an intention that the representation should not be reduced if the population should fall below that existing at the previous census.

MR. JUSTICE DAVIES: It is not contested that the Dominion and the island have a right to make an agreement, that when the island came in it should have six members irrespective of what their population was.

Mr. Newcombe: No my lord.

MR. JUSTICE DAVIES: Had the Dominion power to make a provision inconsistent with section 51?

Mr. Newcombe: Certainly not. I submit that this is clear under the provisions of section 146 which says:

"On such terms and conditions in each case as are in the addresses expressed and as the colony thinks fit to approve subject to the provisions of this Act."

It is subject my Lords to the provisions of this Act, which is one constitution for one Dominion of Canada, providing equality, and to give to these terms and conditions either expressly or by necessary implication any such construction as my learned friends contend for, would produce inequality as between the provinces in their representation in the House of Commons.

I do not think that what I am about to say has anything to do with the case, but in view of what my learned friends have urged as to the possibility or probability of Prince Edward Island losing its representation altogether, I want to point out that there is a clause here which renders that contingency extremely remote and improbable if not entirely impossible. Subsection 4 of section 51 says:

"On any such re-adjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bears to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards."

Now if you consider a case happening at the end of each decade where the diminution is the twenty-first part or upwards of the one-twentieth part, you see that there is a check in the process every ten years, and the province starts over again, and you cannot go back to the beginning for the purpose of considering the proportion. Therefore it may be that a province will have a very much larger representation ultimately in the House of Commons than its population would entitle it to having regard to the unit of the population

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of the Province of Quebec, because if it can barely avoid during each ten years the proportionate reduction of a one-twentieth part, it gets a new proportion established, and therefore I think that is a very carefully thought out provision. I say that these rules under section 51 are prepared with great foresight and will result, I have no doubt, in doing justice to the small communities as well as in providing just representation to the larger ones.

My learned friend the Attorney General for Prince Edward Island asserts that Prince Edward Island entered the union upon a different basis from Ontario and New Brunswick and Nova Scotia. I submit that it did not enter upon a different basis, and that it could not enter upon a different basis. It could only enter subject to the provisions of this Act; subject to the application of section 51 and the other sections which apply to all the provinces and not exclusively to any one province in particular. I submit therefore my Lords, that there is very little open for consideration on the present question, if your Lordships are to be governed by the opinion already delivered, and that the answer to that question depends upon the construction of sections 37 and 51 of the statute, having regard to the terms of union with Prince Edward Island which so far as this point is concerned placed Prince Edward Island upon the same footing as one of the original provinces; and that upon the proper interpretation of these sections, the only answer to be given is in favour of the obligation to reduce under the circumstances which exist.

Aylesworth K.C., in reply: Of course if the question which is here propounded is answered by any necessary implication in the opinion already expressed by the court on the previous reference, there is an end to the matter. We cannot ask your Lordships to change

your views upon the questions that were then under consideration, but we do ask, and we think we are entitled to submit to the court, that it is only the question that was there put and the answer that was given to that very question, that is in the position of a decision of the court in the matter; and that so far as opinions are expressed which were not necessary to a decision of the question than before the court, we have simply an *obiter dictum* which is not necessarily binding at all upon your lordships' court.

Now the Province of New Brunswick, which was there the actor, did not raise the question (which of course if its legal adviser had seen fit it might have raised) upon the construction of section 37, as to whether or not there was anything to prevent the reduction of its provincial representation below the initial number of fifteen. There had been a reduction below 15 in New Brunswick in 1891—there is to be, it is said, a further reduction in the bill now under consideration in the House of Commons. Those advising the province had that expectation or that possibility before them, and they did not see fit to ask that that question should be submitted to the court. They stated their contention upon an altogether different clause of the statute. They contended that there could be no reduction by reason of a certain specific construction which they sought to have put upon sub clause 4 of section 51. They found as a matter of arithmetic that if you segregated the population of the original four provinces into the number of Quebec, their province would not have diminished by one-twentieth as compared with the population of that portion of the Dominion, and so the question which was before your Lordships then was simply one entirely as to the true meaning of subsection 4 of section 51. It was not material at all, not necessary at all I should say, to a

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decision of that question that any opinion should have been pronounced upon the construction of the words "four provinces" in the principal part of section 51. These words "four provinces" may, without detracting in the least degree from the decision of this court in the previous question, have the meaning which I am submitting they should have, namely, the meaning that these words expressed. You can give full effect to every word of the decision which the court gave on the question submitted previously, and still construe the words "four provinces" as they read and not the "seven provinces." The answer to the question has just as much meaning and force, though the section itself has application as a means of re-adjustment for the four provinces and not for the seven provinces. And that we submit is the true intention of the framers of the Act. Why is it not so? They had four confederating provinces to deal with and they provided for the manner in which as among these four provinces representation should be from time to time readjusted. What need to provide for the manner of readjustment as to the new incoming provinces, or as to the new provinces to be created. That could be provided for in the terms of the union if it were one of the provinces already in existence that was coming in, or in the terms of creation if it were to be like Manitoba, some province carved out of the territories. There was no need whatever in 1867, that the Imperial Legislature should provide the means of re-adjustment as to new incoming provinces. They were not concerned I submit with that problem at all, but they were leaving that particular problem of re-adjustment to depend upon whatever contract the new Dominion that was then starting into existence might make with the incoming provinces.

MR. JUSTICE SEDGEWICK: The difficulty of that argument is this: that section 91 or section 92 as well as section 51 would not apply to the incoming provinces of British Columbia or Prince Edward Island specially mentioned in the Act.

Mr. Aylesworth: Not so upon the language, because there is nothing in sections 91 or 92 about the four provinces. It does not use the words "four provinces" but it uses the word "Canada."

Is not that phraseology peculiar? In the previous argument, Mr. Pugsley drew special attention to the way in which the phrase had been changed from "each province" to "the four provinces" and back and forward in the different drafts of this section which are printed in Mr. Pope's book. That argument has no doubt some weight only if it is necessary to interpret the words "four provinces," and it was not in any way necessary for a decision of the previous question that these words should be interpreted.

MR. JUSTICE DAVIES: In reference to the new argument you invoke I would like you to answer this question. It seems to me your case is peculiarly weak for this reason: You say that section 37 provides arbitrarily the number of members which should constitute the House of Commons and that there were also arbitrary numbers assigned to New Brunswick, Nova Scotia and Ontario, and that the re-adjustment under section 51 when brought into force—and it was brought into force from decade to decade—it could operate but not so as to take away from any of these provinces or from the totality of the House of Commons the specific number assigned.

Mr. Aylesworth: Not so as to reduce.

MR. JUSTICE DAVIES: Not so as to reduce. You say that is the effect of the imperial statute, but the trouble with Prince Edward Island is that there is no

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imperial statute assigning any arbitrary number to her. She comes in with the number assigned by mutual agreement between the Dominion and herself, but there is no arbitrary number assigned by imperial legislation to her. Because, don't you see the whole agreement made between Prince Edward Island and the Dominion is expressed to be "subject to the provisions of this Act." Now, this 51st clause of your own concession purposes to increase as well as to reduce provided it does not interfere with section 37. Section 37 does not touch Prince Edward Island, and therefore there is not that limitation upon the application of the re-adjustment provided by section 51 so far as Prince Edward Island is concerned, even if there was that limitation with regard to Ontario and Nova Scotia. That point has occurred to me. Is there something in it?

Mr. Aylesworth: Oh yes, there is very much in it. There are a great many points in it. In the first place the effect of the order-in-council admitting Prince Edward Island into confederation has, under section 146, exactly the force of imperial legislation. By section 146 Her Majesty's Privy Council was empowered to legislate in this regard subject to the provisions of the Act, and accordingly that order-in-council was passed embodying and approving the addresses of the houses submitting the terms of union, and these terms at once received all the force of imperial legislation. It is the same as though it were introduced into section 37.

MR. JUSTICE DAVIES: If it does it answers the suggestion that the effect of the order-in-council read into section 37 was to amend section 37 by making it read, that the House of Commons shall consist of 187 members of which Ontario shall have 82, Quebec 65, Prince Edward Island 6, and so on.

Mr. Aylesworth: Take the words "subject to the provisions of this Act" in section 146, and let me ask if that is not a fair meaning if you give full effect to that. That means that when Prince Edward Island, or Newfoundland, come into the union they come in subject to the provisions of this Act; they come in on the terms which may be settled by compact subject to the provisions of this Act. It would be *ultra vires* of the Act to provide that the judges of Prince Edward Island could hold office for ten years, should be elected, should be appointed by the provincial legislature. It would be contrary to the provisions of this Act to take away from the Dominion Parliament as to Prince Edward Island, any of the powers which section 91 confers. To use the illustration which Mr. Justice Mills put in the other argument, it would be contrary to the provisions of this Act if Prince Edward Island had sought to stipulate that its federal members should sit for seven years instead of five. That would be inconsistent with the provisions of the Act, and that is the force and as I would submit the full force of the words " subject to the provisions of this Act" as found in section 146.

My learned friend was discussing section 37 when he gave a reference to the authority he cited, but it would be equally applicable to section 146. There was nothing, it seems to be conceded on all hands, to have prevented the Dominion agreeing that Prince Edward Island should have eight hundred instead of six. The question is what effect is to be given to these words in the twelfth clause of our terms of union that we are to have six members, the representation to be re-adjusted from time to time under the provisions of the British North America Act. That reverts us to the re-adjusting section 51, and I say if that does have the effect of making section 51 appli-

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cable to Prince Edward Island, it is a matter of compact and not because section 51 by force of its own language would have applied to Prince Edward Island, because by force of the language in 51 it applies only to the four provinces. But if it does apply to Prince Edward Island as a matter of compact should we not give full effect to the idea of readjustment, and to the word member, and that, notwithstanding this clause and notwithstanding the fact that the aggregate of population on the island increased in the decade. From 1881 to 1891 the population of the Island increased in fact, but still they lose a member. Why? Because they have not increased as fast as Quebec and because their diminution is in fact more than one-twentieth part of the whole. Therefore that protective clause did not protect us in 1891, and it does not protect us to-day in 1901. It will not protect us ten years hence, for although we do increase in population we do not increase proportionately. That is the trouble, and just as certain as we lost one member in 1891 and another in 1901, we shall lose another ten years hence and another twenty years hence.

MR. JUSTICE GIROUARD: How is it that in 1892 there was no protest in the House of Commons on the part of the members representing the Island?

Mr. Aylesworth: It was on that occasion that the opinion was expressed that Mr. Williams has referred to by Mr. Dickey and Mr. Dalton McCarthy; that as a matter of course you could not reduce the total representation of the House of Commons below 181.

MR. JUSTICE DAVIES: Reduced to a nut shell, your argument on that point is, that section 37 controls the operation of section 51, so as to prevent any reduction of members below the six then specified.

Mr. Aylesworth: That is putting it in a nut shell. To give full effect to section 37 as well as to section 51

you have to have a minimum, and that is not in conflict with the argument I addressed to your Lordships this morning as to the fixed number of senators, which it never was intended should be equal to nor greater than the representation in the popular assembly. Just a word upon this recital or preamble which is so significantly inserted here in clause 12 of our resolutions of union which says: "That the population of the Island having been increased by 15,000 or upwards." Why should that have been made a reason for giving six members or an apparent reason for it? There can be no other interpretation of it than the one I suggested, namely that it refers to the fact that the population was increasing, because 15,000 was not the unit of representation by any means. The unit was over 18,000 at that time, and the fact of there being in one year an increase of 15,000 or upwards was not a reason in itself for giving the extra member. Just let me say one other word with reference to what has been pointed out to me since I first addressed the court, and which has reference to what Mr. Justice Davies referred to, namely, the abnormal increase of population in the Island between 1871 and 1873. I am told by Mr. Williams that statistics show that the actual census for the Island for 1861 gave a population of 80,857, and the actual census returns of 1871, as stated in clause 6 of the resolution, show the population to be 94,021 or an actual increase between 1861 and 1871 of 13,164. The recital in clause 12 says, speaking in May 1873, the increase has now become 15,000 and upwards. It had only been 13,000 at the time of the taking of the census in 1871, and therefore they allowed that extra 2,000 or thereabouts as measuring the increase of population in the two years. And even allowing for that, they had not enough to give them an extra member at all, but taking the unit of representation as it stood in 1871

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they would have five members and a bare one-eighth ($5\frac{1}{8}$) but still they gave as a matter of compact, or of generosity if you like, the sixth member.

MR. JUSTICE NESBITT: It is a matter of terms.

Mr. Aylesworth: Certainly, and the generosity would be in this sense, that the Dominion was urged by the at home authorities to approach the negotiations in a spirit of liberality and not to stand upon the letter of their right as to representation by population. These are circumstances of course which we advance to the court, not with any suggestion that it is to be considered as a matter of policy, but as circumstances which ought to govern the interpretation of this statute, if it is in any way ambiguous; if it is open to the interpretation we are contending for. I point out that because the opinion of Mr. Justice Mills, that the words "four provinces" in section 51 ought now to be read "seven", is not necessary for a decision of the question that is now before the court, and therefore not a binding view so far as the court is concerned now. There was not then before the court for consideration the interpretation of section 37 of the Act and the contention that the number of members shall never be reduced below the figures therein stated. So far as that contention is concerned, it is presented for the first time on behalf of the Island. I think that covers everything that I have to say to your Lordships by way of reply and explanation. I call your Lordships' attention to the language of the statute creating the Province of Manitoba, 33 Vic. ch. 3, passed on the 12th of May 1873, and therefore as much before all parties for consideration at the time of the framing of the terms of union with Prince Edward Island as were the terms of union with British Columbia or the British North America Act itself. By section 4 of that Manitoba Act, representation is provided for and these are the words:

"The said province shall be represented in the first instance in the House of Commons of Canada by four members."

Is not the presence of the phrase "in the first instance" of great significance? It suggests at once a temporary measure of memberships It was in fact more than the population of Manitoba at that time would have entitled it to according to the unit of representation, It was as it were, saying to Manitoba: Though we give you this number of members it is not to be a permanent thing. Now, the relations of the Dominion to Manitoba were very different from the relations of the province of Prince Edward Island to the Dominion. It was no question of compact or terms in the case of Manitoba but it was a question of granting a constitution to a new province and not a question of making terms with an old one. They were unfettered as to the representation they should grant; they might give and they might take away, but in the case of high contracting powers each on the footing of independence and dominion as the Island and the Dominion were at this time this contract was entered into, it would be an injustice to one of the contracting parties if now that party were to be told: You made your terms; you were only stipulating for six members for the time being. There is no hint of such a thing in anything that is said by the contracting parties, and we urge that your Lordships approach the consideration of the interpretation of this treaty under the view which will enable you to carry out the true meaning and intention of both parties to this treaty.

The opinion of the Court was delivered by

THE CHIEF JUSTICE:—Under the provisions of the Supreme Court Act as amended by the Act 54 & 55 Vict.

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ch. 25, the following question has been referred to the Court by the Governor-General-in-Council:

Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada, liable under the British North America Act, 1867, and amendments thereto and the terms of union of 1873 under which that province entered Confederation, to be reduced below six the number granted to that province by the said terms of Union of 1873?

The Province of Prince Edward Island contends that its representation in the House of Commons is not liable ever to be reduced below six members. That contention is based upon the 12th resolution under which the Province, in 1873, was admitted by an Imperial order in Council into the Union under the provisions of the one hundred and forty sixth section of the British North America Act. That resolution reads as follows:

That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the island shall be represented in the House of Commons by six members; the representation to be re-adjusted from time to time under the provisions of the British North America Act."

