1925

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. FRANCIS ALEXANDER ANGLIN, C.J.
" JOHN IDINGTON J.
" " LYMAN POORE DUFF J.
" PIERRE BASILE MIGNAULT J.
" EDMUND LESLIE NEWCOMBE J.
" THIBAUDEAU RINFRET J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ERNEST LAPOINTE K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. E. J. McMURRAY K.C.

The Hon. LUCIEN CANNON K.C.

10658—1½

ERRATA

Page 303, twenty-seventh line—" McGillivray K.C." should read " Mavor K.C."

Page 511, sixteenth line—" to " should read " in."

Page 560, last line of head-note—" Duff J." should read " Idington J."

Page 565, twenty-sixth line—" V. M. Wilson " should read " U. M. Wilson."

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF THE PREVIOUS VOLUME OF THE SUPREME COURT REPORTS.

Anderson Logging Co. v. *The King* ([1925] S.C.R. 45). Leave to appeal granted, 31st March, 1925. Appeal dismissed with costs, 24th November, 1925.

Board of Trustees of the Rom. Cath. S.S. for Toronto v. *City of Toronto* ([1924] S.C.R. 368). Appeal allowed, 28th July, 1925.

Borrowman v. *The Permutit Co.* ([1925] S.C.R. 685). Leave to appeal granted, 27th July, 1925.

Canadian National Railways v. *Fournier.* Leave to appeal granted *in forma pauperis,* 25th July, 1925.

Canadian Pacific Ry. Co. v. *Ouellette* ([1924] S.C.R. 426). Appeal allowed with costs, 30th March, 1925.

King, The, v. *Eastern Terminal Elevator Co.* ([1925] S.C.R. 434). Leave to appeal refused, 22nd October, 1925.

King, The, v. *Price Brothers.* Leave to appeal granted. 28th July, 1925.

Lakes and St. Lawrence Transit Co. v. *Niagara, St. Catharines and Toronto Ry. Co.* Appeal dismissed with costs, 2nd November, 1925.

Lew v. *Lee* ([1924] S.C.R. 233). Leave to appeal granted, 21st January, 1925. Appeal dismissed with costs, 13th May, 1925.

Manitoba Act, 13 Geo. V, c. 17, Reference ([1924] S.C.R. 317). Appeal dismissed, 26th March, 1925.

Manitoba v. *Canadian National Railways* ([1925] S.C.R. 18). Leave to appeal granted, 5th March, 1925.

Montreal Transportation Co. v. *The King.* Leave to appeal granted, 7th May, 1925.

Ottawa Electric Co. v. *Létang* ([1924] S.C.R. 470). Leave to appeal granted *in forma pauperis,* 17th July, 1925.

Smith v. *The Minister of Finance* ([1925] S.C.R. 405). Leave to appeal granted, 22nd October, 1925.

Stevenson v. *Florant* ([1925] S.C.R. 532). Leave to appeal granted, 28th July, 1925.

Trudel v. *Lemoine* ([1925] S.C.R. 698). Leave to appeal granted, 27th July, 1925.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE SHIP *PERENE* (DEFENDANT).....APPELLANT; 1924

AND

THE OWNERS OF THE *MAID OF SCOTLAND* (PLAINTIFFS) ..... } RESPONDENTS. *Dec. 2, 3. *Dec. 30.

THE SHIP *PERENE* (DEFENDANT).....APPELLANT;

AND

R. P. & W. F. STARR LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE NEW BRUNSWICK DIVISION OF THE EXCHEQUER COURT OF CANADA

Damages—Collision at sea—Insurance—Unexpired portion of premium.

In an action claiming damages for loss of a ship in a collision the owner cannot recover the amount of the unexpired portion of the premium paid for insurance against such loss.

Judgment of the New Brunswick Admiralty Division ([1924] Ex. C.R. 229) varied, Idington J. dissenting.

APPEAL from the judgment of the New Brunswick Admiralty Division of the Exchequer Court of Canada (1) in favour of the respective respondents.

The only question dealt with on this appeal is that stated in the above head-note.

Baxter K.C. and *Carter* for the appellant. Refer to Arnould on Marine Insurance (8 ed.) sec. 1251, page 1510; *Tyrie* v. *Fletcher* (2); *The Geelong,* Registrar's report Roscoe Maritime Collisions, Measure of Damages (2 ed.) 174.

Fred. R. Taylor K.C. for the respondents.

The judgment of the majority of the court Anglin C.J., Duff, Mignault, Newcombe and Rinfret JJ., was delivered by

NEWCOMBE J.—The SS. *Perene* going out of St. John Harbour on 1st February, 1921, at the end of the middle watch,

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 229. (2) 2 Cowp. 666.

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ran down and sank the three-masted schooner *Maid of Scotland,* which was then off the entrance of the harbour intending to beat her way up. The owners of the schooner, defendants in the first named action, proceeded in the Exchequer Court in Admiralty to recover damages for the loss of the vessel. The schooner was laden with 646 tons, 14 cwt. of anthracite coal from New York belonging to R. P. & W. F. Starr, Ltd., the respondent in the second of the above named actions. This company also proceeded in the Exchequer Court in Admiralty to recover damages for the loss of the cargo. The two cases were tried together before the local judge of the court at St. John, upon agreement that the evidence to be given should apply to both cases. The learned local judge for the reasons stated in the very careful judgment which he delivered found for the plaintiffs in both cases and assessed the damages for the schooner at $26,465 and for the cargo at $10,640.78. From these judgments the *Perene,* defendant in both cases, appeals to this court alleging that the findings are erroneous and that she is not responsible for the collision.

These two appeals, in each of which the *Perene* is the appellant, and in which both respondents were represented by the same counsel, were, for convenience, heard together. At the conclusion of the appellant's argument the court considered that the appellant had not, as to either appeal, made out a case of error in fact, or the disregard of any cardinal principle, such as would justify the court in varying the judgments either upon the main question of responsibility, or as to the quantum of damages, except in one particular, as to which counsel for the respondents were heard and the cases reserved for consideration. It appeared that in assessing the damages of the owners the local judge, having valued the vessel at the time of her loss at $20,000, allowed in addition several items, including one for insurance premium unexpired, amounting to $1,634, and that, in assessing the value of the cargo, he allowed for marine insurance premium $156.93, and he states that as to these special items of insurance premium liability was not disputed. Upon appeal however the appellant maintains that these two items were allowed, the one to the owners of the schooner, the other to the owners of the cargo, without authority in law or precedent, and that the dam-

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ages in each case should therefore be reduced by these amounts respectively. As the question in its bearing as to the respective cases depends upon different considerations I shall consider the cases separately.

Perene v. *Maid of Scotland*

No explanation is given in the judgment for including the insurance premium as part of the respondents' damages except the statement that the right to the unexpired insurance premium was not disputed. The schooner was insured by a time policy, and the $1,634 is claimed as that part of the insurance premium paid by the owners of the schooner which, it is said, was attributable to the unexpired period of the policy. The appellant, however, now contends that, the risk having attached, there can be no apportionment of the premium by reason of the loss of the ship by the perils insured against before the expiry of the policy, and that the premium does not constitute an element of loss which can properly be considered in the assessment. On the other hand it is urged that either the premium should be apportioned and the amount attributable to the unexpired period of the policy made good by the appellant, by whose negligence the schooner was sunk; or that the value of the schooner for purposes of assessment should be regarded as enhanced by the fact that she was covered by insurance which had at the time of the loss a considerable period to run. The question is not, so far as I have been able to discover, directly covered by judicial decision. In the case of *The Harmonides* (1), a similar claim was made and disallowed by the District Registrar, but although the report was reviewed on appeal upon other grounds, no question was raised as to the propriety of the District Registrar's disposition of the item for insurance premium; also it appears from Mr. Roscoe's valuable book on The Measure of Damages in Maritime Collisions, 2nd edition, pp. 37, 38, 174, that such claims are not allowed in the Registrar's office. It seems clear enough that no proportionate allocation of the premium upon a marine risk can be referred to any part of the period for which the risk is contracted; the contract is entire and the premium has relation only to the risk in its entirety; therefore it is

(1) [1903] P.D. 1.