In my opinion the province's contention is unfounded. It may well be that the framers of the British North America Act have not foreseen or provided for every possible eventuality in the respective positions of the different provinces of the Dominion, as to population or other matters; it may be that some of the provinces would have refused to join the Union had they foreseen all the results that their adhesion to it is now ascertained to carry. But with such considerations we are not here concerned. On the statute and on the Order in Council of 1873 (which has to be construed as a statute), we must base our answer to the question

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submitted. The negotiations that preceded both or each of them are merged in the statute and the Order in Council. Now, it has to be taken as a settled proposition, as far as this court is concerned, by the opinion we lately delivered on the reference concerning New Brunswick and Nova Scotia (*ante* page 475,) that the representation in the federal House of Commons is, as the fundamental basis in that respect of the constitution, based upon population. I need not here do more than refer to the reasoning upon which we reached that conclusion. The Province of Prince Edward Island's contention, that it occupies an exceptional position in this regard within the union, and that it is entitled to a larger representation comparatively in the House of Commons than the other provinces thereof cannot prevail. It was provisionally that it was given six members, till its representation was re-adjusted with that of the other provinces, as provided for by section 51 of the B. N. A. Act. The resolution in question must be read as if the words "in the first instance" were inserted therein after the word "represented". Otherwise, the words that follow,

> the representation to be re-adjusted from time to time under the provisions of the British North America Act,

would have no meaning whatever. The province would read them out of the resolution. And that cannot be done. They have to be read as if incorporated in a statute, and must be construed as meaning that the representation of the province shall be re-adjusted after every decennial census, as provided for by section 51 of the British North America Act, its representation, in the meantime, to be composed of six members. That section 51 must now be read as if the words "the four provinces" in the first paragraph thereof were replaced by the words "All the provinces". There is nothing that can have any bearing whatever

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on the solution of the question submitted in the assertion on the part of the province that it is only upon the understanding that its representation in the House of Commons should never be reduced below six members that it consented to come into the union. That cannot prevail as an argument. The rest of the Dominion are just as entitled to assert that they would not have admitted the province into the union had it insisted, as it now would do, upon more favourable terms than the other provinces in the matter of representation in the House of Commons.

I would answer the question in the affirmative; that is to say, I am of opinion that as by the Federal census of 1901, the population of Prince Edward Island divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons to that province, the representation of that province must be re-adjusted and reduced proportionately to population as provided for by section 51 of the British North America Act.

(IN CHAMBERS.)

JOSEPH BARRETT (DEFENDANT BY COUNTERCLAIM) ..... } APPELLANT; 1903 *Aug. 24.

AND

LE SYNDICAT LYONNAIS DU KLONDYKE (PLAINTIFFS BY COUNTERCLAIM) ..... } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Appeal per saltum — Extension of time for appealing — Jurisdiction — Supreme and Exchequer Courts Act, ss. 40, 42—Yukon Territory Act, 62 & 63 V., c. 11—North-west Territories Act, R.S.C. c. 50.

A judge of the court appealed from has no jurisdiction to extend the time for appealing *per saltum* to the Supreme Court of Canada.

After the expiration of sixty days from the signing, entry or pronouncing of judgment, leave to appeal *per saltum* to the Supreme Court of Canada cannot be granted.

Quære.—Whether under the provisions of section six of the Yukon Territory Act, 62 & 63 Vict. ch. 11, and of the North-west Territory Act, R.S.C., ch. 50, sec. 42, thereby made applicable to the Territorial Court of Yukon Territory, three judges of that court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of cases therein?

MOTION, in Chambers, by way of appeal from the decision of the Registrar, sitting as a Judge in Chambers, refusing a motion for leave to appeal *per saltum* to the Supreme Court of Canada.

The motion before the Registrar in Chambers was for an order allowing the defendant by counterclaim to appeal *per saltum* from the judgment of Mr. Justice Craig at the trial in favour of the plaintiffs by counterclaim, direct to the Supreme Court

*PRESENT:—Sir Elzéar Taschereau C.J. (in Chambers).

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of Canada, on grounds mentioned in an affidavit filed, setting out, among others, the circumstances of the case as follows:—Judgment was delivered in the action by Craig J. on 17th February, 1903, in the Yukon Territorial Court, directing judgment to be entered on the counterclaim in favour of the Syndicat Lyonnais du Klondyke, against the defendant by counterclaim for $40,500, with costs. On 2nd March, 1903, on application on behalf of the plaintiff by counterclaim, Mr. Justice Craig amended this judgment by directing an account to be taken of the amount owing by the defendant (Barrett) in the original action, to the Canadian Bank of Commerce, plaintiff therein, and that the difference between the amount of the judgment of the bank against the plaintiff by counterclaim (a defendant in the original action) and the amount owing by the defendant, Barrett, to the bank, should be set off *pro tanto* against the judgment in favour of the plaintiff by counterclaim against the defendant Joseph Barrett. The judgment as amended was issued on the 4th of March, 1903. On 2nd April, 1903, Barrett gave notice of appeal to the Territorial Court, *en banc*, and, on 8th April, applied to Dugas J., a judge of said court, to extend the time for filing the appeal books. The court, sitting *en banc*, is composed of three judges. On the application Dugas J. stated that, for special reasons, he would not sit on the hearing of the appeal and absolutely refused to act in the case, at any stage of the proceedings. The affidavit alleged that by reason of this refusal there could be no quorum for the purpose of the hearing *en banc*. On 8th April, applications were made, respectively by the Syndicat and Barrett, to extend the time for appealing to the Supreme Court to enable an application to be made for leave to appeal *per saltum*, and an order was made by one of

the judges of the Territorial Court extending the time until 11th June, 1903. In April a notice of motion was given by the Syndicat returnable before the Registrar of the Supreme Court of Canada, in Chambers, on 18th May, 1903, for leave to appeal *per saltum* to that court from the judgment in favour of the Bank. Barrett thereupon gave notice of a similar motion for leave to appeal *per saltum* from the judgment on the counterclaim, but did not proceed with it in view of a settlement made between the Syndicat and the bank, on 6th May. Upon an application, on behalf of Barrett, on 8th June, 1903, an order was made by Mr. Justice Craig extending the time for appealing *per saltum* to the Supreme Court of Canada for the period of seventy-five days from 11th June, 1903.

Daly for the motion, cited *Schultz* v. *Wood* (1); *Walmsley* v. *Griffith* (2); *Vaughan* v. *Richardson* (3); and *News Printing Company* v. *Macrae* (4).

Bethune opposed the motion.

On 18th August the following judgment was pronounced by

THE REGISTRAR.—This is an application by the defendant, John Barrett, for leave to appeal *per saltum* from a judgment of Mr. Justice Craig of the Territorial Court of the Yukon, pronounced on the 19th of February, 1893, and subsequently amended on the 2nd of March, 1903, and issued on the 4th of March, 1903.

It is alleged, and not denied, that Mr. Justice Dugas, for personal reasons, refused to sit as a member of the Territorial Court upon the proposed appeal to that court from the judgment of Mr. Justice Craig, and in the affidavit in support of the application of Mr.

(1) 6 Can. S. C. R. 585.
(2) 13 Can. S. C. R. 434.
(3) 17 Can. S. C. R. 703.
(4) 26 Can. S. C. R. 695.

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Pattullo, it is alleged, and not denied, that without the presence of Mr. Justice Dugas there can be no quorum of the Territorial Court. I have had difficulty in obtaining any definite information with respect to the constitution and jurisdiction of the Territorial Court of the Yukon. Section 6 of the Act 62-63 Vict., ch. 11, provides as follows:

> The law governing the residence, tenure of office, and oath of office of the judge or judges of the court and the rights, privileges, power, authority and jurisdiction of the court and the judge or judges thereof, shall be the same, *mutatis mutandis*, as the law governing the residence, tenure of office and oath of office of the judges, and the rights, privileges, power, authority and jurisdiction of the Supreme Court of the North-West Territories and of the judges of that court, except as the same are expressly varied by this Act.

Upon looking at the North-west Territories Act (1) we find that by section 42 as amended by 63 & 64 V. c. 44 the Supreme Court of the territories consists of a chief justice and four puisne judges; and by section 49 as amended by 61 V. c. 5, s. 3, three of the judges of the court constitute a quorum.

Upon inquiry at the Department of the Interior I find that the judges of the Territorial Court consist of Justices Craig, Dugas and Macauley. The Gold Commissioner, in certain cases, is also a member of that court, but would not be qualified to sit in the present case had it been taken to appeal.

The first question to be decided is whether, assuming Mr. Justice Dugas unable to sit, would there be a properly constituted Territorial Court to hear this appeal, if that court consisted only of Justices Craig and Macauley; and would section 6 of 62 & 63 V. c. 11 so apply as to give them jurisdiction?

The answer to be given to this inquiry, in my judgment, is by no means clear. As I have before remarked the view of the lawyers in Dawson City and, I may

(1) R. S. C, ch. 50.

assume, of the Yukon Territorial Court, is that the three judges must sit to form a quorum. The affidavits filed on this application show that the time for appealing to the Territorial Court has expired, and if I should refuse this application the result would be that the appellant would be deprived of any appeal.

In a recent case in the Supreme Court from the Yukon Territory an appeal was taken direct to the Supreme Court from a judgment of Mr. Justice Craig, although, at that time by 2 Ed. VII. ch. 35, sec. 6, it was provided that the Territorial Court *en banc* might hear and dispose of motions for new trials, appeals and motions in the nature of appeals.

No motion to quash was made by the respondent, but the court, viewing the question as one of some doubt, of its own motion granted leave to appeal *per saltum*.

In the present case the matter is equally a doubtful one, and in my judgment it is a case in which, under all the circumstances leave to appeal *per saltum* should be granted, unless the objection taken by Mr. Bethune is allowed, namely, that sixty days having elapsed since the date of the judgment of Mr. Justice Craig, neither the Supreme Court nor the court below has or had power to extend the time for bringing the appeal. On this point I find the matter has been determined by the present Chief Justice of the court in an unreported case of *Roberts* v. *Donovan*, decided in Chambers on the 8th July, 1895. In that case, upon an application to the Registrar for leave to appeal *per saltum* the same was refused because more than sixty days had elapsed since the signing of the judgment proposed to be appealed from; the learned Registrar holding that sec. 40 applied, and that the application was too late. His judgment was affirmed by the present Chief Justice. The only distinction between that and

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the present application lies in the fact that an order has been made by a judge of the Territorial Court extending the time for making the application to the Supreme Court. I am unable to find in sec. 42, or elsewhere in the Supreme and Exchequer Courts Act, power given to the court below to make such an order. That section clearly, in my mind, applies only to cases where the court below could make an order allowing the appeal; but, in the present case, the court below has no jurisdiction to allow an appeal *per saltum*, and therefore, in my opinion, the order extending the time for the present application was made without jurisdiction. It has long been the settled jurisprudence of the Supreme Court; *Walmsley* v. *Griffith* (1); *The News Printing Co.* v. *Macrae* (2); that neither the court itself nor any judge thereof has jurisdiction to extend the time within which an appeal must be brought as provided for by section 40 of the Act. I regret I feel compelled to hold that neither has the court below such jurisdiction where the proposed appeal is *per saltum* from the trial judge. Cases must frequently arise like the present in which justice only can be done by extending the time for bringing the appeal.

By Parliament alone however can the remedy be provided. The motion must be refused with costs.

On the motion by way of appeal His Lordship the Chief Justice, in Chambers, after hearing the same counsel for the parties, affirmed the Registrar's decision.

Motion refused with costs.

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(1) 13 Can. S. C. R. 434. (2) 26 Can. S. C. R. 695.

THE CALGARY AND EDMONTON RAILWAY COMPANY AND THE CALGARY AND EDMONTON LAND COMPANY v. THE KING.

1903
*Mar 17,
*April 29.

Railway subsidy — Dominion Lands Act — Mines and minerals— Reservation in grant—Construction of statute.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the suppliants' Petition of Right with costs.

The railway company was included among those intitled to the subsidy land grants authorised by 53 Vict. ch. 4 (D) and, when constructed, the second section of the Act provided that the grants should be made in proportion, upon the conditions fixed, by orders-in-council and as free grants subject only to payment by the grantees of the cost of survey and incidental expenses. When the Act took effect, on 16th May, 1890, the Dominion Lands Regulations of 17th September, 1889, were in force providing that all lands in Manitoba and the North-West Territories should be granted by letters patent containing a reservation of all mines and minerals and the rights necessary for carrying on mining operations. As the railway was constructed, orders-in-council were passed from time to time allotting to the railway company certain of the lands reserved as subsidy under the Act, there being no reference made in the orders-in-council to the land regulations.

The Exchequer Court, by the judgment appealed from, held that lands granted as subsidy to railways

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

(1) 8 Ex. C. R. 83.

1903

CALGARY AND EDMONTON RWAY. CO. v. THE KING.

under 53 Vict. ch. 4 (D.), were subject to the existing land regulations respecting the reservation of baser minerals in the grants thereof, notwithstanding that there was no reference thereto in the orders-in-council allotting the lands to the railway company and that the grant was expressed in the statute to be a free grant subject merely to cost of survey and expenses.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, there being an equal division of opinion among the judges who had heard the appeal, the judgment appealed from stood affirmed and the appeal was accordingly dismissed with costs.

*Appeal dismissed with costs.**

Heimuth K.C. and *Dyce W. Saunders* for the appellants.

Newcombe K.C. for the respondent.

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* Leave to appeal to the Judicial Committee of the Privy Council was granted, 17th July, 1903. *See* Canadian Gazette, vol. xli, p. 400.

LAMOUREUX v. FOURNIER dit LAROSE.

1903

Negligence—Employer and employee—Insecure scaffold—Disobedience to rules—Dangerous way, works and machinery.

*Mar. 10, 11.
*Mar. 26.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Review, at Quebec (1) which had reversed the judgment of Cassault C.J. in the Superior Court, at Quebec, and awarded the plaintiff $1,000 for damages, with costs.

The action was for $5,000 damages sustained by the plaintiff, (respondent,) on account of the death of her husband caused, as alleged, by the falling of a scaffold used as a landing stage for unloading stone from defendant's barges on the River St. Charles, at the City of Quebec. The fall of the scaffold was alleged to have occurred on account of negligence on the part of the defendant in constructing it in an improper manner, insufficient for the purposes for which it was intended and allowing it to become overladen with stone. The defence, in effect, set up that the fall of the scaffold resulted from the contributory negligence of deceased in disobeying orders and wilfully overloading the scaffold while the foreman was momentarily absent. The work was being carried on in waters affected by the ebb and flow of the tides and appeared to have been of a dangerous character unless it was carefully performed under the surveillance of an experienced overseer. The trial was had before the Chief Justice, Sir L. N. Cassault, who dismissed the action on the

* PRESENT:—Sedgewick, Girouard, Davies, Mills and Armour JJ.

(1) Q. R. 21 S. C. 99.

1903

LAMOUREUX v. FOURNIER DIT LAROSE.

ground that deceased had been the cause of his own death through wilful disobedience of orders and gross negligence. The judgment appealed from affirmed the decision of the Superior Court, sitting in review, at Quebec (1), which reversed the judgment rendered at the trial and held that "in order to free himself from civil responsibility in such a case, an employer should, either personally or through his overseer or foreman, not only give orders to his employees to discontinue work when considered dangerous, but that he should also, either personally or through the overseer or foreman, see that such orders were respected and carried out and that, if he failed to do so, he would be liable for damages caused by accidents happening as the result of the non-observance of the orders. The defendant appealed to the Supreme Court of Canada.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Gibsone for the appellant.

Lane for the respondent.

(1) Q. R. 21 S. C. 99.

THE TURNBULL REAL ESTATE COMPANY v. THE KING.

CORKERY *et al.* v. THE KING.

DEBURY *et al.* v. THE KING.

1903

*June 8.

*Oct. 6.

Expropriation of lands—Damages—Mode of assessment—Valuation rolls —Present uses—Prospective value—Evidence.