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difficult to perceive how any just distribution can be made. If the risk had not attached presumably the premium would be adjusted by refund from the insurer to the insured, and in such a case, upon obvious principles, neither would be entitled to recover from the wrongdoer through whose fault the property was lost before the attaching of the risk. The expense of the premium is directly attributable to the contract, not to the collision, and damages based upon interference with the insurance contract are too remote. Moreover, since it is the insured and not the wrongdoer who has the benefit of the insurance, it is incompatible with principle that the latter should pay for it. This objection is well stated by Mr. Roscoe, citing *Yates* v. *White* (2); and *Bradburn* v. *Great Western Ry. Co.* (3), where he says:

> If any part of the premium could be recovered from the owner of the wrongdoing ship the latter would be fairly entitled to ask that the amount paid under the policy should be taken into consideration in the assessment of the damages; and it has been held that a wrongdoer is not entitled to claim any reduction in respect of money received by an injured party under a policy.

For these reasons I am disposed to think that, notwithstanding the absence of any objection at the trial, the learned judge had no authority in law to bring the insurance premium into the assessment of damages.

I do not think, however, that either because of the insurance or for any other reason the value of the vessel as found by the local judge should be increased, and therefore in the result the conclusion upon the whole case with regard to the schooner is that the judgment below should be varied by reducing the amount found, namely, $26,465 by $1,634, the amount included in it for insurance premium, and that in all other respects the judgment should be affirmed for the reasons stated in the judgment at the trial. But inasmuch as the defendants in the Exchequer Court did not dispute the insurance premium, which also represents only a comparatively small item of the aggregate amount involved in the appeal, they will, notwithstanding the variation of the judgment, have no costs of the appeal.

Perene v. *Starr, Ltd.*

In figuring the value of the cargo the local judge includes the amount paid for the coal, 10 per cent added for profits,

(1) 4 Bing. N.C. 272.

(2) L.R. 10 Ex. 1.

commission brokerage and overhead, a small advance on freight, cost of exchange and marine insurance premium, $156.93, the latter being the cost of insurance for the voyage, and beginning with a quotation from Halsbury's Laws of England, vol. 26, p. 541, he says:—

> Cargo owners who have lost their goods carried in one vessel in consequence of a collision due to the negligent navigation of another vessel, are as a rule entitled to recover from the owners of the other vessel the value of the goods at the place and time and in the state at and in which they ought to have been delivered to the owners, as the value is the market price of the goods if there is a market there. If not, such value has to be calculated, taking into account among other matters the cost price, the expenses of transit, and the importer's profit.
>
> No evidence was given before me to show what the market price of the goods was at the city of St. John, the place at which the coal ought to have been delivered to the plaintiffs. Such value must, therefore, be calculated, and among other matters to be taken into account as laid down in the paragraph which I have quoted from Halsbury, are the cost price, the expenses of transit and the importer's profit.
>
> It was not contended on behalf of the defendant that ten per cent of the amount of the coal was too large a sum to be allowed to cover the items mentioned and which were described by Mr. Starr as covering profits, incidental expenses, brokerage, cost of telegraphing and other items. I am of opinion that the charge was a moderate one, and as no objection was taken to it on the ground of the percentage charged, and as in calculating the market value the items mentioned should be taken into account, I will fix the damages at the full amount of $10,640.78 with interest from the first day of February last.

There appears to be no misdirection here. It is true that the selling price of coal at St. John is not proved by evidence of the market, but Mr. Starr who was called to establish the value gave his testimony without any objection whatever, and from this it would appear that according to the actual price paid, plus the additions above mentioned, the coal would have a value of less than $16.50 per long ton at St. John, and seeing that the local judge found the value in accordance with the proof so made; that the admissibility of the evidence was not questioned; and particularly that no objection to any item was made, except as to the propriety of including any sum for estimated profit; it would seem, having regard to the course of the trial, that his finding ought not to be disturbed. The cost of the insurance, if the cargo had safely come to hand, would have been realized out of the proceeds of the sale, and I see no reason why the total value as found by the local judge should be reduced by the amount of the premium; it really would form part of the cost of the goods to the owner at St. John.

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For these reasons and for the reasons stated by the local judge, this appeal should be dismissed with costs.

IDINGTON J.—The steamship *Perene,* in the Bay of Fundy, on the 1st of February last, ran down in collision the sailing schooner *Maid of Scotland* and thereby sank her and her cargo and four of her crew, which consisted of six men in all. The result was the total loss of the schooner and her cargo, as well as of four lives.

The learned Chief Justice Hazen, as Local Judge in Admiralty, having tried the claims of the owners of the schooner *Maid of Scotland* arising out of said collision, and the claims of the respondent R. P. & W. F. Starr, Limited, owners of the cargo, delivered, on the 30th of April, a long and well considered judgment finding the appellant wholly to blame.

At a later date, the 13th of May last, he heard the counsel for the respective parties relative to the damages to be allowed as flowing from and recoverable by the respective respondents, and delivered, as result thereof, on the 19th of May last, a lengthy and able judgment covering in every reasonable way the entire questions arising in both cases.

From these judgments the *Perene* appealed to this court and, after a long argument by the leading counsel (exceeding the limit of time allowed by the rules of our court), we came to the unanimous conclusion that as to the question of which party was to blame, there was no doubt in our minds that the judgment of the learned trial judge was right, and there was no need for counsel for respondent to deal with anything except the question of damages, and the appellant's counsel were heard as to the items they objected to.

They objected to the principle upon which the learned trial judge proceeded, in assessing the damages for the loss of the schooner.

That seemed to me hardly arguable as there was ample evidence for him to have allowed more for the value of the schooner than he did. I will advert to that later in considering some objections taken to some of the other items that the owners of the schooner were allowed.

Meantime I will take up the claims for the loss of the cargo with which the learned judge dealt first.

He sets forth the claims made in respect thereof, and deals therewith, as follows:—

In the case in which R. P. & W. F. Starr, Limited, is plaintiff, being No. 227, the amount which the plaintiff claims is $10,640.78, with interest at five per cent from the first day of February, and the claim is made up as follows:

Amount paid for coal	$ 9,215 48
Ten per cent which Mr. Starr gives as the amount to cover commission brokerages and overhead	921 54
Advance made on freight	58 20
Premium actually paid for U.S. funds	288 03
Marine Insurance premium	156 93
	$10,640 78

together with interest from the time of the loss at five per cent.

Of these items the only one to which objection is taken by counsel for the defendant is the second item, viz., $921.54, and it is submitted that so far as that covers profits and commissions it is not competent to the plaintiff to claim it and he is not entitled to it. In support of this proposition two cases were cited—*Ewbank* v. *Nutting* (1), *and British Columbia, etc., Co.* v. *Nettleship* (2), both of which are common law cases, the facts being entirely different from those in the present case, and it is admitted by the defendant's counsel that they are not directly in point.

He then proceeded to quote the rule laid down in Halsbury, vol. 26, page 541, and refer generally to the evidence, and continued as follows:

It was not contended on behalf of the defendant that ten per cent of the amount paid for the coal was too large a sum to be allowed to cover the items mentioned and which were described by Mr. Starr as covering profits, incidental expenses, brokerage, cost of telegraphing and other items. I am of opinion that the charge was a moderate one, and as no objection was taken to it on the ground of the percentage charged, and as in calculating the market value the items mentioned should be taken into account, I will fix the damages at the full amount of $10,640.78 with interest from the first day of February last.