APPEALS from three judgments of the Exchequer Court of Canada awarding damages and increasing the compensation offered by the Crown, based on valuations by appraisers, on the expropriations of the appellants' lands taken for a Rifle Range at St. John, N.B., as follows, respectively, to the Turnbull Real Estate Company $7,425 (1), to David Corkery and Johanna Corkery, $2,500, and to Lucy Gertrude Visart DeBury, $850.

The matters at issue in the three cases were of a similar nature and the cases were submitted together at the arguments. In the Exchequer Court the decision was, in effect, that as the lands at the time of the expropriation had a prospective value for residential and other purposes beyond that which then attached to them as lands used for agricultural and other similar purposes, such prospective value should be taken into consideration in the assessment of the sufficient and just compensation that ought to be paid by the Crown upon the expropriations for public purposes to be used in such a manner as would, in various ways, affect the lands injuriously and diminish their prospective values. In assessing the

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

(1) 8 Ex. C. R. 163.

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CORKERY et al. v. THE KING.

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increased compensation awarded the Exchequer Court Judge looked at the assessed valuation of the lands as shewn upon the municipal assessment rolls, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeals with costs.

Appeals dismissed with costs.

Pugsley K.C. and *Alward K.C.* for appellants, The Turnbull Real Estate Company.

Pugsley K.C. for the appellants, Corkery *et al.*

Coster K.C. for the appellants, DeBury *et al.*

McAlpine K.C. for the respondent.

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ACTION—*Public work—Negligence of Crown officials—Right of action—Liability of the Crown —50 & 51 V., c. 16, ss. 16, 23, 58—Jurisdiction of the Exchequer Court — Prescription—Art. 2261 C. C.*] Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held*, reversing the judgment appealed from (7 Ex. C. R. 1), Davies J. dissenting, that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of the 16th, 23rd and 58th sections of the Exchequer Court Act. *The Queen* v. *Filion* (24 Can. S. C. R. 482) approved *The City of Quebec* v. *The Queen* (24 Can. S. C. R. 430 referred to.—The prescription established by Art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his petition of right. LETOURNEUX *v.* THE KING — — — 335

2——*Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata—Right of action.*] A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease: *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *The City of Montreal* v. *McGee* (30 Can. S. C. R. 582), and *The Chaudière Machine and Foundry Co.* v. *The Canada Atlantic Railway Co.* (33 Can. S. C. R. 11) followed. ANCTIL *v.* CITY OF QUEBEC — — — — 347

ACTION—*Continued.*

3——*Municipal corporation — Construction of sidewalks—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice —R. S. C. c. 135, s. 63.*] The plaintiff brought his action to recover the value of a strip of land of which the defendant was illegally in possession. The courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au pétitoire*. In order to cease litigation, the Supreme Court of Canada, without directing any amendment of the pleadings, reversed the judgments of the courts below, directed that the record should be remitted to the trial court for the purpose of ascertaining the extent of the property affected by the trespass and ordered the restoration thereof to the plaintiff. BURLAND *v.* CITY OF MONTREAL — — — 373

4——*Contract under seal — Undisclosed principal — Partnership.*] P. sold mining areas and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company which received a deed of the land and did some work but finally ceased operations. Only a small part of the stock was sold and none was given to P. who took action against the purchaser and H. claiming that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action. *Held*, that no action could lie against H. on the agreement under seal not signed by even if it was for his benefit and a seal was not necessary. PORTER *v.* PELTON 449

5——*Leased lands — Emphyteusis — Injuries to property — Trespass — Recovery of lands—Recovery of damages—Legal and beneficial estates—Adding parties.*] Where lands have been leased for a long term, amounting to an emphyteusis, the right of action *au pétitoire* for the recovery of the lands from a third party in adverse occupation lies in the lessor and the action to recover damages for injuries caused to the leased lands

ACTION—*Continued.*

lies in the lessee.—Where the petitory action has been brought by the lessor with a demand for damages for injuries caused to the leased lands by the defendant, the lessee may be added, on application to amend, as a party plaintiff to the action for the purpose of recovering the damages. MASSAWIPPI VALLEY RAILWAY CO. *v.* REED — — — 457

6 ——*Railway embankment — Trespass — Nuisance—Continuing damages — Right of action.*] — — — — — — 11

See NUISANCE 1.

7 ——*Insurance policy — Contract — Mortgage clause—Right of Action by Mortgagee* — 94

See INSURANCE FIRE 1.

ADMIRALTY LAW—*Navigation—Narrow channels. "White law" R. 24—Right of way—Meeting ships—Collision.*] Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers of St. Mary, St. Clair, Detroit, Niagara and St. Lawrence when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take." *Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting vessels Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of upgoing vessels to hug the United States shore.—The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The "Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the "Carmona." The "Shenandoah" then gave the port signal and steered accordingly. The "Carmona," thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah" but on going ahead again collided with the vessel in tow. *Held*, reversing the judgment of the local judge (8 Ex. C. R. 1) that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed. DAVIDSON *v.* GEORGIAN BAY NAVIGATION CO. THE SHENANDOAH AND THE CRETE — — 1

APPEAL—*Special leave—60 & 61 V. c. 34 (e)—Error in judgment—Concurrent jurisdiction—Procedure.*] Special leave to appeal from a judgment of the Court of Appeal for Ontario, under subsec. (*e*) of 60 & 61 Vict. ch. 34, will not be granted on the ground merely that there is error in such judgment.—Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.—The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney General. S. having been refused such fiat applied for a writ of mandamus which the Division Court granted and its judgment was affirmed by the Court of Appeal. *Held*, that the mandamus having been granted, the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused. The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere. ATTY. GEN. FOR ONTARIO *v.* SCULLY — — 16

2 ——*Jurisdiction—Matter in controversy—Removal of executors—Acquiescence in trial court judgment—Right of appeal—R. S. C. c.* 135, *s.* 29.] The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed. *Noel* v. *Chevrefils* (30 Can. S. C. R. 327) followed; *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished. DONOHUE *v.* DONOHUE — — — — — — 134

3 ——*Libel—Question of privilege—Proof of malice—Improper admission of evidence—Misdirection—Power to grant new trial on appeal—N. S. Judicature Act, O.* 57, *R.* 5; *O.* 38, *R.* 10.] Where in a case tried with a jury the defendant asked only for a new trial in the court appealed from the Supreme Court of Canada cannot order judgment to be entered for him on the appeal. GREEN *v.* MILLER — — — — — — — 193

4 ——*Findings of Courts appealed from—Evidence—Questions of fact—Reversal on appeal.*] There is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the decision at the trial on the facts. *Held*, per Girouard J., following *Village of Granby* v. *Ménard* (31 Can. S. C. R. 14) that the evidence being contradictory and the trial judge having found for the

APPEAL—*Continued.*

defendant, which finding the evidence warranted, his judgment should not have been reversed on appeal. DEMPSTER *v.* LEWIS **292**

5——*Concurrent findings of courts below—Reversal on questions of fact—Improper rulings—Reversal on a matter of procedure.*] Where the findings of the trial courts were manifestly erroneous and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the courts below and also reversed the concurrent rulings of those courts refusing leave to amend the statement of claim by alleging an account stated. BELCHER *v.* MCDONALD — **321**

Leave to appeal to the Privy Council was granted, August, 1903.

6——*Assessment of damages — Estimating by guess—Concurrent findings—Reversal on appeal —New trial.*] The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. Armour J., however, was of opinion that the proper course was to order a new trial. WILLIAMS *v.* STEPHENSON — — — **323**

7——*Jurisdiction—Interlocutory proceeding — Final judgment.*] An order (Q. R. 12 K. B. 445) requiring opposants *afin de charge* to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely an interlocutory judgment from which no appeal lies to the Supreme Court of Canada. *Lacroix* v. *Moreau* (16 L. C. R. 180) referred to. DESAULNIERS *v.* PAYETTE — — **340**

8——*Jurisdiction — Amount in controversy — Secretion of estate by insolvent—Contrainte par corps—Arts.* 885, 888 *C. P. Q.*] On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned the appellant, under the provisions of Art. 888 C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000. *Held*, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada. CLEMENT *v.* BANQUE NATIONALE **343**

9——*Jurisdiction—Matter in controversy—Right of appeal—Personal condemnation—Action possessoire.*] In a possessory action with conclusions for $200 damages, the defendant admitted plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed the trial court judgment, dismissing the possessory conclusions and adjudging $200 for rent of the premises in question. *Held*, that the defendant had no right of appeal to the Supreme Court of Canada. DAVIS *v.* ROY — — — **345**

10——*Practice — Adding alternative claims— Amendment — Discretionary orders — Duty of Appellate Court.*] Where the court below in the exercise of judicial discretion refused leave to amend the pleadings the Supreme Court would not interfere with such exercise of their discretion. PORTER *v.* PELTON — — **449**

11——*Questions of law—Findings of fact—Reversal on appeal.*] On questions of law, the judgment appealed from was reversed, Davies J., *dubitante*, but the findings, on conflicting testimony, in respect of damages, by the trial judge, were not disturbed on the appeal. MISSISSIPPI VALLEY RAILWAY CO. *v.* REED — **457**

BOUNDARY — *Railways — Construction of deed—Location of permanent way—Laying out boundaries—Fencing—Riparian rights—Notice of prior title—Registry laws—Possession—Acquisitive prescription.*] In the conveyance of lands for the permanent way the deed described lands sold to the railway company bounded by an unnavigable stream, as "selected and laid out" for the railway. Stakes were planted to show the side lines, but the railway fences were placed inside the stakes above the water's edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water rights, mills, and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. That the description in the deed included, *ex jure naturæ*, the river *ad medium filum aquæ* and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them; 2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their absention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the

BOUNDARY—*Continued.*

fences or the bed of the stream *ad medium filum*; and 3. That such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. MASSAWIPPI RAILWAY CO. *v.* REED — — — **457**

CARRIERS—*Railways—Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.*] F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mill Co. at Sunnyside in Toronto West. The G.T.R. had no station at Sunnyside the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G.T.R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to Jan. 2nd, 1900, five cars, one addressed to the Company and the others to themselves at Sunnyside. On Jan. 10th the Company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for, and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th F. Bros. were notified that the cars were there subject to their orders and two days later F., one of the firm, went to Swansea and met the Company's manager. They could not get at the cars where they were, and F. arranged with the station agent to have them placed on the company's siding and he would have what the company wonld accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G.T.R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company, but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills. *Held*, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at

CARRIERS—*Continued.*

Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by the refusal of the company to receive them.—The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head. *Held*, reversing such decision, Mills J. dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring a further action should they see fit. THE GRAND TRUNK RAILWAY CO. OF CANADA *v.* FRANKEL. — — — **115**

2—*Contract—Shipping receipt—Carriers—Limitation of liability—Sale for non-payment of freight—Principal and agent—Varying terms of contract.*] Conditions in a shipping receipt relieving the carrier from liability for losses or damages arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier.—A shipping receipt with terms as above was for carriage by the defendants and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special control with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shown by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no authority as such to consent to a variation of the special contract nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants and that they were not exempted by the terms of the shipping receipt from liability for their full

CARRIERS—*Continued.*

value under the terms.—As the evidence showed definitely what damages had been sustained, there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B. C. Rep. 82) ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour J. however, was of opinion that the judgment of Craig J. at the trial should be restored. WILSON *v.* CANADIAN DEVELOPMENT CO. — — 432

Leave to appeal to the Privy Council was refused in July, 1903.

CASES—*Agricultural Savings & Loan Co.* v. *Liverpool & London & Globe Ins. Co.* (3 Ont. L. R. 127) reversed — — — — 94
See INSURANCE, FIRE 1.

2——*Attorney General of Nova Scotia* v. *Lovitt* (35 N. S. Rep. 223) affirmed — — 350
See SUCCESSION DUTIES.

3——*Attorney General for Ontario* v. *Scully* (4 Ont. L. R. 394) leave to appeal refused — 16
See APPEAL 1.

4——*Barter* v. *Smith* (2 Ex. C. R. 455) overrated in part — — — — — 39
See PATENT OF INVENTION.

5——*Canada Atlantic Railway Co.* v. *City of Ottawa* (4 Ont. L. R. 75n) affirmed — 376
See RAILWAYS 2.

6——*Chaudière Machine and Foundry Co.* v. *Canada Atlantic Railway Co.* (33 Can. S. C. R. 11) followed — — — — 347
See DAMAGES 1.

7——*Drew* v. *The King* (Q. R. 11 K. B. 477) affirmed — — — — — 228
See CRIMINAL LAW 1.

8——*Fowlie* v. *Ocean Accident and Guarantee Corp.* (4 Ont. L. R. 146.) affirmed — 253
See INSURANCE ACCIDENT.

9——*Georgian Bay Navigation Co.* v. *Ships Shenandoah and Crete* (8 Ex. C. R. 1) reversed — — — — — — 1
See ADMIRALTY LAW.

10——*Gilbert Blasting and Dredging Co.* v. *The King* (7 Ex. C. R. 221) affirmed — 21
See CONTRACT 1.

11——*Granby, Village of* v. *Menard* (31 Can. S. C. R. 14) followed by Girouard J. — 292
See EVIDENCE 4.

CASES—*Continued.*

12——*Griffin* v. *Toronto Railway Co.* (7 Ex. C. R. 411) reversed — — — — 39
See PATENT OF INVENTION.

13——*Hamburg 'American Packet Co.* v. *The King* (7 Ex. C. R. 150) affirmed — 252
See PUBLIC WORKS 2.

14——*Hanson* v. *Village of Grand' Mere* (Q. R. 11 K. B. 77) affirmed — — — 50
See MUNICIPAL CORPORATIONS 1.

15——*Harrison* v. *Western Assurance Co.* (35 N. S. Rep. 488) reversed — — 473
See INSURANCE, FIRE 2.

16——*Henning* v *Maclean* (4 Ont. L. R. 666) affirmed — — — — — 305
See WILL 3.

17——*Laberge* v. *Equitable Life Ins. Co.* (24 Can. S C. R. 59) distinguished — 134
See APPEAL 2.

18——*Lacroix* v. *Moreau* (16 L. C. R. 180) referred to — — — — 340
See APPEAL 7.

19——*Letourneux* v. *The Queen* (7 Ex. C. R. 1) reversed — — — — — 335
See PUBLIC WORKS 3.

20——*Miller* v. *Green* (35 N. S. Rep. 117) reversed — — — — — 194
See LIBEL.

21——*Montreal, City of* v. *McGee* (30 Can. S. C. R. 582) followed — — — 347
See DAMAGES 3.

22——*Montreal and Ottawa Railway Co.* v. *City of Ottawa* (4 Ont. L. R. 56) affirmed — — — — — — 376
See RAILWAYS 2.

23——*Myers* v. *Sault Ste. Marie Pulp and Paper Co.* (3 Ont. L. R. 600) affirmed — 23
See NEGLIGENCE 1.

24——*McDonald* v. *McDonald* (35 N. S. Rep. 205) affirmed — — — — 145
See GIFT 1.

25——*Noel* v. *Chevrefils* (30 Can. S. C. R. 327) followed — — — — — 134
See APPEAL 2.

26——*Osborne* v. *Morgan* (13 App. Cas. 227) followed — — — — — 314
See MINES AND MINERALS.

CASES—*Continued.*

27——*Quebec, City of* v. *The Queen* (24 Can. S. C. R. 420) referred to — — — 335
See Public Works 3.

28——*Queen, The* v. *Filion* (24 Can. S. C. R. 482) approved — — — — 335
See Public Works 3.

29——*Thorne* v. *Parsons* (4 Ont. L. R. 682) affirmed — — — — — 309
See Will 4.

30——*Wilson* v. *Canadian Development Co.* (9 B. C. Rep. 82) reversed — — 432
See Contract 4.

CIVIL CODE—Art. 569 (*Emphyteuis*) — 457
See Railways 3.

2——*Arts.* 807, 819 (*Donations*) — 370
See Gift 2.

3——*Arts.* 1065, 1691, (*Contract, Damages*)-418
See Contract 4, 5.

4——*Art.* 1411 (*Marriage Covenants*) — 370
See Gift 2.

5——*Arts.* 1472, 1487 (*Sale*) — — 457
See Railways 3.

6——*Art.* 1593 (*Alienation for rent*) — 457
See Railways 3.

7——*Art.* 1691 (*Damages*) — — 418
See Contract 4, 5.

8——*Arts.* 2193, 2196 (*Possession, Prescription*) — — — — — 457
See Railways 3.

9——*Arts.* 2242, 2251 (*Prescription*) — 457
See Railways 3.

10——*Art.* 2261 (*Prescription*)— — — 353
See Public Works.

CIVIL CODE OF PROCEDURE—*Art.* 77. (*Parties to actions*) — — — 457
See Railways 3.

11——*Arts.* 885, 888 (*Contrainte par corps*)—343
See Appeal 8.

CHOSE IN ACTION—*Will—Devise of all testator's property—Debt due by devisee.*] A devise of all "my real estate and property whatsoever and of what nature and kind soever" at a place named does not include a debt due by the devisee, who resided and carried on business at such place, to the testator. (4 Ont. L. R. 682 affirmed.) Thorne *v.* Thorne 309

COMMUNITY OF PROPERTY—*Marriage contract—Universal community—Don mutuel—Registry laws—Construction of contract—Divisibility—Arts.* 807, 819, 1411, *C. C.* — 370
See Marriage Laws.

CONSTITUTIONAL LAW—*Construction of B.N.A. Acts—Representation of Provinces in House of Commons—Aggregate population of Canada.*] In determining the number of representatives to which Ontario, Nova Scotia and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in subsection 4 of section 51 of the B.N.A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. *In re* Representation of the Provinces of Canada in the House of Commons of Canada — — 475

2——*Constitutional law—B. N. A. Act*, 1867—*Representation of P. E. Island in House of Commons.*] The special terms on which the Province of Prince Edward Island was admitted into the Dominion do not exempt that province from the general operation of the clauses of the B. N. A. Act, 1867, as to representation in the House of Commons after the decennial census. *In re* Representation of Prince Edward Island — — — — — 594

Leave to appeal to the Privy Council granted 11th November, 1903.

CONTRACT—*Public work—Abandonment and substitution of work—Implied contract.*] The suppliants contracted with the Crown to do certain work on the Cornwall Canal the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging and other works connected with the deepening and widening of the Cornwall Canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By section 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at

CONTRACT—*Continued.*

any time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract and adopted another plan the work on which was given to other contractors. After it was completed the suppliants filed a Petition of Right for the profits they would have made had it been given to them. *Held*, affirming the judgment of the Exchequer Court (7 Ex. C. R. 221) that the contract contained no express covenant by the Crown to give all the work done to the suppliant and section 34 prohibited any implied covenant therefor. Therefore the Petition of Right was properly dismissed. GILBERT BLASTING & DREDGING CO. *v.* THE KING — — — — — — 21

2——*Fire insurance—Void policy—Renewal—Mortgage clause.*] By sec. 167 of The Ontario Insurance Act a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy. *Held*, reversing the judgment of the Court of Appeal (3 Ont. L. R. 127), and restoring that at the trial (32 O. R. 369), Girouard J. contra, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval. *Held*, per Girouard J. that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy. LONDON AND LIVERPOOL AND GLOBE INS. CO. *v.* AGRICULTURAL SAVINGS AND LOAN CO. — — — 94

3——*Contract for construction of works—Specifications—"From" and "to" streets—Reference to annexed plan—Construction of deed—Mistake—Costs.*] The words "from" and "to" streets mentioned in specifications for the construction of works undertaken by an agreement in writing as shown on a plan annexed to and declared to form part of the contract are not necessarily exclusive and, in the case in question, where the agreement provided that the works should be constructed "along Notre-Dame street from Berri street to Lacroix street as shown on said plan" these words mean as far as the plan shows along Notre-Dame street but not exceeding the most distant side of Lacroix street. Mills and Armour JJ. dissenting, were of opinion that the plan was annexed to the written agreement merely for the purposes of illustration and that the words in the agreement limited the contract so that the works undertaken would not include constructions shown on the plan over any portion of either Berri street or Lacroix street. CITY OF MONTREAL *v.* CANADIAN PACIFIC RAILWAY CO. — — 396

CONTRACT—*Continued.*

4——*Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts.* 1065, 1691 *C. C.—Appeal on special questions—Deferred payment—Computation of interest—Payments in advance—Rebates—Powers of appellate court.*] The provisions of article 1691 of the Civil Code of Lower Canada do not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; the contract must, under that article, be in either cancelled *in toto* or not at all. The municipality agreed to pay for works to be constructed by promissory notes payable in two years without interest, said notes to be delivered to the contractor on the completion of the works and to bear a date assumed to be the mean date of completion of the works as carried on in detail. The amount of the notes represented the price of the tender with average interest added, and the municipality reserved the privilege of making payments upon the acceptance of progressive estimates on the works as completed from time to time, without interest or previous notice "en déduisant les intérêts composés au taux de six pour cent par an à échoir après l'époque des paiements et lesquels étaient compris dans le prix de soumission pour la totalité des deux années." The mean date was settled as 15th Dec. 1899, and the notes for the balance due were delivered in 1900. The trial court allowed the municipality interest on advance payments from the dates on which they had been respectively made, both before and after 15th Dec. 1899, up to 15th Dec. 1901, but the judgment appealed from disallowed all interest prior to 15th Dec. 1899, on the payments which were made before that date. *Held*, that upon the proper construction of the contract the method followed by the court of appeal as to the calculation of interest on the advance payments was correct.—The court of appeal, however, calculated this interest on the basis of the actual price of the works as tendered for. *Held*, reversing the judgment appealed from on this point, that the interest should be calculated on the basis of the price actually mentioned in the contract, and upon the actual amount of the advance payments made.—Certain of the works were not executed, by orders from the municipality and, on this head, the trial court refused to deduct $2,442.50 from the plaintiff's claim. The judgment appealed from, did deduct this amount from the judgment in favour of the plaintiff. It appeared, however, that the plaintiff had, at least tacitly, consented to this diminution and made no protest in respect thereof. *Held*, that, under the circumstances, the plaintiff could not claim the sum in question as damages under articles 1065 and 1691 of the

CONTRACT—*Continued.*

Civil Code. Ville de Maisonneuve *v.* Banque Provinciale — — — — — 418

5——*Shipping receipt—Carriers—Limitation of liability — Damages — Negligence — Connecting lines—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*] Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of "the safe keeping or carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier.—A shipping receipt with terms as above was for carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shown by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had not authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants and that they were not exempted from liability in respect thereof, at their full value, under the terms of the shipping receipt. As evidence showed definitely what damage had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B. C. Rep. 82), ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour J. however, was of opinion that the judgment of Craig J. at the trial should be restored. Wilson *v.* Canadian Development Co. — — — — — — 432

Leave to appeal to the Privy Council was refused in July, 1903.

CONTRACT—*Continued.*

6——*Marriage contract—Universal community—Don mutuel—Registry laws—Construction of contract — Divisibility — Arts.* 807, 819, 1411 *C. C.* — — — — — — 370

See Marriage Laws.

7——*Sale of monument by sample—Evidence of contract—Findings on contradictory evidence—Reversal on appeal—Practice* — — 292

See Evidence 4.

8——*Contract under seal—Undisclosed principal—Partnership—Amendment* — — 449

See Action 4.

9——*Lease for 999 years—Contrat innommé—Emphyteusis—Bail à rente* — — 457

See Railways 3.

CONTRAINTE PAR CORPS—*Appeal — Jurisdiction—Amount in controversy—Secretion of estate by insolvent — Contrainte par corps—Arts.* 885, 888 *C. P. Q.*] On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned the appellant, under the provisions of Art. 888 C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000. *Held*, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada. Clement *v.* Banque Nationale. *and* Bilodeau — — — — 343

CONVERSION—*Carrier's contract—Shipping receipt—Limitation of Liability—Damages—Negligence—Connecting lines—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*] A shipping receipt with conditions relieving the carrier from liability for loss or damages arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the officers, servants or workmen of the carrier, without his fault or privity, and restricting claims to the cash value of the goods at the port of shipment, agreed for the carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the season of 1899, the variation being shown by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transporta-

CONVERSION—*Continued.*

tion on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted from the liability in respect thereof, at their full value. Wilson *v.* Canadian Development Co. — — — — — 432

Leave to appeal to the Privy Council was refused in July, 1903.

COSTS—*Provincial bonds—Succession duties—Exempted securities—Sale under will—Duty on proceeds—Proceedings by or against the Crown—Costs.*] Costs will be given for or against the Crown as in other cases. Jurisprudence of Privy Council and Supreme Court of Canada stated as settled by a number of cases specially referred to. Lovitt *v.* Attorney General of Nova Scotia. — — — — 350

2——*Construction of written contract—Specifications—"From" and "to" streets—Reference to annexed plan—Mistake—Apportionment of costs.*] Where the contentions of neither party were fully adopted, the appeal was allowed without costs in the Supreme Court of Canada. City of Montreal *v.* Canadian Pacific Railway Co. — — — — — 396

CRIMINAL LAW—*Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. Arts.* 5551, 5561—*Criminal Code, sec.* 145.] The hearing of a charge by a magistrate, assuming to act as a Justice of the Peace having authority to hear it is a judical proceeding within the meaning of section 145 of the Criminal Code, and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that the magistrate had no jurisdiction over the subject matter of the complaint. Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills J. dissenting.] Drew *v.* The King. — 228

2——*Canada Evidence Act*, 1893—*Husband and wife—Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.*] Under the provisions of "The Canada Evidence Act, 1903," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the

CRIMINAL LAW—*Continued.*

person accused but may also be compelled to testify. Mills J. dissenting.—Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills J. dissenting.—*Per* Girouard J. (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo*, *de facto* or *de corpore*. Sexual intercourse is such communicaaion and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per* Mills J. (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per* Taschereau, C.J. The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. Gosselin *v.* The King. — — — — — — 255

CROWN—*Public work—Navigation of River St. Lawrence—Negligence—Repair of channel—Parliamentary appropriation—Discretion as to expenditure.*] Action for damages to SS. Arabia sustained by striking an obstruction in the River St. Lawrence ship-channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under section 16 (*c*) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor in Council and Minister who were responsible only to parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. Hamburg American Packet Co. *v.* The King — — — — — 252

Leave to appeal to the Privy Council granted, July, 1903.

CROWN—*Continued.*

2——*Mines and minerals—Placer mining regulations—Staking claims—Overlapping locations—Renewal grant—Unoccupied Crown lands.*] In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously stated by W. In 1900 he applied for and obtained a renewal grant for the same area, W.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T staked bench-claims for the lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land. *Held*, affirming the judgment appealed from, Davies and Armour JJ. dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and new application, and that, following the rule in *Osborne* v. *Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant should not be disturbed. ST. LAURENT *v.* MERCIER — 314

3——*Provincial bonds—Succession duties—Exempted securities—Sale under will—Duty on proceeds—Proceedings by or against the Crown—Costs.*] Costs will be given for or against the Crown as in other cases. Jurisprudence of Privy Council and Supreme Court of Canada stated as settled by a number of cases specially referred to. LOVITT *v.* ATTORNEY GENERAL OF NOVA SCOTIA — — — — 350

4——*Railway subsidy—Dominion Lands Act—Reservation in grant.*] By an equal division of opinion, the Supreme Court affirmed the decision of the Exchequer Court (8 Ex. C.R. 83) by which it was held that lands granted as subsidy to railways under 53 Vict. ch. 54 (*d*) were subject to the existing regulations respecting reservation of baser minerals in the grants thereof, notwithstanding that there was no reference thereto in the Orders in Council alloting the lands to the railway, and that the grant was expressed in the statute to be a free grant subject merely to cost of survey. CALGARY & EDMONTON RAILWAY CO. *v.* THE KING — 673

(Leave to appeal to the Privy Council was granted, July, 1903.)

5——*Injury from public work—Negligence of Crown officials—Right of action—Liability of Crown—50 & 51 Vict. ch. 16, ss. 16, 23, 58. Jurisdiction of Exchequer Court—Prescription—Art. 2261 C.C.* — — — — 335

See NEGLIGENCE 2.

DAMAGES — *Nuisance—Trespass—Continuing damage.*] In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work. *Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained. CHAUDIÈRE MACHINE AND FOUNDRY CO. *v.* CANADA ATLANTIC RWAY. CO. — — — — — — 11

2——*Assessment of damages—Estimating by guess—Concurrent finding—Reversal on appeal—New trial.*] The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. Armour J., however, was of opinion that the proper course was to order a new trial. WILLIAMS *v.* STEPHENSON — — — — — 323

3——*Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata—Right of action.*] A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease. *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same

DAMAGES—*Continued.*

cause. *City of Montreal* v. *McGee* (30 Can. S. C. R. 582) and *Chaudière Machine and Foundry Co.* v. *Canada Atlantic Ry. Co.* (33 Can. S. C. R. 11) followed. ANCTIL *v.* CITY OF QUEBEC — — — — — 347

4——*Emphyteutic lease—Injuries to leased lands—Right of action—Domaine utile—Recovery by lessee.*] The right of action for damages to leased lands lies in the lessee of an emphyteusis who has the beneficial estate therein and, where the owner of the legal estate has brought a petitory action to eject an adverse occupant and for damages, the lessee may be added as a party, plaintiff in the action, for the purpose of recovering any damages that may be shown to have been sustained. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — — 457

5——*Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts.* 1065, 1691 *C. C.—Deferred payments—Computation of interest — Payments in advance—Rebates* — — — 418

See CONTRACT 4, 5.

6——*Contract — Shipping receipt — Carriers—Liability limited by special conditions—Negligence — Connecting lines of transportation — Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract* — — — 432

See CARRIERS 2.

DEBENTURES—*Provincial bonds—Sucession duties—Property exempt—Sale under will—Duty on proceeds.*] Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ. dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were. LOVITT *v.* ATTORNEY GENERAL FOR NOVA SCOTIA — 350

DEED — *Railways — Construction of deed — Location of permanent way—Laying out boundaries — Fencing — Riparian rights — Notice of prior title—Registry laws—Possession—Acquisitive prescription.*] In the conveyance of lands for the permanent way the deed described lands

DEED—*Continued.*

sold to the railway company as bounded by an un-navigagle stream, as "selected and laid out" for the railway. Stakes were planted to show the side lines, but the railway fences were placed inside the stakes above the waters edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water-rights, mills, and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. That the description in the deed included, *ex jure naturæ*, the river *ad medium filum aquæ* and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them; 2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences or the bed of the stream *ad medium filum*, and 3. That such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. MASSAWIPPI VALLEY RAILWAY COMPANY *v.* REED — — — — — 457

DELIVERY—*Donatio mortis causâ—Deposit receipt—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.* — — — — — — 145

See GIFT 1.

2——*Commencement of insurance contract—Delivery of policy—Incontestability—Operation of conditions.* — — — — 383

See INSURANCE LIFE.

DEMOLITION—*Construction of sidewalk—Trespass—Damages—Removal of works constructed.*

See ACTION 3.

2——*Riparian rights—Inquiry through construction of dams—Removal of obstructions.* —

See TITLE TO LAND 4.

DEPOSIT RECEIPT—*Donatio mortis causâ—Deposit receipt—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.* — — — — — 145

See GIFT 1.

DOMAINE DIRECT.
See Title to land 4.

DOMAINE UTILE.
See Title to land 4.

DONATION—*Marriage covenant—Universal community—Registry laws.*— — — 370
See Marriage laws.
And *see* Gift.