I see no ground for complaining of said finding and would dismiss the appeal with costs to the said owners of the cargo.

Then as to the claims of the owners of the *Maid of Scotland,* the learned trial judge presents that as follows:—

Coming now to the other case, No. 226, *Frank K. Warren* v. *SS. Perene,* the plaintiff claims damages for the loss of the *Maid of Scotland* of $40,000, and the following additional amounts:

Value of stores and ship chandlery	$ 1,300 00
Cost of removing spars	1,000 00
Insurance premiums unexpired	1,634 00
Freight on coal for Starr payable in U.S. funds	750 00
Earnings of voyage to Canary Islands payable in U.S. funds	2,000 00
Premium on freight on coal and lumber to the Canary Islands for U.S. funds	81 00
	$46,765 00

(1) 7 C.B. 797. (2) 37 L.J.C.P. 235.

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Of these items those for the unexpired insurance premium, the freight on the Starr coal, the earnings of the voyage to the Canary Islands and the premium for the United States funds are not disputed. The plaintiff also claims interest from the first day of April last, the date on which under the charter party the vessel after discharging its cargo at St. John and loading there with lumber, would have delivered the same at the Canary Islands. That charter party was given in evidence. It was dated on the 17th January, 1924, and under it the vessel was chartered from St. John to Las Palmas, Grand Canary, to carry a cargo of pine or spruce lumber not exceeding 450,000 s.f. The amount to be paid under the charter party at $10 s.f. amounted to $4,500, and the evidence was that the disbursements and expenses in connection with this would amount to $2,500, leaving a balance of profit of $2,000. Under the authorities it is quite clear that the plaintiff is entitled to this amount.

The principal controversy was over the amount that should be allowed as damages for the total loss of the *Maid of Scotland,* and it will be necessary to consider the principles that should be applied in arriving at such damages.

I wish to draw particular attention to the statement of the learned judge in the foregoing as to those items not disputed, and which, practically, I submit, must be taken as attesting an admission as made by the appellant at the trial.

Now it is in regard to one of these very items that is for the proportion of the insurance premium allowed, that the counsel for appellant had most to say here, in dealing with the minor items.

I pressed him for evidence relevant thereto for, as I pointed out to him, there might be some very satisfactory explanation, but he could not point to any; however he was frank enough to admit that he had not taken any objection thereto at the trial, or on argument below, and only thought of it afterwards.

Counsel for respondent affirmed he had never heard of this objection until he read the factum of appellant.

It is to be observed that the case was tried without any pleadings. The preliminary act of each party is all that appears in the record. Counsel for respondent suggested that the learned trial judge no doubt had in mind the contest over the value of the vessel and that he may have borne that in mind in trying to do justice herein between the parties, for the estimate upon which he proceeded was so far below the claim made and the last word in that connection upon which I surmise he acted, was by Mr. Warren, who put it at $20,000 to $25,000, and he allows only the lower of these estimates when I imagine he might have

easily gone a few thousand dollars higher, and that may be simply because he felt he was making allowances in other items which must be considered.

Of course such speculative reasoning is not very satisfactory.

But upon thinking this matter over and reading further than the argument led me, I find that in the conclusion the learned judge reaches, he allows interest to the respondent only from first of April next, whilst in the other case he allows interest from the first of April last; and gives reason therefor as follows:

with interest at five per cent on this amount from April 1 next, the date at which the charter for carrying lumber to the Canary Islands would have expired.

If I am right in my conjecture that he was trying thereby and by the freight allowances he made, to arrive at a just dealing between the parties, then I feel, as respondents were entitled to interest from the date of the accident and wrong done by the appellant, which has not been allowed but postponed till following April, which, at five per cent, would balance things up, the claim now made by appellant is rather frail, indeed has no proper foundation in justice to be given effect to in this court.

There is a freight claim also allowed which may be viewed in same light.

I am not at all in doubt that a judge or jury think interest should be allowed from the date of the accident; the law will give it unless there is some special provision relative to such a case as this.

Often there is a very great difference in this application of the allowance of interest to the particular case in question in the varying jurisdiction we have to deal with.

All the other grounds of objection on the part of counsel for appellant are matters involving no principle of law.

And I submit that the case of *Tyrie* v. *Fletcher* (1) does not touch what we have to deal with herein. As between insured and insurer it is clear law, unless by the contract differed from, but it is not what is involved herein.

And the cases cited by appellant of *Cattle* v. *The Stockton Waterworks Co.* (2), and *La Société Anonyme de Re-*

(1) 2 Cowp. 666.

(2) L.R. 10 Q.B. 453.

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morquage à Hélice v. *Bennetts* (1), do not touch this case and, though cited as doing so in principle, I respectfully beg to differ.

I would dismiss this appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Baxter, Lewin, Carter & Hunton.*

Solicitor for the respondents: *Fred. R. Taylor.*

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*Dec. 3.
*Dec. 30.

IRENE PEARL MIDDLEBRO AND ANOTHER ..... } APPELLANTS;

AND

HAROLD G. RYAN AND NORMAN RYAN ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Will—Use of definite terms—Repetition—Presumption of uniformity.

When, in a deed or will, a word or phrase is used with a definite meaning and the same is repeated but the meaning is not so clear, *prima facie* the same meaning is intended to be conveyed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario varying the order made by Latchford J. on a motion for the advice of the court as to construction of the will of George Byron Ryan.

The material clauses of the will and the matters to be decided will be found in the opinions of the judges reported herewith.

Hellmuth K.C. for the appellants.

H. J. Scott K.C. for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was written by

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1911] 1 K.B. 243.

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MIDDLEBRO v. RYAN

Anglin C.J.C.

ANGLIN C.J.C.—The question to be decided on this appeal is whether " the book value " of the testator's businesses, at which the respondents are given an option to acquire them, is that which appeared at the date of the testator's death in his books or is that shewn on the last statement of its affairs entered in the firm's books by the managers thereof in the usual course of business prior to the exercise of such option. Mr. Justice (now Chief Justice) Latchford, who heard the matter on an originating summons, took the former view; the Appellate Divisional Court the latter.

Clause "c " of the will reads as follows:

(c) I direct that my store property on Wyndham street, Guelph, shall be taken in and considered as one of the assets of my Guelph business and that my store property in Owen Sound shall be taken in and considered as one of the assets of my Owen Sound business. Both of the said properties shall be taken in at the book value thereof and the income therefrom shall be paid into and all taxes and outgoings in connection therewith shall be paid and borne by my said Guelph business and my said Owen Sound business respectively.

Clause " f," on which the question now before us arises, is in the following terms:

(f) I direct that after the expiration of five (5) years from my decease unless otherwise arranged with my executors, my sons, if they desire to purchase the said businesses shall commence to pay my estate for the same upon the basis of the book value thereof at the rate of not less than ten per cent (10%) thereof annually.

The Appellate Division also held that " the book value of the store properties " referred to in clause " c " of the will means the book value as it appears in the last annual or other statement entered in the firm's books by the managers thereof in the usual course of business, whereas, Latchford J. had held that " the book value " as shown by the books of the testator at his death is what is meant in that clause.

The present appeal is from the variation by the Appellate Divisional Court of the judgment of Mr. Justice Latchford on both these points.

The testator owned two businesses—one in Guelph, the other in Owen Sound. By his will he directed that these businesses should be carried on by his trustees (his widow, eldest daughter and two sons) under the management of the two sons who had been actively engaged with him in the businesses and had a sum of $30,000 " standing to their credit " in them.