DUTIES—*Provincial lands—Succession duties—Property exempt—Sale under will—Duty on proceeds.*] Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ. dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were. Lovitt *v.* Attorney General for Nova Scotia — — 350

ELECTION LAW — *Controverted election—Stay of proceedings pending appeal on preliminary objections — Trial within six months — Extension of time—Disqualification.*] Preliminary objections to an election petition filed on 22nd February, 1902, were dismissed by Loranger J. on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on Oct. 10th, making Nov. 17th the day fixed for the trial under the order of 31st May. On Nov. 14th a motion was made before Loranger J. on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th Nov., but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on Dec. 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed. *Held*, that the effect of the

ELECTION LAW—*Continued.*

order of May 31st was to fix Nov. 17th as the date of commencement of the trial; that the time between May 31st and Oct. 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that Dec. 4th on which it was begun was therefore within the said six months. *Held*, also, that if the order of 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings and the order of Mr. Justice Lavergne on Nov. 17th was proper. As to the disqualification of the member elect by the judgment appealed from the members of the court were equally divided and the judgment stood affirmed. St. James Election Case — — — 137

EMINENT DOMAIN.
See Expropriation of Lands.

EMPHYTEUSIS — *Railway lands and permanent way — Adverse occupation — Petitory action—Lease for 999 years—Injuries to roadbed—Right of action for damages—Ownership.*] The plaintiffs had leased a railway constructed by them to operating companies for 999 years, reserving a rental payable at stated times and upon terms as to maintaining the railway and its proper operation by the lessees. In the action brought *au pétitoire* for the recovery of part of the leased lands from an adverse occupant and for damages caused to the line of railway by the defendant, the plea raised questions that the lease was actually an alienation of all plaintiffs' interests in the lands occupied by the railway and left them without any right of action either to recover the possession or to obtain damages for injuries sustained by the lands. *Held*, affirming the judgment appealed from, that the lease amounted to an emphyteutic lease assigning the *domaine utile* of the railway and all the plaintiffs' rights in respect thereof reserving, however, the *domaine direct* and, consequently, the plaintiffs had the right of bringing the action *au pétitoire* which lies in the party having the legal estate, and that the lessees might, on an application for an amendment, be added as parties plaintiffs in the action, for the purposes of recovering any damages shown to have been sustained upon the leased lands, the action for which would lie only in the holder of the beneficial estate therein. Massawippi Valley Ry. Co. *v.* Reed. — — — —

ESCROW—*Commencement of contract—Policy of life insurance—Delivery* — — 383
See Insurance, Life.

ESTOPPEL—*Railways — Location of permanent way—Fencing—Laying out boundaries—Construction of deed—Estoppel by conduct—Words of limitation — Description of lands—Registry laws—Notice of prior title—Riparian rights — Possession — Acquisitive prescription—Tenant by sufferance—Right of action—Adding parties—Practice.* — — — — 457

See RAILWAYS 3.

EVIDENCE—*Donatio mortis causâ—Deposit receipts — Cheques and orders—Delivery for beneficiaries — Corroboration — Construction of statute.*] McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each payable out of the deposit receipt to the respective beneficiaries which McD. signed and returned to his brother who handed to McD's wife the one payable to her and the receipt and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards. *Held*, affirming the judgment appealed against (35 N. S. Rep. 205) Sedgewick and Armour JJ. dissenting, that this was a valid *donatio mortis causâ* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for interest not specified in the gift. By R. S. N. S. [1900] ch. 163, sec. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence. *Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. McDONALD *v.* McDONALD — — — 145

2——*Libel—Privilege — Proof of malice—Admissibility of evidence — Misdirection — New trial.*] G. local manager for Nova Scotia of the Confederation Life Association of which M. had been a local agent, wrote to Mrs. Freeman, a policy holder, the following letter. "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish with regard to continuing the policy?" In an action for libel it was shown that he had not been dismissed from the agency but wanted larger commissions in continuing, which were refused and that he was not a defaulter but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money. *Held*, that such evidence was improperly received and there was a miscarriage of justice by its admission.—The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away." *Held*, that this was misdirection that the question for the jury was not the truth or falsity of the statements but whether or not, if false, the defendant honestly believed them to be true, so that it was misdirection on a vital point. The majority of the Court were of opinion, Girouard and Davies JJ. *contra*, that as defendant had asked for a new trial only in the Court below this Court could not order judgment to be entered for him and a new trial was granted. Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed. GREEN *v.* MILLER — — — — 193

3——*Criminal law—Canada Evidence Act*, 1893—*Husband and wife—Competency of witness—*

EVIDENCE—*Continued.*

"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.] Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills J. dissenting.—Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills J. dissenting.—*Per* Girouard J. (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo*, *de facto* or *de corpore*. Sexual intercouse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per* Mills J. (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per* Taschereau C.J. The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. GOSSELIN *v.* THE KING — — — — 255

4——*Sale by sample—Evidence of contract—Findings of fact.*] In an action for the price of a tombstone the defence was that it was not of the design ordered. It had been ordered from photographic samples and an order form was filled in which, when produced at the trial, contained the words "E. M. Lewis Reporter Design" which the defence claimed was not in it when it was signed by the purchaser but which was there two or three hours later when handed to one of the vendors by his foreman who had taken the order and filled in the form. The evidence at the trial was conflicting and the Chancellor, trying the case without a jury, decided for the defence and dismissed the action. His judgment was reversed by the Court of Appeal. *Held*, per Taschereau C. J., that the evidence establishes that the words in dispute were on the order when it was signed and the plaintiffs were entitled to recover. *Held*, per Sedgewick and Davies JJ., Mills J. *hesitante*, that even if these words were not originally on the order the circumstances disclosed in evidence show that the design supplied was substantially that ordered and the judgment appealed from should stand. *Held*, *per* Girouard J. That, following *Village of Granby* v. *Ménard* (31 Can. S. C. R. 14) findings on contradictory evidence ought not to be reversed by an Appellate Court. DEMPSTER v. LEWIS — — — — — 292

5——*Negligence—Injury to workman—Proximate cause—Ontario Factories Act—Fault of fellow workman* — — — — 23

See NEGLIGENCE 1.

6——*Proof of accidental death—Waiver of condition in policy—Finding of jury—Verdict* — — — — — — — 253

See INSURANCE, ACCIDENT.

7——*Possession of lands—Verdict—Statute of limitations* — — — — — 444

See TITLE TO LANDS 3.

EXCHEQUER COURT OF CANADA—*Injury from public work—Negligence of Crown officials—Right of action—Liability of the Crown 50 & 51 Vict. ch. 16, ss. 16, 23, 58—Jurisdiction of Exchequer Court—Prescription—Art. 2261 C. C.* — — — — — — 335

See ACTION 1.

EXECUTORS AND ADMINISTRATORS—*Appeal—Jurisdiction—Matter in controversy—Removal of executors—Acquiescence in trial court judgment—Right of appeal—R. S. C. c. 135, c. 20.*] The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed. *Noël* v. *Chevrefils* (30 Can. S. C. R. 327) followed; *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished. DONOHOE *v.* DONOHUE — — — 134

EXEMPTIONS—*Succession duties—Property exempt—Sale under will—Duty on proceeds.*] Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ.

EXEMPTIONS—*Continued.*

dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were. LOVITT *v.* ATTY. GEN. FOR NOVA SCOTIA — — — — — — — — 350

EXPROPRIATION OF LANDS—*Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata —Right of action.*] A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpected term of the lease: *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and defendant cannot be twice sued for the same cause. *The City of Montreal* v. *McGee* (30 Can. S. C. R. 582), and *The Chaudière Machine and Foundry Co.* v. *The Canada Atlantic Railway Co.* (33 Can. S. C. R. 11) followed. ANCTIL v. CITY OF QUEBEC — 347

2——*Construction of railway—Crossing and using highways—Compensation to municipality —Terminus "at or near" point named* — 376

See RAILWAYS 2.

FAULT.

See NEGLIGENCE.

FENCES—*Location of railway—Laying out boundaries—Construction of deed—Estoppel by conduct—Riparian rights—Possession—Prescription—Title to land* — — — 457

See RAILWAYS 3.

GIFT—*Donatio mortis causâ—Deposit receipts —Cheques and orders—Delivery for beneficiaries — Corroboration — Construction of statute.*] McD. being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each payable out of the deposit receipt to the respective beneficiaries which McD. signed and returned to his brother who handed to McD's wife the one payable to her and the receipt and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards. *Held*, affirming the judgment appealed against (35 N. S. Rep. 205) Sedgewick and Armour JJ. dissenting, that this was a valid *donatio mortis causâ* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for interest not specified in the gift.—By R. S. N. S. [1900] ch. 163, sec. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence. *Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. MCDONALD *v.* MCDONALD — — — — — 145

2——*Marriage covenant—Universal comunity—Don mutuel—Registry laws—Arts.* 807, 819, 1411 *C. C.—Construction of contract.*] A marriage contract contained the following clause: "Les futurs epoux se sont faits et se font par ces présentes au survivant d'eux ce acceptant, donation viagére, mutuelle, égale et reciproque de tous les biens meubles et immeubles, acquêts, conquêts, propres et autres biens généralement quelconques qui se trouveront étre et appartenir au premier mourant au jour de son déces, de quelque nature qu'ils soient, et a quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant, à sa caution juratoire et gardant viduité." It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of art. 1411 C. C. and, as such, did not require registration, as the clause is divisible and the stipulation in question as to universal community merely a simple marriage covenant and not subject to the rules and formalities applicable to gifts. HUOT *v.* BIENVENU. — — — — — 370

AND *see* WILL.

HIGHWAY — *Railway chamber — Highway crossing—Compensation to municipality—Terminus "at or near" point named.*] Authority to a company to construct a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil,

HIGHWAY—*Continued.*

Prescott and Russell. *Held*, that if it were necessary the railway could pass through Carleton county, though it was not named. *Held*, also, that in this Act the words "at or near the city of Ottawa" meant in or near the said city. Judgment appealed from (4 Ont. L. R. 56; 2 Ont. L. R. 336) affirmed. CITY OF OTTAWA *v.* CANADA ATLANTIC RAILWAY CO.; CITY OF OTTAWA *v.* MONTREAL AND OTTAWA RAILWAY CO. — — — — — 376

2——*Operation of tramway—Municipal regulations—Powers—By-law or resolution—Construction of statute—Use of streets—Crossings* — 180

See TRAMWAY.

AND *see* RAILWAYS.

HOUSE OF COMMONS—*Constitutional law—Construction of B. N. A. Acts—Representation of provinces in House of Commons—Aggregate population of Canada.*] In determining the number of representatives to which Ontario, Nova Scotia and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in subsection 4 of sec. 51 of the B. N. A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. *In re* REPRESENTATION IN THE HOUSE OF COMMONS OF CANADA — — — 475

2——*Constitutional law—B. N. A. Act*, 1867—*Representation of P. E. Island in House of Commons.*] The special terms on which the province of Prince Edward Island was admitted into the Dominion do not except that province from the general operation of the clauses of the B. N. A. Act, 1867, as to representation in the House of Commons after a decennial census. *In re* REPRESENTATION OF PRINCE EDWARD ISLAND. — — — — — 594

Leave for an appeal to the Privy Council has been granted.

HUSBAND AND WIFE — *Criminal Law—Procedure at trial—Canada Evidence Act*, 1893—*Husband and wife as competent witnesses—"Communications"—Privilege—Construction of statute—Directions given by legal adviser.* — — — — — — — 255

See CRIMINAL LAW 2.

AND *see* MARRIED WOMAN.

INSOLVENCY—*Appeal—Jurisdiction—Secretion—Contrainte par corps* — — 343

See APPEAL 8.

INSURANCE, ACCIDENT—*Accident insurance—Proof of loss—Waiver—Finding of jury—Verdict.*] The proofs of loss were furnished within the time limited by the policy without objection as to their sufficiency, but payment

INSURANCE, ACCIDENT—*Continued.*

was refused on the ground that the circumstances came within the clause against liability where death occurred through suicide, etc. Objection to sufficiency of proofs was taken for the first time in the statement of defence delivered a couple of years afterwards. The judgment appealed from (4 Ont. L. R., 146) was affirmed, holding that the proofs were sufficient and the right to object had been waived. The body was found lying on a railway track, having been run over by a train; it was seen by the engineer before it was struck; shots had been heard shortly before and a pistol was found near by; two holes, which might have been caused by pistol bullets, were found in the cap of deceased. The policy was for death by accidental bodily injury through violent external means; R.S.O., (1897) ch. 203, sec. 152, to be read with the policy, defines "accident" as bodily injury by external force happening without intent of the person injured, or as the result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The evidence did not satisfy the jurors that deceased came to his death by his own hand, but that he came to his "death by external injury" unknown to them. *Held*, affirming the judgment appealed from that the finding was too vague to be construed as a finding of accidental death. OCEAN ACCIDENT & GUARANTEE CORPORATION *v.* FOWLIE. — — — — 253

INSURANCE, FIRE—*Fire Insurance—Void policy—Renewal—Mortgage clause.*] By sec. 167 of The Ontario Insurance Act a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy. *Held*, reversing 3 Ont. L. R. 127 and restoring the judgment at the trial. (32 O. R. 369), Girouard J. *contra*, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval. *Held*, per Girouard J. that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy.—The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy?

Quære. Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? LIVERPOOL &

INSURANCE, FIRE—*Continued.*

Globe Ins. Co. *v.* Agricultural Savings & Loan Co. — — — — — 94

2 —— *Fire insurance — Application — Untrue statement — Materiality — Statutory condition.*] In an application for insurance against fire, among the questions to the applicant were: —"Have you ever had any property destroyed by fire?" Ans. "Yes." "Give date of fire and, if insured, name of company interested? Ans. "1892, National and London & Lancashire." The evidence showed that there was a fire on the applicant's properties in 1882 and two fires in 1892 and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires. *Held*, reversing the judgment appealed from (35 N. S. Rep. 488) that the above questions were material to the risk and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy. Western Assurance Co. *v.* Harrison — — — — — — 473

INSURANCE, LIFE—*Commencement of insurance contract — Delivery of policy — Incontestability — Operation of conditions.*] An application for life insurance dated 16th Sept., 1894, and made part of the contract to be effected, provided that the issue of a policy in the usual form and delivered should be the only acceptance thereof and that the place of contract for all purposes should be the head office of the company at Toronto. The policy insured the applicant's life to 5th Oct., 1895, and provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the President and Managing Director signed and delivered the contract at Toronto "this 27th day of September, A.D. 1894." The insured lived in British Columbia and the policy and receipt were mailed at Toronto on 27th Sept. to the company's agent at Winnipeg, and forwarded by him on 1st Oct. to the insured who would not receive it before 7th Oct. Insured died on 30th Sept., 1897. *Held*, Taschereau C.J. dissenting, that the policy and receipt were delivered, and the contract of insurance was completed, at least as early as 27th Sept., 1894, when the papers were mailed at Toronto.—The policy provided that after being in force for three years only certain specified conditions therein should be binding on the holder and in all other respects the liability of the company thereunder should not be disputed. The insured violated a condition, but not one so specified, that would have avoided the policy but for this clause. *Held*, that said provision covered breaches of conditions made during the three years the policy was in force, and was not confined to those committed subsequent thereto, and as the three years expired on 27th Sept., 1897, the insured dying three days later the company was liable. North American Life Ass. Co. *v.* Elson — — — — 383

INTEREST — *Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts.* 1065, 1691 *C. C.—Deferred payments—Computation of interest—Payments in advance—Rebates* — — 418

See Contract 5.

JUDGMENT—*Appeal—Special leave—60 & 61 Vict. ch.* 34 *(e)—Error in judgment—Concurrent jurisdiction—Procedure—Mandamus*— 16

See Appeal 1.

2——*Criminal law—Perjury—Judicial proceeding—De facto tribunal — Misleading justice—Construction of statute — R. S. Q. arts.* 5551, 5561—*Criminal Code, sec.* 145 — — 228

See Criminal law 1.

3——*Injury from public work—Negligence of Crown official—Right of action—Liability of the Crown—50 & 51 Vict. ch.* 16, *ss.* 16, 23, 58—*Jurisdiction of Exchequer Court—Prescription—Art.* 2261 *C. C.* — — — — 335

See Action 1.

And *See* Appeal.

LANDLORD AND TENANT—*Construction of deed — Laying out boundaries — Riparian rights — Possession — Prescription.*] Where a railway built fences above the water line of a non-navigable stream, which was stated as the boundary of lands conveyed to the company, the possession of the strip of land left unenclosed and of the stream *ad medium filum* by the vendor and his assigns, after the conveyance to the company, is not a possession *animo domini* as required for the acquisitive prescription of ten years under Art. 2251 C. C., but merely an occupation as tenant by sufferance upon which no such prescription could be based. Massawippi Valley Railway Company *v.* Reed. — — — — — — 457

LEASE—*Emphyteusis — Alienation — Petitory action — Damages — Right of action.*] The plaintiff had leased lands for 999 years and brought a petitory action to recover them from a third party in adverse occupation. A demand was also made for damages alleged to have been caused to certain of the leased lands by the defendant. On a question raised as to plaintiff's right of action to recover the lands and for the damages, it was *Held*, affirming the judgment appealed from, that the lease amounted to an emphyteutic lease assigning the *domaine utile*, reserving, however, the *domaine direct*,

LEASE—*Continued.*

and, consequently, the plaintiff had the right of bringing the action *au pétitoire* which lies in the party having the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees. *Held*, also that he had a right to the petitory conclusions as holder of the legal estate although he could not recover the damages the right of action for which accrued only to the lessees as owners of the *domaine utile* (beneficial estate)—*Semble* that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. Massawippi Valley Railway Company *v.* Reed — — — — — 457

LIBEL—*Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.*] G. local manager for Nova Scotia of the Confederation Life Association of which M. had been a local agent wrote to Mrs. Freeman, a policy-holder, the following letter. "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the Company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so, I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the

LIBEL—*Continued.*

policy?" In an action for libel it was shown that M. had not been dismissed from the agency but wanted larger commissions in continuing, which were refused and that he was not a defaulter but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money. *Held*, that such evidence was improperly received and there was a miscarriage of justice by its admission.—The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away." *Held*, that this was misdirection that the question for the jury was not the truth or falsity of the statements but whether or not, if false, the defendant honestly believed them to be true, so that it was misdirection on a vital point.—The majority of the Court were of opinion, Girouard and Davies JJ. *contra*, that as defendant had asked for a new trial only in the Court below this court could not order judgment to be entered for him and a new trial was granted. Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed. Green *v.* Miller — — — 193

LIMITATION OF ACTIONS — *Title to lands—Statute of limitations—Possession.*] In 1822, M. obtained a grant of land from the Crown, and in 1823, permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870, he deeded the land to his four sons who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B. who proceeded to cut timber from it. In an action for trespass by P.: *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of his land for twenty years before 1870 which had ripened into a title. If not, the deed to the sons in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. Bentley *v.* Peppard — — — — — 444

MANDAMUS—*Appeal—Special leave*—60 & 61 *V. c.* 34 (*e*)—*Error in judgment—Concurrent jurisdiction—Procedure.*] Special leave to appeal from a judgment of the Court of Appeal for Ontario, under subsec. (*e*) of 60 & 61 Vict. ch. 34, will not be granted on the ground merely that there is error in such judgment. Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.—The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney General. S. having been refused such fiat applied for a writ of mandamus which the Div. Court granted and its judgment was affirmed by the Court of Appeal. *Held*, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused. The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere. Atty. Gen. of Ontario *v.* Scully — — 16

MARRIAGE LAWS—*Marriage covenant—Universal community—Don mutuel—Registry laws—Arts.* 907, 819, 1411 *C. C.—Construction of contract.*] A marriage contract contained the following clause: "Les futurs epoux se sont faits et se font par ces présentes au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les biens meubles et immeubles, acquêts, conquêts, propres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès, de quelque nature qu'ils soient, et a quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant, à sa caution juratoire et gardant viduité." It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of Art. 1411 C. C., and, as such, did not require registration, as the clause is divisible and the stipulation in question as to universal community merely a marriage covenant and not subject to the rules and formalities applicable to gifts. Huot *v.* Bienvenu — — — — 370

MARRIED WOMAN.

See Criminal Law 2.
" Evidence 3.

MINES AND MINERALS—*Placer mining regulations—Staking claims—Overlapping locations — Renewal grant — Unoccupied Crown lands.*] In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously staked by W. In 1900 he applied for and obtained a renewal grant for the same area, W.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T. staked bench claims for the lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land. *Held*, affirming the judgment appealed from, Davies and Armour JJ. dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and new application and that, following the rule in *Osborne* v. *Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant should not be disturbed. St. Laurent *v.* Mercier. — — — — — 314

MISTAKE—*Construction of written contract—Specifications—"From" and "to" streets—Reference to annexed plan—Mistake—Apportionment of costs.* — — — — 396

See Contract 3.

MORTGAGE—The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy. *Quære.* Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? London & Liverpool & Globe Ins. Co. *v.* Agricultural Savings & Loan Co. — — 94

MUNICIPAL CORPORATIONS—*Waterworks—Guarantee of debentures—By law—Vote of ratepayers — Approval of Lieutenant-Governor*—60 *V. c.* 78, *ss.* 7, 27 (*Que.*)] Judgment appealed from (Q. R. 11 K. B. 77) affirmed, (Girouard J. dissenting,) holding that a by-law to authorise the guarantee of waterworks debentures issued by a company under 60 Vict. ch 78, (Que.) sec. 7 and 27 must be approved by the ratepayers and L.-G.-in-Council before it can be legally binding upon a municipal corporation. Hanson *v.* Village of Grand'Mère—50

2——*Tramway—Operation of railway—Use of streets — Municipal regulations — Crossings —*

MUNICIPAL CORPORATIONS—*Con.*

Powers—By-law or resolution—63 *V. c.* 176 (*N. S.*)—*R. S. N. S.* (1900) *c.* 71, *ss.* 263, 264—*Construction of statute.*] By the Nova Scotia statute, 63 Vict. ch. 176, the tramway company was granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property. *Held*, reversing the judgment appealed from, Davies J. dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of section 254 of "The Towns Incorporation Act." (R. S. N. S. (1900) ch. 71.) LIVERPOOL & MILTON RWAY. CO. *v.* TOWN OF LIVERPOOL — — — 180

3 —— *Railway charter — Highway crossing — Control of streets — Compensation to municipality—Terminus "at or near" point named.*] Authority to a company to construct a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorised construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the Counties of Vaudreuil, Prescott and Russell. *Held*, that if it were necessary, the railway could pass through Carleton County, though it was not named. *Held*, also, that in this Act the words "at or near the City of Ottawa" meant in or near the said city. Judgment appealed from (4 Ont. L. R. 56; 2 Ont. L. R. 336) affirmed. CITY OF OTTAWA *v.* CANADA ATLANTIC RY. CO. CITY OF OTTAWA *v.* MONTREAL & OTTAWA RY. CO.—376

NAVIGATION—*Admiralty law—Navigation —Narrow channels—"White law" R.* 24—*Right of way—Meeting ships—Collision.*] Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take." *Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting vessels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.—The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The

NAVIGATION—*Continued.*

"Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the "Carmona." The "Shenandoah" then gave the port signal and steered accordingly. The "Carmona" thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah" but on going ahead again collided with the vessel in tow. *Held*, reversing the judgment of the local judge (8 Ex. C. R. 1) that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed. DAVIDSON *v.* GEORGIAN BAY NAVIGATION CO. THE SHENANDOAH AND THE CRETE — — 1

2 ——*Public work—Navigation of River St. Lawrence — Negligence — Repair of channel—Parliamentary appropriation—Discretion as to expenditure.*] Action for damages to SS. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship-channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under sec. 16, (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and Minister who were responsible only to Parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. HAMBURG AMERICAN PACKET CO. *v.* THE KING. — — — — — 252

[Leave to appeal to Privy Council granted, July, 1903.]

NEGLIGENCE—*Injury to workmen—Proximate cause—Ontario Factories Act.*] A workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step ladder to get on a plank in front of the drier. The step ladder was movable and placed close to a revolving cog wheel. On returning from the drier on one occasion another workman, accidentally or intentionally, remov-

NEGLIGENCE—*Continued.*

ed the ladder as he was about to step on it and before he could recover his balance his leg was caught in the cog wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded and the ladder fastened to the floor; and that the non-guarding and fastening constituted negligence on the part of the defendants. *Held*, affirming the judgment of the Court of Appeal (3 Ont. L. R. 600), that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor for which the defendants were liable. Sault Ste. Marie Pulp & Paper Co. *v.* Myers. — — 23

2——*Public work—Negligence of Crown officials—Right of action—Liability of the Crown*—50 & 51 *V.*, *c.* 16, *ss.* 16, 23, 58—*Jurisdiction of Exchequer Court—Prescription—Art.* 2261 *C. C.*] Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held*, reversing the judgment appealed from (7 Ex. C. R. 1), Davies J. dissenting, that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of the 16th, 23rd and 58th sections of the Exchequer Court Act. *The Queen* v. *Filion* (24 Can. S. C. R. 482) approved; *The City of Quebec* v. *The Queen* (24 Can. S. C. R. 430) referred to.—The prescription established by art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in the Petition of Right. Letourneux *v.* The King — — — — 335

3——*Carriers—Special contract—Limitation of liability—Damages—Wrongful conversion on connecting line of transportation—Sale of goods for non-payment of freight.*] Conditions in a shipping receipt relieving the carrier from liability for loss or damages arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. Wilson *v.* Canadian Development Co. — — — — — — 432

Leave to appeal to the Privy Counil was refused in July, 1902.

4——*Negligence—Employer and employee—Insecure scaffold—Disobedience to rules—Dangerous way, works or machinery.*] The Supreme Court affirmed the judgment appealed from which had affirmed the decision of the Court of Review, at Quebec (Q. R. 21 S. C. 99) reversing the trial judgment and holding that it was the duty of the employer not only to order the discontinuance of dangerous operations on an insecure scaffold, but also to take measures to ensure the carrying out of such orders and that, in the event of an accident occurring through neglect or disobedience of such orders, the employer was liable in damages for injuries caused thereby. Lamoureux *v.* Fournier *dit* Larose — — — — — 675

5——*Railways—Carriers—Special instructions—Acceptance by consignee—Warehousemen—Amendment* — — — — — 115

See Carriers 1.

6——*Public work—Navigation of River St. Lawrence—Repair of ship channel—Expenditure of Parliamentary appropriation.*

See Public Works 2.

NEW TRIAL—*Libel—Question of privilege—Proof of malice—Improper admission of evidence—Misdirection—Power to grant new trial on appeal—N. S. Judicature Act, O.* 57, *R.* 5; *O.* 38, *R.* 10.] Where in a case tried with a jury the defendant asked only for a new trial in the court appealed from, the Supreme Court of Canada cannot order judgment to be entered for him on the appeal.—Evidence as to how the recipient of a letter understood it as imputing to the person mentioned therein a wrongful retention of money should not be received on the trial of an action for libel as making proof of actual malice; the reception of such evidence in the case in question caused a miscarriage of justice and justified the defendant's application for a new trial.—Where the trial judge charged the jury that the question to be decided was the truth or falsity of the statements in the alleged libellous letter it was a misdirection that gave the defendant a right to a new trial as the question at issue was whether or not, if the statements were false, the defendant honestly believed them to be true.—Order 57 rule 5, of the Nova Scotia Judicature Act applies only to cases tried by a judge without a jury and order 38, rule 10 applies to cases tried with a jury. Green *v.* Miller — — — — 193

NEW TRIAL—*Continued.*

2——*Assessment of damages—Estimating by guess—Concurrent findings—Reversal on appeal—New trial.*] The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. Armour J. however, was of opinion that the proper course was to order a new trial. WILLIAMS *v.* STEPHENSON — — — — — 323

3——*Evidence as to damages—Discretionary order—New trial.*] In a case where the evidence showed definitely what damages had been sustained and where there appeared to be no good reason for remitting the case back to the trial court to take further evidence the Supreme Court of Canada, in reversing the judgment appealed from refrained from ordering a new trial but directed that the damages as found by the trial judge should be reduced to the amount proved in respect of certain goods wrongfully converted. Armour J. was, however, of opinion that the judgment of the trial judge ought to have been restored. WILSON *v.* CANADIAN DEVELOPMENT COMPANY — — 432

(Leave to appeal refused by Privy Council, July, 1903.)

4——*Carriage by railways—Special instructions—Acceptance by consignees—Warehousemen* — — — — — — — 115

See RAILWAYS 1.

5——*Registry laws—Prior conveyance—Constructive notice.* — — — — 457

See PRESCRIPTION 2.

NUISANCE—*Embankment—Flooding premises—Obstruction—Trespass—Continuing damage.*] In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work. *Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained. CHAUDIERE MACHINE & FOUNDRY CO. *v.* CANADA ATLANTIC RAILWAY CO. — — — — 11

NUISANCE—*Continued.*

2——*Expropriation of lands—Uses injurious to adjacent property—Depreciation in prospective value* — — — — — 677

See RIFLE RANGE.

ONTARIO FACTORIES ACT—*Negligence—Injury to workman—Proximate cause—Ontario Factories Act—Fault of fellow workman.*] — — — — — — — 23

See NEGLIGENCE 1.

OWNERSHIP—*Emphyteutic lease—Action pétitoire—Right of action for damages—Legal and beneficial estates.* — — — 457

See TITLE TO LAND 4.

PARTITION—*Opening of substitution—Legacy to substitutes—Partition per stirpes a per capita* — — — — — 328

See WILL 5.

PARTNERSHIP—*Contract under seal—Undisclosed principal—Partnership—Amendment.* — — — — — — — 449

See ACTION 4.

PATENT OF INVENTION—*Expiry of patent of invention—Manufacture—Extension of time—Acting Officers.*] A patent of invention expires in two years from its date or at the expiration of a lawful extension thereof if the inventor has not commenced and continuously carried on its construction or manufacture in Canada so that any person desiring to use it could obtain it or cause it to be made.—A patent is not kept alive after the two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it if he has not commenced to manufacture in Canada. *Barter* v. *Smith* (2 Ex. C. R. 455), overruled on this point.—The power of extension beyond the two years given to the Commissioner of Patents or his deputy can only be exercised once. *Quære.* Can it be exercised by an Acting Deputy Commissioner? POWER *v.* GRIFFIN — — — — — — — 39

PERJURY—*Criminal law—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. arts*, 5551, 5561—*Criminal Code, sec.* 145.]—The hearing of a charge by a magistrate assuming to act as a Justice of the Peace having authority

PERJURY—*Continued.*

to hear it, is a judicial proceeding within the meaning of section 145 of the Criminal Code, and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that the magistrate had no jurisdiction over the subject matter of the complaint. Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills J. dissenting. Drew *v.* The King — — — 228

And *See* Criminal Law 1.

PLAN —*Contract for construction of works—Specifications—"From" and "to" streets—Reference to plan annexed—Construction of deed—Mistake—Costs* — — — — 396

See Contract 3.

POSSESSION —*Title to land—Possession—Statute of limitations.*] In 1822 M. obtained a grant of land from the Crown and in 1823, permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870, he deeded the land to his four sons who sold it in 1873, and by different conveyances, the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B. who proceeded to cut timber from it. In an action for trespass by P.: *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not, the deed to his sons, in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. Bentley *v.* Peppard — 444

2 —— *Title to land — Fencing — Boundaries—Railway—Adverse possession—Notice by registration of prior conveyance* — — 457

See Prescription 2.