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Anglin C.J.C.

The trustees were given power to fix a " cash salary " for the managers; they were required to set aside annually a sum equal to 7 per cent on the testator's capital invested in the businesses which, with 7 per cent per annum on his residuary estate, would provide an " income fund " from which his widow should receive an annuity of $6,000 and the residue would be distributable amongst his four children equally. Any surplus profits of the businesses, after paying the managers' salaries, setting aside such 7 per cent and providing whatever further sums the trustees should deem proper " for depreciation, taxes, contingencies and reserve," were to belong to the two sons as additional salary, but were to remain with the $30,000 above mentioned in the businesses at their credit, but without bearing interest, until such time as they should purchase the same.

The testator also directed that the proceeds of the sale of certain lands owned by him in Saskatchewan should be paid into and form part of the assets of his businesses and that the properties in which his Guelph and Owen Sound businesses were carried on should also be assets of those businesses respectively and should " be taken in at the book value thereof." He empowered his trustees to invest further estate moneys in the Guelph and Owen Sound businesses and, if they thought fit, to establish other similar businesses. The businesses were to be carried on as long as the trustees should think it practicable or desirable; but, in the event of Mrs. Ryan's death before the sons had acquired them, a joint stock company was to be incorporated to take over the businesses on a basis which would ensure to his two daughters 7 per cent on their interest or share of the estate invested in them.

The adjudication of Latchford J. that

> the sons cannot make an election to buy any of the businesses of the testator till after the expiration of five years from the death of the testator,

affirmed by the Appellate Divisional Court, has been accepted by the parties and is, therefore, binding, as is also the determination of the Appellate Division, reversing the decision of Latchford J., that the 7 per cent payable into the " income fund " out of the profits of the businesses is to be computed upon

> the net capital as it appears in the last annual or other statement entered in the firm's books by the managers thereof, in the usual course of busi-

ness from year to year, and if supplemented by the trustees from the proceeds of the Testator's Saskatchewan lands referred to in the will, or by other advances, as it may appear from year to year in the books of the two establishments.

It is abundantly clear that the store properties were to be regarded as part of the assets of the businesses from the death of the testator. Clause " c " so directs. It was as of that date that they were to " be taken in." There would, therefore, with the utmost respect, seem to be no room for doubt that " the book value " of the store properties dealt with in clause " c," as was held by Latchford J., is " the book value " thereof as shewn in the books at the time of the testator's death.

The interpretation of clause " f " is perhaps not so free from difficulty. A careful study of all the provisions of the will does not disclose any ground which can be said to be entirely conclusive for supporting either of the two constructions of it which are preferred by the respective parties. Taking all the considerations which have been suggested into account, however, the weight of them seems to us to favour the conclusion reached by Mr. Justice Latchford.

What is given to the sons is an option to purchase. They are under no obligation to acquire the businesses. In our opinion the apparent intention of the testator was that if they wished to exercise that option they should pay to his estate the capital he had invested in the businesses represented by their value, including that of the real estate, as they stood on his books at his death; that, in addition, they should pay to the estate any capital subsequently invested in the businesses by his trustees, whether proceeds of sales of Saskatchewan lands or other advances of estate moneys; and that as to such additional investments the sums payable would be the amounts which would appear in the firm's books as the value of the assets in which they were invested when put into the businesses. The same observations would apply to any estate moneys invested by the trustees in establishing other similar businesses.

As to the existing businesses, the testator probably desired to fix a price at which his sons might acquire them. If their value should materially increase (as is said to be the case with the real estate) the sons might reap an ad-

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vantage from their industry, foresight and good management; should the values substantially decline under their management, the sons were not obliged to purchase on the terms of the option, but could bargain with their fellow-trustees, with whom the will expressly provides they may "otherwise arrange" for the acquisition of the businesses; and, failing an agreement, by taking proper steps they could secure the right to bid on the businesses if offered for sale by the trustees. But, if they should exercise the option given by the will, it must be at a price which would ensure the general estate payment of the entire capital invested by the testator in the businesses as he left them, and also any other estate capital subsequently put into them by the trustees. It is quite unlikely that the testator meant to place his sons in a position where their interests would conflict with their duty, as might be the case if the purchase price under the option were to be the book values placed by them as managers upon the businesses at whatever date they might elect to purchase.

Moreover, as above indicated, the words "the book value thereof" in clause "c" clearly means, in our opinion, the values at which the store properties were entered in the testator's books at the time of his death. While it cannot he said to be a canon of construction that identical words recurring in a will must be taken to have been used to express the same meaning (compare *Ridgeway* v. *Munkittrick* (1), per Sugden L.C., with *In re Brooke, Edyvean* v. *Archer* (2), and *In re Cozens, Miles* v. *Wilson* (3)), it is at least consistent with good sense that *prima facie* when a testator repeats an expression or formula of words, which he had already used to convey a particular idea, he may be presumed to intend again to express the same idea. Of course the context, the nature of the subject-matter or the whole tenor of the instrument may sufficiently indicate an intention to use such formula or expression in some different sense and the presumption will then be rebutted. But here there is no inconsistent context, the subject-matter is neutral in suggestion and any indication afforded by the will as a whole rather points to the words, "the book value,"

(1) [1841] 1 Dr. & War. 84, 93. (2) [1903] A.C. 379, 384.
(3) [1903] 1 Ch. 138, 143.

being intended to prescribe the same criterion of value in clause "f" as in clause "c." There appears, therefore, to be no ground for departing from the view, which has been termed "good sense" and "a principle of common sense," that where a word or phrase is used with a definite meaning in one clause of a deed or will it will be presumed to mean the same thing if used in another part of such deed or will where its meaning is not so clear. (*In re Birks, Kenyon* v. *Birks* (1); *Edwards* v. *Edwards* (2)).

Finally, it is common ground that from the purchase price payable on exercising their option the sons will be entitled to deduct the entire sum of $30,000, which stood to their credit in the businesses at the time of their father's death, on whatever basis that purchase price should be arrived at. It would seem strange indeed, if the value of the businesses according to the last statement entered by them as managers in the firm's books had greatly diminished, that the sons paying that reduced value should, nevertheless, be entitled to deduct from it the entire sum of $30,000 and also any further sums held in the businesses as surplus profits appropriated to them as additional salary under a provision above referred to. It is difficult to accept that as the testator's intention. It would be equally difficult to believe that, if the value of the businesses had greatly augmented through the prudence, foresight and industry of the sons, their father meant to exact from them, as a condition of exercising their option, a purchase price equal to such enhanced value. That such was not his intention is shewn by the very provision assigning to them as additional salary the net profits of the businesses remaining after making the deductions for their cash salaries as managers, the 7 per cent contribution to the "income fund" and the other charges for which the trustees are directed to provide.

Nor does the provision of clause "g" directing the payment into "the income fund" of 7 per cent annually

upon the book value of my capital invested in the said businesses from time to time

present any difficulty. The words "from time to time" were necessary because of the provision for additions to the

(1) [1900] 1 Ch. 417, 418. (2) 12 Beav. 97, 100.

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invested capital of the proceeds of the sales of Saskatchewan lands and the advances from the testator's general estate which the trustees were empowered to make. Their presence rather indicates that intending the words "the book value of any capital invested in the said businesses" in clause "g" to mean the amounts so invested as shown in the firm's books at some date other than that of his death, the testator thought it necessary to add a phrase apt to convey that idea.