PRACTICE—*Controverted election—Stay of proceedings pending appeal on preliminary objections—Trial within six months — Disqualification.*] Preliminary objections to an election petition filed on 22nd Feb., 1902, were dismissed by Loranger J. on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on Oct. 10th, making Nov. 17th the day fixed for the trial under the order of 31st May. On

PRACTICE—*Continued.*

Nov. 14th a motion was made before Loranger J. on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th Nov., but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on Dec. 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed. *Held*, that the effect of the order of May 31st was to fix Nov. 17th as the date of commencement of the trial; that the time between May 31st and Oct. 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that Dec. 4th on which it was begun was therefore within the said six months. *Held* also, that if the order of 31st May could not be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergne on Nov. 17th was proper. As to the disqualification of the member elect by the judgment appealed from the members of the court were equally divided and the judgment stood affirmed. St. James Election Case — — — — 137

2 —— *Appeal — Concurrent findings of courts below—Reversal on questions of facts—Improper rulings—Reversal on a matter of procedure.*] Where the findings of the trial courts were manifestly erroneous and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the courts below, and also reversed the concurrent rulings of the courts below refusing leave to amend the statement of claim by alleging an account stated. Belcher *v.* McDonald — — — 321

3 —— *Municipal corporation — Construction of sidewalks—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice —R. S. C. ch.* 135, *s.* 65.] The plaintiff brought his action to recover the value of a strip of land of which the defendant was illegally in possession. The courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au pétitoire*. In order to cease litigation, the Supreme Court of Canada, without directing any amendment of the pleadings, reversed the judgments of the courts below, directed that the record should be remitted to the trial court for the purpose of ascertaining the extent of the property affected by the trespass and ordered the restoration

PRACTICE—*Continued.*

thereof to the plaintiff. BURLAND *v.* CITY OF MONTREAL — — — — — 373

4——*Adding alternative claims—Amendment—Discretionary orders—Duty of appellate court.*] Where the court below, in the exercise of judicial discretion refused leave to amend the pleadings the Supreme Court of Canada refused to interfere with this exercise of their discretion on an appeal. PORTER *v.* PELTON — 449

5——*Findings of fact—Reversal on questions of law—Amendment—Action by lessor—Emphyteusis—Alienation—Right of action—Adding parties.*] The judgment appealed from was reversed on the questions of law, Davies J. *dubitante*, but the findings on conflicting testimony in respect to damages made by the trial judge were not disturbed on the appeal. *Semble* that where a lessor had the *domaine direct* and the lessees the *domaine utile* in lands and the lessor brought action *au pétitoire* to recover the lands and for damages, if there had been damages proved, an amendment should have been allowed adding the lessees as parties, plaintiffs in the action in order to recover damages, if any, that might have been sustained. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — — — 457

6——*Libel—Questions of privilege—Proof of malice—Admission of evidence* — — 193

See LIBEL.

7——*Criminal law—Procedure at trial—Canada Evidence Act*, 1893—*Husband and wife as competent witnesses—"Communications"—Privilege—Construction of statute—Directions given by legal adviser* — — — — — 255

See CRIMINAL LAW 2.

8——*Findings of fact—Reversal of questions of fact—Amendment—Action by lessor—Emphyteusis—Alienation—Right of action—Adding parties* — — — — — 457

See RAILWAYS 3.

PRESCRIPTION—*Damages arising from public work—Negligence of Crown officials—Limitation of action—Art.* 2261 *C. C.*] The prescription established by article 2261 of the Civil Code of Lower Canada applies to damages for injuries to property caused by the negligence of Crown officials to keep a public work in proper order. LETOURNEUX *v.* THE KING. — — — — — — — 335

2——*Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Registry laws—Notice of prior title—Riparian rights—Possession animo domini—Acquisitive prescription—Arts*, 1487, 2193, 2196, 2242, 2251 *C. C.—Art.* 77. *C. P. Q.*] A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for the permanent way. Stakes were planted to show the side lines, but the railway fencing was placed inside the stakes above the water line, although the company could not have the quantity of land conveyed unless they took possession *ad medium filum aquæ*. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of stream and, subsequently to the registration of the deed to the company, sold the rest of his property including water-rights, mills and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." Plaintiffs never operated the railway but, immediately on its completion, under powers by their charter, and The Railway Act, 14 & 15 Vict. ch. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under such lease. The *action pétitoire*, including a claim for damages, was met, amongst other defences, by pleas; that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by P. and the company in permitting him to retain possession of the strip of land in question and the river *ad medium filum*; that by ten years possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years and that, by thirty years adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal the Supreme Court, held—1. That the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium filum aquæ* as an incident of the lands thereby granted and their title could not be defeated under the subsequent conveyance by their vendor and warrantor, notwithstanding that they may not have taken physicial possession of all the lands described in the prior conveyance. 2.—That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for acquisitive prescription of ten years under Art. 2251, C.C but merely an occupation as tenant by sufferance upon which no such prescription could be based. 3.—That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. 4.—That the terms of the

PRESCRIPTION—*Continued.*

description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years prescription, more especially as he was charged with notice of that prior conveyance through the registration of the deed to the company. 5.—That the acquisitive prescription of thirty years under Art. 2242 C. C., could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property he had failed to deliver *animo domini* nor in good faith. Massawippi Valley Railway Company *v.* Reed — 457

PRINCE EDWARD ISLAND—*Constitutional law—B. N. A. Act,* 1867—*Representation of P. E. I. in House of Commons*] The representation of the Province of Prince Edward Island in the House of Commons of Canada is liable to be reduced under sec. 51, s.s. 4 B. N. A. Act, 1867, after a decennial census as is that of the other provinces of Canada. *In re* Representation of P. E. I. in House of Commons — — — — — — — 594

Leave has been granted for an appeal to the Privy Council.

PRINCIPAL AND AGENT—*Carriers' contract—Shipping receipt—Limitation of liability — Damages — Negligence — Connecting lines — Wrongful conversion — Sale of goods for non-payment of freight — Principal and agent — Varying terms of contract.*] A shipping receipt with conditions relieving the carrier from liability for loss or damages arising out of "the safe keeping and carriage of the goods," even though caused by the negligence, carelessness or want of skill of the officers, servants or workmen of the carrier without his fault or privity, and restricting claims to the cash value of the goods at the port of shipment, agreed for the carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the season of 1899, the variation being shown by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no

PRINCIPAL AND AGENT—*Continued.*

authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted from liability in respect thereof, at their full value. Wilson *v.* Canadian Development Co. — 432

Leave to appeal to the Privy Council was refused in July, 1903.

2——*Contract under seal—Undisclosed principal—Partnership—Amendment* — — 449

See Action 4.

PUBLIC OFFICER—*Expiry of patent of invention—Manufacturing in Canada—Extension of time limit—Acting Deputy-Commissioner* — — — — — — — 39

See Patent of Invention.

PUBLIC WORK—*Contract—Public work—Abandonment and substitution of work—Implied contract.*] The suppliants contracted with the Crown to do certain work on the Cornwall Canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging and other works connected with the deepening and widening of the Cornwall Canal on section no. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or to diminish the work to be done, the contractors to comply with his written requirements therefor. By sec. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract and adopted another plan the work on which was given to other contractors. After it was completed the suppliants filed a Petition of Right for the profits they would have made had it been given to them. *Held*, affirming the judgment of the Exchequer Court (7 Ex. C. R. 221) that the contract contained no express covenant by the Crown to give all the work

PUBLIC WORK—*Continued.*

done to the suppliant and sec. 34 prohibited any implied covenant therefor. Therefore the Petition of Right was properly dismissed. GILBERT BLASTING & DREDGING CO. *v.* THE KING — — — — — — 21

2——*Ship channel—Navigation of River St. Lawrence—Negligence—Repair—Parliamentary appropriation—Discretion as to expenditure.*] Action for damages to SS. Arabia sustained by striking an obstruction in the River St. Lawrence ship-channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under section 16 (*c*) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and minister who were responsible only to parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. HAMBURG AMERICAN PACKET CO. *v.* THE KING — 252

(Leave to appeal to Privy Council granted July, 1903).

3——*Injury from public work—Negligence of Crown officials—Right of action—Liability of the Crown*—50 *&* 51 *V., c.* 16, *ss.* 16, 23, 58—*Jurisdiction of the Exchequer Court—Prescription—Art.* 2261 *C. C.*] Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held,* reversing the judgment appealed from (7 Ex. C. R. 1), Davies J. dissenting, that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of the 16th, 23rd and 58th sections of the Exchequer Court Act. *The Queen* v. *Filion* (24 Can. S. C. R. 482) approved; *City of Quebec* v. *The Queen* (24 Can. S. C. R. 430) referred to.—The prescription established by Art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his Petition of Right. LETOURNEUX *v.* THE KING — — — 335

PUBLIC WORK—*Continued.*

4——*Expropriation of lands—Damages for use of rifle range—Mode of assessment—Valuation roll—Present uses—Prospective value—Evidence.*] The judgments appealed from (8 Ex. C. R. 163) decided in effect, that as the lands taken for use as part of a rifle range, at the time of expropriation, had a prospective value for residential and other uses beyond that which then attached to them as lands in use for agricultural and other similar purposes, such prospective values should be taken into consideration in assessing what would be sufficient and just compensation to be paid upon the expropriation of the lands for such public uses as would, in various ways, affect the lands injuriously and diminish their prospective values. In making the assessment of such compensation, the court below consulted the municipal assessment rolls, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the lands expropriated. The Supreme Court of Canada affirmed the judgment appealed from. *The Turnbull Real Estate Co.* v. *The King; Corkery et al.* v. *The King; DeBury et al.* v. *The King* — — — — — — 677

QUORUM—*Territorial Court of Yukon Territory—Quorum to constitute court for hearing appeals.*] *Quære.* Whether under the provisions of the Yukon Territory Act, 62 & 63 Vict. ch. 11, sec. 6 and sec. 42 of ch. 50 R. S. C., thereby made applicable to the Territorial Court of Yukon Territory, three judges of that court are necessary to constitute a quorum for the hearing of appeals from judgments rendered upon the trial of causes therein. BARRETT *v.* LE SYNDICAT LYONNAIS DU KLONDYKE — — — — — — 667

RAILWAYS—*Carriage of Goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.*] F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G.T.R. had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the Rolling Mills Co, had a siding capable of holding three four cars. In 1897 F. Bros, instructed the G.T.R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co,, and in Oct., 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to Jan. 2nd, 1900, five cars, one addressed to the Company and the others to themselves at Sunnyside. On Jan. 10th the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for and refused to accept

RAILWAYS—*Continued.*

more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th F. Bros. were notified that the cars were there subject to their orders and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G.T.R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills. *Held*, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them.—The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head. *Held*, reversing such decision, Mills J. dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring a further action should they see fit. The Grand Trunk Rway. Co. of Canada *v.* Frankel. — — — — **115**

2——*Railway—Highway Crossing—Control of Street—Compensation to Municipality—Terminus "at or near" point named.*] Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorized construction of a railway from

RAILWAYS—*Continued.*

Vaudreuil to a point at or near Ottawa passing through the counties of Vaudreuil, Prescott and Russell. *Held*, that if it were necessary the railway could pass through Carleton county though it was not named. *Held*, also, that in this Act the words "at or near the city of Ottawa" meant "in or near" said city. Judgment of the Court of Appeal (4 Ont. L. R. 56) affirming the judgment at the trial (2 Ont. L. R. 339) affirmed. City of Ottawa *v.* Canada Atlantic Ry. Co. City of Ottawa *v.* Montreal & Ottawa Ry. Co. — — — **376**

3——*Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by sufferance—Arts.* 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 *C. C.—Art.* 77 *C. P. Q.—14 & 15 Vict. ch.* 51—25 *Vict. ch.* 61 *s.* 15—*Findings of fact—Assessment of damages—Emphyteutic lease—Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*] A railway company purchased land from P., bounded by a non-navigable river, as 'selected and laid out' for their permanent way Stakes were planted to show the side lines, but the railway fencing was placed at some of the disputed points, above the waterline, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium filum* and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as 'including that part of the river which is not included in the right of way, etc.' The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter and The Railway Act, 14 & 15 Vict. ch. 51, leased it for 999 years to another company, and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas (1) that the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium filum;* (3) that by ten years possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years; and (4) that, by thirty

RAILWAYS—*Continued.*

years adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal to the Supreme Court. *Held*, 1. That the description in the deed to the railway included, *ex jure naturæ*, the river *ad medium filum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance.—2. That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by suffrance upon which no such prescription could be based.—3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed.—4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company.—5. That the acquisitive prescription of thirty years under art. 2242 C. C. could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, Davies J. *dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs rights in respect of the railway reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as owners of the legal estate, although the right of action or the damages, if any, sustained would belong o the lessees.—*Semble* that, if necessary, the

RAILWAYS—*Continued.*

lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — 457

4——*Railway subsidy—Dominion Lands Act—Reservation in grant.*] By an equal division of opinion the Supreme Court affirmed the decision of the Exchequer Court (8 Ex. C. R. 83) by which it was held that lands granted as subsidy to railways under 53 Vict. ch. 4 (D) were subject to the existing regulations respecting reservation of baser minerals in the grants thereof, notwithstanding that there was no reference thereto in the orders-in-council alloting the lands to the railway and that the grant was expressed in the statute to be a free grant subject merely to cost of survey. CALGARY & EDMONTON RY. CO. *et al. v.* THE KING — 673

Leave to appeal to the Privy Council was granted, July, 1903.

5——*Railway embankment—Trespass—Nuisance—Continuing damages—Right of action.* — — — — — — — 11

See DAMAGES 1.

6——*Municipal regulations—Operation of tramway—Use of streets—Crossings—Powers—By-law or resolution—Construction of statute* — 180

See TRAMWAY 1.

REGISTRY LAWS—*Marriage covenant—Universal community—Don mutuel—Registry laws—Arts.* 807, 819, 1141 *C. C.—Construction of contract.*] A marriage contract contained the following clause: "Les futurs epoux se sont faits et se font par ces présentes au survivant d'eux ce acceptant, donation viagère, mutuelle, ègale et reciproque de tous les biens meubles et immeubles, acquêts, conquêts, propres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès, de quelque nature qu'ils soient, et à quelque lieu qu'ils soient situés. pour par le dit survivant en jouir en usufruit à sa caution juratoire et gardant viduité." It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of Art. 1411 C. C, and, as such, did not require registration, as the clause is divisible and the stipulation in question as to universal community merely a simple marriage covenant and not subject to the rules and formalities applicable to gifts. HUOT *v.* BIENVENU. — — — — — 370

REGISTRY LAWS—*Continued.*

2——*Adverse possession of Land—Acquisition prescription — Priority of title — Constructive notice* — — — — — — 457

See Title to Land 4.

RES JUDICATA—*Assessment of damages—Reservation of future recourse—Expropriation of leased premises—Right of action* — 347

See Action 2.