Reading the will as a whole the dominant idea of the testator seems to have been, after providing for his widow, that there should be equality in the distribution amongst his four children of the amount of the value of his estate as he would leave it. Subject to that, he desired that the businesses, which he had established, and out of which he had made his fortune, and in the worth and earning capacity of which he probably had the fullest confidence, should not disappear or pass into the control of strangers, but should continue in the hands of his two sons who were already actively engaged therein and for whom, he no doubt thought, they would provide honourable and prosperous careers. There are two outstanding features of the scheme which the testator sought to formulate in regard to the taking over of the businesses by his two sons designed to secure to them every reasonable advantage therefrom and at the same time adequately to protect the interests of his daughters in that part of his estate which consisted of capital invested and to remain for some time invested in those businesses. While, on the one hand, the sons should have the full benefit of any net profits beyond the outlay and reserve necessary for the carrying on of the businesses on a safe basis, and a reasonable return to his estate for the use of his capital invested in them, on the other, in the event of his sons exercising the option to buy the businesses the capital so invested as he left it, and any additional capital the trustees might put in, would all be repaid to, and would form part of, his general estate in which his two daughters were to share equally with his two sons. Only by construing the words "upon the basis of the book value thereof" in clause "f" as meaning on the basis of the values of the businesses as they appeared in the testator's books at the

time of his death can effect be given to both of these apparent intentions of the late George Byron Ryan.

For the foregoing reasons this appeal should be allowed and the judgment of Mr. Justice Latchford restored in the two particulars which are the subject of the appeal. This seems to be a proper case for a direction that the costs of both appellants and respondents should be paid out of the testator's estate as between solicitor and client.

IDINGTON J.—This appeal arises out of an application to the Supreme Court of Ontario by the executors and trustees of the last will and testament of the late George Byron Ryan, for the advice and opinion of the said court in regard to the interpretation and construction of said will.

Some thirteen questions were asked. Mr. Justice (now Chief Justice) Latchford heard the application and gave judgment answering said questions.

Two of the executors (the sons of deceased and beneficiaries under said will) appealed therefrom to the Appellate Division of said Supreme Court, and the present appellants (the two daughters of deceased and beneficiaries under said will) cross-appealed, and judgment was given maintaining the said judgment except as to one point involved, and varied in that regard the said judgment.

Hence this appeal by said daughters.

Having carefully considered the several opinions given by the respective judges in the courts below, and the arguments addressed to us, I have come to the conclusion that this appeal should be allowed and the judgment of Mr. Justice Latchford restored, and that the costs of all parties here should be allowed and paid out of the estate.

Appeal allowed with costs.

Solicitors for the appellants: *Hellmuth, Cattanach & Meredith.*

Solicitors for the respondents: *Aylesworth, Wright, Thompson & Lawr.*

1924
*Dec. 17.
*Dec. 30.

THE GOVERNMENT OF THE PROVINCE OF MANITOBA AND ANOTHER ..... } APPELLANTS;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY AND OTHERS.. } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Statute—Construction—Railway Board—Jurisdiction—Agreement of railway company with province—1 Edw. VII, c. 53 (D).

By an agreement made in 1901 between the Canadian Northern Ry. Co. and the Government of Manitoba the Lieutenant Governor in Council was authorized to fix the rates to be demanded by the company for the carriage of freight on its lines in the province. This agreement was confirmed by Acts of Parliament and the legislature respectively, the Dominion Act containing the following provisions: Sec. 3. "Nothing in this Act or in the indenture contained in the schedule shall * * * (*a*) divert or limit, temporarily or otherwise, the rights or powers * * * of any commission * * * respecting any matter or thing, obligation or duty; (*c*) authorize the Canadian Northern Ry. Co. * * * to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, etc., or any higher rates for the carriage of freight or passengers, than those heretofore or hereafter fixed * * * by any commission or other authority."

Held, that sec. 3 (*a*) clearly reserves the rights and powers of the Board of Railway Commissioners which is a commission or authority within its terms; and that 3 (*c*) which deals with special matter of tolls does not except that subject from the generality of 3 (*a*) on the principle *generalia specialibus non derogant,* inasmuch as the two subsections are concerned with different matters and do not overlap nor conflict.

APPEAL from an order of the Board of Railway Commissioners for Canada on a question of the jurisdiction of the board.

The question for decision is thus stated in the order granting leave to appeal.

"Whether the judgment of the board, as set out in the reasons for judgment, was right in determining that the Manitoba Agreement and the Acts, statutes of Manitoba, 1901, chap. 39, and statutes of Canada, 1901, chap. 53, do not limit the power of the board to increase or authorize the increase of the tolls and rates to an amount exceeding the tolls established for the carriage of goods and passen-

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

gers upon the lines of the Canadian Northern Railway Company, referred to in the said agreement and statutes."

Chrysler K.C. and *Craig K.C.* for the appellants.

Phippen K.C. and *Fraser K.C.* for the respondent the Canadian Northern Ry. Co.

Lafleur K.C. and *Flintoff* for the respondent the Canadian Pacific Ry. Co.

The judgment of the court was delivered by:—

NEWCOMBE J.—By order of the Board of Railway Commissioners for Canada of 26th December, 1917, upon application of the respondent companies and of the Toronto, Hamilton and Buffalo, Pere Marquette, New York Central, Michigan Central, Kettle Valley and Great Northern Railway Companies, it was ordered that, subject to the provisions of the Crow's Nest Pass agreement and of the judgment pronounced by the learned Chief Commissioner, and concurred in by the other members of the board, copy of which was attached to the order, the standard tariffs of maximum mileage tolls approved by the board to be charged between stations on the individual steam railway systems subject to its jurisdiction might, by new tariffs to be submitted for the board's approval and published in the *Canada Gazette* as required by sections 327 and 331 of the Railway Act, and, following such approval and publication, made effective not earlier than 1st February, 1918, be increased to the extent limited by the order.

Upon the hearing of the application counsel were heard not only on behalf of the parties and the railway companies above mentioned, but also on behalf of a number of the Boards of Trade of the more important cities from Montreal to Vancouver, the Canadian Manufacturers Association, various manufacturing concerns and others interested in railway tariffs. The appellant Government opposed the application upon the ground, among others, that the increase of rates, which was in the result granted, would conflict with an agreement of 11th February, 1901, between the appellant Government and the Canadian Northern Railway Company, one of the respondents, whereby, in consideration of a guaranty of the company's bonds, the company agreed that the Lieutenant-Governor in Council

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should fix the freight rates of the company as provided in clause (8) of the agreement which will presently be quoted; and inasmuch as this agreement had been confirmed by statute of Manitoba, ch. 39 of 1901, and also had been in a qualified or limited manner recognized by statute of the Dominion, ch. 53 of 1901, the province contended that the board had no authority to increase the tolls in excess of those established under the agreement.

The case was very carefully considered in the decision of the board.

Afterwards, by order of 22nd January, 1918, upon application to the board by the appellants for leave to appeal from the order, the board granted leave to appeal upon the following question:—

Whether the judgment of the board, as set out in the reasons for judgment, was right in determining that the Manitoba Agreement and the Acts, statutes of Manitoba, 1901, chapter 30, and statutes of Canada, 1901, chapter 53, do not limit the power of the board to increase or authorize the increase of the tolls and rates to an amount exceeding the tolls established for the carriage of goods and passengers upon the lines of the Canadian Northern Railway Company, referred to in the said agreement and statutes.

Although the appeal has been pending since the date of the last mentioned order it was brought to hearing only during the present sittings of the court. The appellants' case was very fully presented, but the court considered it unnecessary to hear counsel for the railway companies who had appeared to maintain the order of the board.

I am now to state reasons why, in the judgment of the court, the appeal should be dismissed.