RIFLE RANGE—*Expropriation of lands—Damages for use of rifle range—Mode of assessment—Valuation roll—Present uses—Prospective value—Evidence.*] The judgments appealed from, (see 8 Ex. C. R. 163) decided, in effect, that as the lands taken for use as part of a rifle range, at the time of expropriation, had a prospective value for residential and other uses beyond that which then attached to them as lands in use for agricultural and other similar purposes, such prospective values should be taken into consideration in assessing what would be sufficient and just compensation to be paid upon the expropriation of the lands for such public uses as would, in various ways affect the lands injuriously and diminish their prospective values. In making the assessment of such compensation, the court below consulted the municipal assessment rolls, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the lands expropriated. The Supreme Court of Canada affirmed the judgment appealed from. The Turnbull Real Estate Co *v.* The King; Corkery et al *v.* The King; De Bury et al *v.* The King — — — — 677

RIPARIAN RIGHTS—*Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Possession—Acquisitive prescription—Tenant by sufferance—Arts.* 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 *C. C.—Art.* 77 *C. P. Q.* 14 *& 15 Vict. ch.* 51, 25 *Vict. ch.* 61 *s.* 15—*Findings of fact—Assessment of damages — Emphyteutic lease — Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*] A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to show the side lines, but the railway fencing was placed inside the stakes above the water-line, although the company could not have the quantity of land conveyed unless they took possession of the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium filum* and, after the registration of the deed to the company, sold the rest of his property including

RIPARIAN RIGHTS—*Continued.*

water-rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, etc." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter and The Railway Act, 14 & 15 Vict. ch. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas; (1) that the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P to retain possession of the strip of land in question and the river *ad medium filum;* (3) that by ten years possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years and (4) that, by thirty years adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal to the Supreme Court; *Held*—1. That the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium filum aquæ* as an incident of the grant and that the title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possesion of all the lands described in the prior conveyance. 2.—That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under Art. 2251 C. C., but merely an occupation as tenant by sufferance upon which no such prescription could be based. 3.—That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. 4.—That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company. 5.—That the acquisitive prescrip-

RIPARIAN RIGHTS—*Continued.*

tion of thirty years under Art. 2242 C. C. could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, Davies J. *dubitante*, but the findings, on conflictory testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as owners of the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees.—*Semble* that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — — — 457

RIVERS AND STREAMS—*Public work—Navigation of River St. Lawrence—Negligence—Repair of channel—Parliamentary appropriation—Discretion as to expenditure.*] Action for damages to SS. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship-channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under sect. 1 (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and Minister who were responsible only to Parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. HAMBURG AMERICAN PACKET CO. *v.* THE KING — — — 252

RIVERS AND STREAMS—*Continued.*

(Leave to appeal to Privy Council granted, July, 1903).

2——*Railways—Construction of deed—Location of permanent way — Laying out boundaries—Fencing—Riparian rights—Notice of prior title—Registry laws—Possession — Acquisitive prescription.*] In the conveyance of lands for the permanent way the deed described lands sold to the railway company as bounded by a non-navigable stream, as "selected and laid out" for the railway. Stakes were planted to show the side lines, but the railway fences were placed inside the stakes above the water's edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water-rights, mills, and dams constructed in stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. that the description in the deed included, *ex jure naturæ*, the river *ad medium filum aquæ*, and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them;—2. that the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences or the bed of the stream *ad medium filum*; and—3. that such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. MASSAWIPPI VALLEY RY. CO. *v.* REED — 457

SALE—*Succession duties—Exempted property—Provincial bonds—Sale under will—Taxation of proceeds of sale* — — — — 350

See DUTIES.

2——*Sale of monument by sample—Evidence of contract—Findings on contradictory evidence—Reversal on appeal—Practice* — — 292

See EVIDENCE 4.

3——*Contract— Shipping receipt — Carriers—Liability limited by special conditions—Negligence — Connecting lines of transportation — Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent — Varying terms of contract* — — — — 432

See CARRIERS 2.

SHIPPING — *Admiralty law — Navigation — Narrow channels — "White law" R. 24 — Right of way — Meeting ships — Collision* — — 1

See NAVIGATION 1.

SOLICITOR — *Criminal law — Procedure at trial — Canada Evidence Act*, 1893 — *Husband and wife as competent witnesses — "Communications" — Privilege — Construction of statute — Directions given by legal adviser* — — 255

See CRIMINAL LAW 2.

STATUTE, CONSTRUCTION OF — *Canada Evidence Act*, 1893 — *Construction and interpretation — Competency of husband and wife as witnesses — Communications — Privilege — Reference to Hansard debates.*] Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills J. dissenting. — Evidence by the wife of the person accused of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills J., dissenting. — *Per* Girouard J. (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo, de facto* or *de corpore*. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received. — *Per* Mills J. (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown. — *Per* Taschereau C. J. The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. GOSSELIN *v.* THE KING — 255

2 — *Constitutional law — Construction of British North America Acts — Representation of Provinces, etc., in House of Commons — Aggregate population of Canada.*] In determining the number of representatives to which Ontario, Nova Scotia and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in subsection 4 of section 51 of the British North America Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. — *In re* REPRESENTATION OF THE PROVINCES OF CANADA IN THE HOUSE OF COMMONS OF CANADA, — — 475

3 — *Constitutional law — Construction of B. N. A. Acts — Representation of P. E. Island in House of Commons.*] The special terms on which the Province of Prince Edward Island was admitted into the Dominion do not except that province from the general operation of the clauses of the British North America Act, 1867, as to representation in the House of Commons as above stated. *In re* REPRESENTATION OF PRINCE EDWARD ISLAND — — — 594

4 — *Donatio mortis causâ — R. S. N. S.* [1900] *ch.* 163, 535. — *Corrobative evidence* — 145

See GIFT 1.

5 — *R. S. N. S.* [1900] *ch.* 71, *ss.* 263, 264 — *Municipal regulations — Operation of tramway — By-law or resolution — 63 V. c.* 176 (*N.S.*) — 180

See TRAMWAY 1.

6 — *Perjury — Judicial proceeding — De facto tribunal — Misleading justice — Jurisdiction — R. S. Q. Arts. 5551, 5561 — Criminal Code, sec. 145* — — — — — 228

See CRIMINAL LAW 1.

7 — *Construction of statute — Railway charter — Terminus "at or near" a point named* — 376

See RAILWAY 2.

STATUTES — *B. N. A, Act, 1867, s. 51* — 475

See CONSTITUTIONAL LAW 1.

2 — *R. S. C. c. 135, s. 63* [*Supreme and Exchequer Courts*]. — — — — 373

See ACTION 3.

3 — *R. S. C. c. 135, s. 29* [*Supreme and Exchequer Courts.*] — — — — 134

See APPEAL 2.

4 — *50 & 51 V. c. 16, ss. 16, 23, 58 (D)* [*Supreme and Exchequer Courts.*] — — 335

See PUBLIC WORKS 2.

5 — *55 & 56 V. c. 29, s. 145 (D)* [*Criminal Code.*] — — — — — 228

See CRIMINAL LAW 1.

6 — *56 V. c. 31 (D)* [*Canada Evidence Act.*] — — — — — — 255

See CRIMINAL LAW 2.

7 — *60 & 61 V. c. 34, s. 1 s.s. (e) (D)* [*Supreme Court.*] — — — — — 16

See APPEAL 1.

8 — *14 & 15 V. c. 51 (Can.)* [*Railways.*] — 457

See RAILWAYS 3.

STATUTES—*Continued.*

9——*25 V. c. 61, s. 15 (Can.)* [*Massawippi Valley Railway Co.*] — — — — 457

See Railways 3.

10——*R. S. Q. Arts. 5551, 5561* [*Trespass.*] — — — — — — 228

See Criminal Law 1.

11——*60 V. c. 78 ss. 7, 27 (Que.)* [*Stadacona Water, Light & Power Co.*] — — 50

See Municipal Corporation 1.

12——*R. S. N. S. (1900) c. 63, s. 35* [*Evidence.*] — — — — — — 145

See Gift 1.

13——*R. S. N. S. (1900) c. 71, ss. 263, 264* [*Towns Incorporporation.*] — — 180

See Municipal Corporation 2.

14——*63 V. c. 176 (N.S.)* [*Liverpool & Milton Railway Co.*] — — — — 180

See Municipal Corporation 2.

SUBSTITUTION—*Construction of will—Opening of substitution—Legacy to substitutes——Legatees taking per stirpes or per capita.*] By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime and, after her death, to his surviving children and, by the sixth clause, provided as follows: "Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, a compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété." *Held*, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes*. Remillard *v.* Chabot — — — 328

SUCCESSION DUTIES—*Provincial bonds—Succession duties—Property exempt—Sale under will—Duty on proceeds.*] Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney General claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills JJ. dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were. Lovitt *v.* Attorney General for Nova Scotia — — 350

TENANT—*Recourse for drmages—Expropriation—Right of action—Fencing—Laying out boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Description of lands—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by sufferance—Right of action—Adding parties—Practice* — — 457

See Railways 3.

And *See* Landlord and Tenant—Lease—Title to Land.

TITLE TO LAND—*Will—Devise for life—Remainder to devisee's children—Estate tail.*] Land was devised to D. for life "and to her children if any at her death," if no children to testator's son and daughter. D. had no children when the will was made. *Held*, that the devise to D. was not of an estate in tail, but on her death her children took the fee. Grant *v.* Fuller — — — — — 34

2——*Devise of real property—Condition of will—Restraint on alienation.*] A devisee of real estate under a will was restrained from selling or encumbering the property for a period of twenty-five years after the death of the testator. *Held*, reversing the judgment appealed from, that as the restraint, if general, would have been void the limitation as to time did not make it valid. Blackburn *v.* McCallum — — — — — 65

3——*Possessory title—Statute of limitations.*] In 1802, M. obtained a grant of land from the Crown and in 1823, permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870, he deeded the land to his four sons who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B. who pro-

TITLE TO LAND—*Continued.*

ceeded to cut timber from it. In an action for trespass by P.: *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not, the deed to his sons, in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. BENTLEY *v.* PEPPARD — — — — — 444

4——*Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by sufferance—Arts.* 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 *C. C. Art.* 77 *C. P. Q.*—14 & 15 *Vict. ch.* 51—25 *Vict. ch.* 61 *s.* 15—*Findings of fact—Assessment of damages — Emphyteutic lease — Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*]—A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to show the side lines, but the railway fencing was placed inside the stakes above the water line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium filum* and, after the registration of the deed to the company, sold the rest of his property including water-rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, etc." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter, and The Railway Act, 14 & 15 Vict. ch. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas (1) That the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) That the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium filum*; (3) That by ten years possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years; and (4) That, by thirty years adverse possesion without title, the defendant and his *auteurs* had

TITLE TO LAND—*Continued.*

acquired a title to the strip of land and riparian rights in question. On appeal to the Supreme Court; *Held* 1.—That the description in the deed to the railway company included *ex jure naturæ*, the river *ad medium filum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2.—That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under Art. 2251 C. C., but merely an occupation as tenant by sufferance upon which no such prescription could be based. 3.—That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the land conveyed. 4.—That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company. 5.—That the acquisitive prescription of thirty years under Art. 2242 C. C. could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, Davies J. *dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as owners of the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees.—*Semble*, that, if necessary, the lessees might have been allowed to be added as parties, plain-

TITLE TO LAND—*Continued.*

tiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — — — — 457

TORT—*Contract—Shipping receipt—Carriers—Liability limited by special conditions—Negligence—Connecting lines of transportation—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract* — — — 432

See CARRIERS 2.

TRAMWAY—*Municipal corporation—Tramway—Operation of railway—Use of streets—Regulations—Crossings—Powers—By-Law or resolution—63 V. c. 176 (N. S.)—R. S. N. S. (1900) c. 71, ss. 263, 264—Construction of statute.*] By the Nova Scotia statute, 63 Vict. ch. 176 the tramway company was granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property. *Held*, reversing the judgment appealed from, Davies J. dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of section 264 of "The Towns Incorporation Act." (R. S. N. S. (1900) ch. 71.) LIVERPOOL & MILTON RWAY. *v.* TOWN OF LIVERPOOL. — — 180

2——*Occupation of leased lands—Injury to leased property—Recovery of land and damages* — — — — — — 457

See TITLE TO LAND 4.

VERDICT—*Proof of accidental death—Waiver of condition in policy—Finding of jury—Verdict.* — — — — — 253

See INSURANCE, ACCIDENT.

2——*Evidence of possession—Finding of jury—Statute of limitations* — — — 444

See TITLE TO LAND 3.

3——*Railways—Carriers—Special instructions—Acceptance by consignee—Negligence—Amendments* — — — — — 115

See RAILWAY 1.

WARRANTY—*Possession animo domini—Vendor in possession—Acquiring adverse title by prescription.*] A warranty of title to lands cannot hold adverse possession of the lands conveyed such as is required to make title by acquisitive prescription. MASSAWIPPI VALLEY RY. CO. *v.* REED — — — — 457

WATERCOURSES—*Railways—Construction of deed—Location of permanent way—Laying out boundaries—Fencing—Riparian Rights—Notice of prior title—Registry laws—Possession—Acquisitive prescription.*] In the conveyance of lands for the permanent way the deed describing lands sold to the railway company as bounded by non-navigable stream, as "selected and laid out" for the railway. Stakes were planted to show the side lines, but the railway fences were placed inside the stakes above the water's edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water-rights, mills, and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. That the description in the deed included, *ex jure naturæ*, the river *ad medium filum aquæ* and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them;—2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed diferent from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences or the bed of the stream *ad medium filum*, and—3. That such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. MASSAWIPPI VALLEY RY. CO. *v.* REED. — — — — — 457

WATERWORKS—*Municipal debenture—By-law—Approval by ratepayers and Lieutenant Governor—60 V. c. 78, ss. 7, 27 (Que.)* — — — — — — — 50

See MUNICIPAL CORPORATIONS 1.

"WHITE LAW"—*Admiralty law—Navigation—Narrow channels—"White law" R. 24—Right of way—Meeting ships—Collision* — 1

See ADMIRALTY LAW 1.

WILL—*Devise for life—Remainder to devisee's children—Estate tail.*] Land was devised to D. for life "and to her children if any at her death," if no children to testator's son and daughter. D. had no children when the will was made. *Held*, That the devise to D. was not of an estate in tail, but on her death her children took the fee. GRANT *v.* FULLER 34.

WILL—*Continued.*

2——*Condition in Will—Devise of real estate—Restraint on alienation.*] A devisee of real estate under a will was restrained from selling or encumbering it for a period of twenty-five years after the testator's death. *Held*, reversing the judgment appealed from, that as the restraint, if general, would have been void the limitation as to time did not make it valid. BLACKBURN *v.* MCCALLUM — — 65

3——*Construction of will—Survivorship—Intestacy.*] H. by his will provided for disposal of his property in case his wife survived him but not in case of her death first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time I request the following disposition to be made of my property" * * * H. died sixteen days after his wife but made no change in his will. *Held*, affirming the judgment appealed from (4 Ont. L. R. 666; 2 Ont. L. R. 169) that H. and his wife were not deprived of life at the same time and he therefore died intestate. MACLEAN *v.* HENNING — — — — 305

4——*Debt by devisee to testator—Devise of all testator's property—Chose in action.*] A devise of all "my real estate and property whatsoever and of what nature and kind soever" at a place named does not include a debt due by the devisee, who resided and carried on business at such place, to the testator; (4 Ont. L. R. 682 affirmed). THORNE *v.* THORNE — 309

5——*Construction of will—Opening of substitution—Legacy to substitutes—Legatees taking per stirpes or per capita.*] By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime and, after her death, to his surviving children and, by the sixth clause, provided as follows: "Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et légue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par, mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété." *Held*, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's childrem, on the opening of the substitution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes*. REMILLARD *v.* CHABOT — — — 328

6——*Succession duties—Exempted property—Provincial bonds—Sale under will—Taxation of proceeds of sale* — — — — 350

See DUTIES.

WITNESS—*Husband and wife—Competency of witness—Criminal cases—Canada Evidence Act*, 1893—"*Communications*"—*Privilege—Advice of legal counsel* — — — 255

See CRIMINAL LAW 2.

WORDS AND TERMS—1. "*At or near*" — — — — — — — 376

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2. "*Bounded by the river*" — — 457

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3. "*Communications*" — — — 255

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4. "*From*" *and* "*to*" — — — 396

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5. "*Near.*" "*At or near*" — — 376

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6. "*To,*"—"*From*" *and* "*to*" — — 396

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