By the agreement of 11th February, 1901, which was executed under seal by the respective parties, and for considerations which are not in question, the Canadian Northern Railway Company agreed by clause (8) that:

Up to the 30th day of June, A.D. 1930, the Lieutenant-Governor in Council shall from time to time fix the rates to be charged or demanded by the company for the carriage of all freight from all points on the company's lines in Manitoba to Port Arthur, and from Port Arthur to all points on the company's lines in Manitoba, and from all points on the company's lines in Manitoba to all other points on said lines in Manitoba. Provided always that, before any rates are so fixed, the company shall be heard and their interests taken into consideration. The company agrees that it will not at any time after the said rates have been so fixed charge or demand for the carriage of freight between the points aforesaid greater rates than those so fixed by the Lieutenant-Governor in Council.

The Canadian Northern Railway Co. was, at the time of the making of this agreement and still is, a Dominion company under the exclusive legislative authority of the Parliament of Canada, and the agreement itself, as the 4th clause recognizes, acknowledges the necessity of legislation by the Parliament of Canada in order to make its provisions effective in their application to the railway. The parties covenant that they will use their best endeavours to procure from the Provincial Legislature and from the Parliament of Canada such legislation as may be necessary to confirm the agreement, and to enable and require the parties to carry it out in order that its true intent and meaning may be properly and fully accomplished.

The agreement having been executed was accordingly submitted to the Legislature and to Parliament. Chapter 39 of Manitoba, confirming the agreement, was enacted on 20th March, 1901, and the Dominion Act, chapter 53 of 1901, was enacted on 23rd May of that year.

It follows from what has been said, and it is common ground in the case, that the tariff rates, or powers for fixing tariff rates, stipulated for by the agreement are binding upon the railway and can be justified as rates to be charged by it only by Dominion legislation. The Act, chapter 53 of 1901, by s. 2 declares that the Canadian Northern Railway Company has and shall be deemed to have had at the time of the execution of the agreement full power, among other things, to make the covenants and agreements therein contained relating

to the rates to be charged or demanded by the said company for the carriage of freight and passengers.

Then follows s. 3, upon the effect or meaning of which the case depends; its material provisions are as follows:—

3. Nothing in this Act or in the indenture contained in the schedule hereto, or done in pursuance of this Act or of the said indenture, shall,—

(*a*) divest or limit, temporarily or otherwise, the rights or powers (under existing or future legislation of the Parliament of Canada) of the Governor in Council, or of the Railway Committee of the Privy Council, or of any commission or other authority, respecting any matter or thing, obligation or duty;

(*c*) authorize the Canadian Northern Railway Company, contrary to the meaning of The Railway Act, to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, rebate, drawbacks or concession, or any higher rates for the carriage of freight or passengers than those heretofore or hereafter fixed, under the authority of existing or future legislation of the

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Parliament of Canada, by the Governor in Council, or by the Railway Committee of the Privy Council, or by any commission or other authority.

It is admitted that the Board of Railway Commissioners for Canada is a commission or authority within the meaning of clause (*a*), and therefore it is difficult to perceive how this Act, which is the only competent legislative sanction for the rates stipulated by the agreement, can, in view of the plain reservation of the powers of the board by clause (*a*) admit of an interpretation which would divest those powers.

Although it was not denied that s. 3 (*a*) is expressed in terms broad enough to reserve to the board jurisdiction to make the order in question, it was suggested that this is a general clause, limited by s. 3 (*c*), which is of a special character, relating to tolls, and operates, therefore, upon the principle of the general maxim "*generalia specialibus non derogant*," to withdraw or except that subject from the generality of s. 3 (*a*). But clauses (*a*) and (*c*) are in truth concerned with different subject matters; they do not overlap, and therefore the latter cannot derogate from the former. Clause (*a*) relates to the powers of the Governor in Council, the Railway Committee of the Privy Council, or any commission or other statutory authority, while clause (*c*) is concerned only with powers of the respondent company. Each of these clauses operates within its own plane and they do not conflict. Moreover it will be observed by clause (8) of the agreement that the authority for the fixing of rates by the Lieutenant-Governor in Council, to which the company consented, was limited to a period which will expire on 30th June, 1930, and that it exists therefore only temporarily. Now s. 3 (*a*) of the Act to which the agreement is scheduled provides that neither the Act nor the agreement is to divest or limit *temporarily* or otherwise the powers of the Board of Railway Commissioners; presumably the word "temporarily" was introduced for a purpose, and the right to fix the rates conferred by clause (8) of the agreement is, so far as has been made to appear, the only right or power provided for by the agreement which may be aptly described as "temporary." If this be true, s. 3 (*a*), not only by general provision includes the jurisdiction of the Board of Railway Commissioners relating to rates for

the carriage of freight and passengers, but also particularly embraces their jurisdiction as to rates.

The question subject to appeal should therefore be answered affirmatively, upholding the jurisdiction of the board.

Solicitors for the appellants: *Chrysler & Chrysler.*

Solicitor for the respondent the Canadian Northern Ry. Co.: *F. H. Phippen.*

Solicitor for the respondent the Canadian Pacific Ry. Co.: *E. P. Flintoff.*

THE CANADIAN DRUG COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE BOARD OF THE LIEUTENANT-GOVERNOR IN COUNCIL (DEFENDANT) ..... RESPONDENT.

1924
Nov. 6.
*Dec. 30.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Intoxicating Liquor Act of N.B.—Sale by licensees—Amending Act—Sale by Crown—Taking over licensees' stock—Time of valuation—Increase in Customs duty—Sales tax—Interest—6 Geo. V, c. 20; 9 Geo. V, c. 53 (N.B.)

By the Intoxicating Liquor Act of New Brunswick, 1916, liquor was sold by licensed vendors; by an amendment in 1919 control of the business by the Crown through a board was authorized, such board being permitted to take over the stock of liquor held by the licensees of whom the Canadian Drug Co. was one, who were required, on request, to furnish a statement of the stock in hand or in transit with the prices paid and other particulars, the value to be based on such statement or, if that could not be done, to be determined by a method agreed upon. Upon payment therefor the liquor should become the property of the Crown. The Amending Act came into force on April 18, 1921, and the operating board was appointed on the same day; on May 10 the Customs duty on liquor was increased; the parties agreed on the value of the liquor of the Canadian Drug Co. except on the point as to whether or not the increased duty should be added to the value and the amount of the sales tax or any interest should be allowed; the liquor was delivered to the board in June and July and paid for in October subject to the above mentioned rights as to value.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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Held, that the value of the liquor should be determined as of the date at which delivery was made and the Drug Co. was entitled to the increased duty.

Held also, that the case must be treated as one of purchase and sale in which the vendor is entitled to be paid the amount of the sales tax on the price.

Held further, that the vendor was not entitled to interest either on the purchase price or the amount of the sales tax.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1) affirming the judgment at the trial in favour of the respondent.

This appeal is from the judgment on a case stated for the opinion of the court below. The stated case is as follows:—

1. The defendant is the Board created under and by virtue of Act of Assembly, 9 George V, 1919, chapter 53. The Board was constituted by Order in Council dated April 18, 1921.

2. The plaintiff previous to and at the time of the passing of the said Order in Council was a wholesale licensee authorized to sell intoxicating liquors under the Intoxicating Liquor Act, 1916.

3. On or about the twenty-first of June, 1921, the plaintiff delivered to the defendant two thousand six hundred and fifty-six cases of liquors under the terms of the said Act, containing approximately five thousand three hundred and twelve gallons, and on or about the twenty-fifth day of June, 1921, delivered to the defendant eight hundred cases of liquor then being held in bond, and other smaller lots were also taken over by the defendant at a later date.

4. Subsequent to the payment by the plaintiff of the customs duties on said two thousand six hundred and fifty-six cases of liquor, and while the same were still in plaintiff's possession and before delivering same to the defendant, namely, on or about the tenth day of May, 1921, the duty on intoxicating liquor was increased by the Dominion Parliament to ten dollars per gallon on the strength of proof.

5. The defendant through the Lieutenant-Governor in Council paid the plaintiff the sum of eighty-one thousand six hundred and eighty-two dollars and seventy-two cents 10th October, 1921, for the purpose of satisfying the

(1) [1924] 4 D.L.R. 273.

plaintiff's claim for the said liquors, and which sum the plaintiff received without prejudice to his claim herein. The said sum was made up as shown in the schedules annexed hereto and marked "A," "B," and "C," the sum allowed for duty being based upon the rate in force previous to May 10, 1921.

6. At the time the goods were entered for duty by the plaintiff it was still carrying on its business as a wholesale licensee. Looking to the taking over of said goods the following letters were written by the defendant to the plaintiff dated the 18th April, 1921; 7th May, 1921; and 16th May, 1921; and by the plaintiff to the defendant dated the 13th May, 1921, copies of which are attached hereto marked "D," "E," "F" and "G."

7. That the plaintiff continued in business until the 15th July, 1921, for its export business and until the 30th June, 1921, for its local business.

8. The question to be determined by the court is whether the plaintiff is entitled to be paid under said Act, 9 George V, chapter 53, the value of the said liquors at the time they were taken over by the defendant or the value of the said liquors prior to the increase in the Canadian duty to ten dollars a gallon. If the court is of opinion that the plaintiff is entitled to be paid the value of the said liquors at the time of delivery to the defendant, judgment will be entered for the plaintiff for twenty-four thousand seven hundred and fifty-five dollars and sixty-four cents and interest thereon to date of judgment, if the court is of the opinion that the plaintiff is entitled to interest, and twelve hundred and ten dollars and sixty-three cents sales tax thereon and interest on said sales tax to date of judgment (if the court should be of opinion that the plaintiff is entitled to interest and sales tax), together with costs. If the court is of opinion that the plaintiff is not so entitled judgment will be entered for the defendant with costs.

The material statutory provisions are set out in the judicial opinions published herewith.

Taylor K.C. for the appellant.
Hughes K.C. for the respondent.

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The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Rinfret JJ.), was delivered by

NEWCOMBE J.—A question of law is here submitted in the form of a special case stated for the opinion of the Supreme Court of New Brunswick under the provisions of Order XXXLV, Rule 1, Judicature Rules of New Brunswick, which provides that the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court; that every such case shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby, and that the court shall be at liberty to draw from the facts and documents stated any inferences, whether of fact or law, which might have been drawn therefrom if proved at the trial.

The special case, which is dated 17th December, 1923, consists of eight paragraphs, as follows. See page 24.

By the Intoxicating Liquor Act, 1916, of New Brunswick, c. 20, the sale of intoxicating liquor in the province, except by licensees, was generally prohibited, and provision was made for the issue of wholesale and retail licences for the sale of liquor in the quantities permitted or for specified purposes. The licences were granted by the provincial Secretary-Treasurer to the licensees, and for the warehouses or stores occupied by them respectively. They were to expire on 1st May in each year, which date, by the amendment now to be mentioned, was changed to 31st October. By the amending Act, c. 53 of 1919, it was provided that the Lieutenant-Governor in Council might take over and conduct the business of the wholesale vendors in the province licensed to sell liquors under the Intoxicating Liquor Act, and that he might appoint a board of three persons to represent him in carrying out the provisions of the Act. It was stated in the argument that when the amending Act came into operation there were in the province only three wholesale licensed vendors. The appellant company was one of these.

By ss. 3, 4 and 5 of the last-mentioned Act it is provided as follows:—

3. Each of the wholesale licensees shall, upon request in writing, deliver to the Lieutenant-Governor in Council a correct list of the stock of

liquor on hand held by him, as well as any liquor purchased prior to the delivery of such request and in actual transit at the time, together with a statement of the true prices paid for each item of liquor mentioned in such statement, and in every case in which any such liquor has been purchased subject to a discount or allowance of any kind the same shall be correctly set forth in such statement, which shall be signed by the licensees, the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock on hand or in transit as aforesaid, and the said value so arrived at, with the cost of the freight added, together with the value of any equipment hereinafter mentioned, shall be deemed to be the purchase price of such liquor and equipment.

(*a*) Should there be any part of the stock on hand the value of which cannot be determined as aforesaid, such other method of fixing its value shall be adopted as may be mutually agreed upon.

(*b*) Any necessary equipment used by the licensee in carrying on such business may be purchased by the Lieutenant-Governor in Council at a price to be either mutually agreed upon or determined by valuation.

4. Upon payment over to the vendor of the amount of the purchase price by the Lieutenant-Governor in Council the said liquor enumerated in such list with the equipment, if any, shall forthwith become the property of the Lieutenant-Governor in Council and all right and title thereto shall thereupon be vested in the Lieutenant-Governor in Council as trustees free of all claims whatsoever, and the licence held by such vendor under the said Act shall thereafter be null and void to all intents and purposes whatsoever.

5. The right of the Lieutenant-Governor in Council to import, buy and sell liquor for the purposes of this Act or the Intoxicating Liquor Act, shall be as full and ample in all respects as the right of a licensee licensed under the Intoxicating Liquor Act, and any proceedings incident thereto or connected in any way with any matter or thing authorized or permitted by this Act to be done or performed may, with the consent of the Attorney General, be taken by any court of law or otherwise in the name of the said board representing the Lieutenant-Governor in Council.

These sections belong to a group which, it is declared by s. 11, shall be read with and as part of the Intoxicating Liquor Act, 1916, and it is also provided that all enactments inconsistent therewith shall be deemed to be repealed. Section 13 is as follows:—

13. All liquor used, sold or kept for sale in the province of New Brunswick, either by doctors, dentists or licensees, shall be purchased from the board representing the Lieutenant-Governor in Council.

By the following section, 31st October is substituted for 1st May, as the date of the expiry of the licences.

The amending Act was passed on 17th April, 1919; the material sections were to come into force by proclamation which was subsequently issued, and the board was constituted by order in council of 18th April, 1921. Thereupon the chairman of the board wrote the appellant company, by letter dated 18th April, referring to the Act and stating that an order in council had been passed

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Newcombe J

appointing the board, or commission, as it is called in the correspondence, and stating that at a regular meeting of the commission the chairman had been directed to request the wholesale vendors to submit a statement of the estimated amount of liquor as defined by the Act which they would have in stock on 1st May, 1921, and requesting the appellant company in accordance with this order to furnish him

> with full information of the amount of stock you would be able to turn over to the Commission on the 1st proximo enumerating the brands and also the sale prices to us,

adding that the board was very desirous to obtain this information at the earliest possible moment. The letter concludes with a statement that the writer expected to be in St. John on 20th April to arrange a meeting of the commission there, and that he would be pleased to meet a representative of the appellant company "who could give the quantity of stock on hand and the prices thereof." This letter obviously had in view negotiations between the parties for sale of goods to be delivered on 1st May at prices to be stipulated. There is in evidence another letter of the chairman to the appellant company dated 7th May, which reads as follows:—

> Fredericton, N.B.,
> May 7, 1921.
>
> The Canadian Drug Co.,
> St. John, N.B.
>
> Gentlemen: I would draw your attention to my letter of the 18th of April, wherein I requested you to deliver to me a statement showing the stock of liquor which you would have on hand on May 1, 1921. I would also make reference to my conversation with you in St. John, April 20, regarding the same subject. I regret very much to say that this statement has not yet been received by me.
>
> In accordance with the Intoxicating Liquor Act amended as passed April 17, 1919, I would request that you deliver to me a correct list of the stock of liquor on hand, held by you, as well as any liquor bought by you and which is in actual transit. I shall also require a statement of the true prices paid for each item of liquor mentioned in your statement, and any other case in which any such liquor has been purchased subject to a discount or allowance of any kind. In addition to this value you may state the cost of freight on those purchases.
>
> The above statements are urgently required by our board, in order that the necessary arrangements may immediately be made for the taking over of your stock, to effect the cancellation of your wholesale licence, and to begin the functioning of the board, as required by law.
>
> I am enclosing a copy of the above mentioned Act for your information, and would particularly draw your attention to section 3 contained therein.

Trusting to receive the statement as requested by registered mail without further delay, I remain,

Yours very truly,

Chairman.

NEW BRUNSWICK BOARD OF LIQUOR COMMISSIONERS.

The answer of the appellant company, which is dated 13th May, is as follows:—

May 13, 1921.

Hon. J. F. Tweedale,
Chairman of the Board of Liquor Commissioners,
Fredericton, N.B.

Dear Sir: We have your favour of the 7th (which is unsigned by you), and note your remarks contained therein. When the writer personally met you with Mr. Bently and Mr. McGuire on your last visit to St. John and discussed this matter, at that time he asked you if you desired list of stock on hand at the present time and if you were prepared to take over and pay for it then; your reply was that you were not in a position to take over any stock as you wanted to be equipped for doing business and you had no money to pay for same. The writer asked you when you would be in a position and your reply was not before the middle of June or July and you asked writer if we would have sufficient stock to start you in business at that time; his reply to you then was if you would give us definite date when you would start in business, when you would be prepared to take over stock; your reply was that, after the Commission came back from Montreal you would have another interview with him and in the meantime you asked him if he would write you giving you all the information possible with regards to the liquor business, etc., in New Brunswick, you would appreciate it very much; on account of absence and pressure of business the writer has not been able to do this, but he understands you will be here on Tuesday when we will submit list of our stock and prices.

Yours truly,

And to this the chairman replied, under date of 16th May, as follows:—

Fredericton, N.B., May 16, 1921.

The Canadian Drug Co., Ltd.,
72 Prince William Street,
St. John, N.B.

Gentlemen: I have your favour of the 13th inst., and in reply would say that I expect to be in St. John to-morrow (the 17th inst.), when I shall personally take up with you the subject matter to which you make reference in your communication.

I regret very much that our letter of the 7th inst. to you was inadvertently mailed without my signature, but I am enclosing you another which is duly signed by me to replace the original, and is for your retention please.

Yours very truly,

J. F. Tweeddale,
Chairman.

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The office of the board was at Fredericton and that of the appellant company at St. John, and it was therefore from Fredericton and St. John that these letters were respectively despatched. The 7th May, 1921, fell on a Saturday, but whether or not the chairman's letter of that date was received before 10th May is not stated. I shall assume however that it was received on the 9th, as that would be in ordinary course of the post if the letter were posted on the 7th.

This letter closed the correspondence and it is apparent that no agreement had at that time been reached. It was intended, as the chairman's last letter states, that the discussion should be continued on the occasion of his visit to St. John on the following day.

It is not stated that the appellant company at any time complied with the request of the board of 7th May to deliver a correct list of the stock of liquor on hand and in actual transit with a statement of the true prices paid for each item, and cost of freight thereon, although the list which bears date 21st June, to which I shall refer, contains this information, in addition to other particulars, with regard to the liquor which was taken over by the board on 21st and 25th June. The statement required by letter of 7th May, as therein explained, had for its purpose that arrangements might immediately be made for the taking over of the stock and to effect cancellation of the plaintiff's wholesale licence, and so that the board might begin its operations as required by law, but the letter contains no express intimation that the Lieutenant-Governor in Council proposed to exercise any faculty of decision with which he may have been endowed by the statute to arrive at or determine the actual value of the stock. In fact neither the actual value nor the cost could be arrived at upon evidence of the true prices paid plus freight under the provisions of the first paragraph of s. 3, because the stock in hand of the appellant company had, for the greater part, been imported by the company, which had paid thereon large amounts for customs duty in addition to freight, insurance, and other items of expense contributing to the cost and to the value.

It is matter of plain inference that the parties met at St. John after the chairman's letter of 16th May, and it is stated that, on or about 21st June, the board received and took over from the appellant company a large part of the latter's stock on hand according to the list of that date, in which were set out the various items and opposite thereto the invoice prices including freight, insurance, etc.; the rate of duty paid; the total amount of customs duty; and the wharfage and cartage per case. It appears from this statement that duty had been paid upon each item except one, namely, 800 cases Old Orkney, which had been imported at a cost, including freight, insurance, etc., wharfage and cartage, of £2,423.12.9, converted into Canadian currency, rate of exchange 4.40, at $10,664.02; the Old Orkney was in bond, and there was in the statement no charge for duties upon it. The total value figured according to this statement is $64,941.47.

All the liquors mentioned in this list were delivered by the plaintiff to the defendant on 21st June, except the 800 cases of Old Orkney, which were delivered on 25th June.

Subsequently the remainder of the appellant company's stock was taken over on different days from 5th July to 27th July, when the last delivery was made.

The question for decision is not very aptly framed; it is as follows:—

> The question to be determined by the court is whether the plaintiff is entitled to be paid under said Act, 9 George V, chapter 53, the value of the said liquors at the time they were taken over by the defendant or the value of the said liquors prior to the increase in the Canadian duty to ten dollars a gallon.

Now the plaintiff is by strict interpretation not entitled to be paid anything *under the said Act;* it is only by virtue of the proceedings authorized by the Act, or by agreement which the parties are by the Act empowered to make, that the plaintiff can in a sense be entitled to payment under the Act. The Act itself does not bind the Government to acquire the stock of any vendor although it authorizes the acquisition by the exercise of the powers which the Act confers. The object of the question is, however, sufficiently plain. It is put in view of the facts stated and the inferences to be drawn therefrom; for while mere questions of fact cannot be raised upon a special case, *Burgess* v. *Mor-*

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ton (1), the court may nevertheless draw proper inferences of fact which have not been specifically admitted when these are not inconsistent with and reasonably follow from the facts stated; this power is expressly recognized by the rule.

The question has in contemplation the necessity of determining whether the value of the liquor, actually acquired by and delivered to the board for the purposes of the Act, is to be ascertained as of a time before the customs duty was increased, and the date of the increase is accepted as decisive of the point of time at which, as an admitted fact, the liquor took on an additional value of $24,755.64, for the reason that after the appellant company had paid the customs duty upon the greater part of its imported stock, the rate of duty imposed upon the like goods was raised by the Customs Tariff Amendment Act, 1921, which, although not sanctioned until 4th June, declared by s. 4 that these duties shall be deemed to have come into force on 10th May, and to have applied to all goods imported or taken out of warehouse for consumption on or after that day, and to goods previously imported for which no entry for consumption was made before that day.

The parties, by the correspondence and by the negotiations which ensued, were endeavouring to arrive at the actual value of the goods, and they succeeded except as to the incidence of the value which the goods acquired on 10th May. The difficulty which they encountered in coming to an agreement upon the question submitted, as they did upon the other questions presented by their negotiations, appears to have arisen from the fact that the respondent considered that, either by operation of the statute or by the effect of what was done in pursuance of its provisions, the law required that the valuation should proceed as of a date previous to 10th May, and, if so, that the accession of value on that date would not belong to the appellant. Now while the Act of 1919 plainly contemplates, as the justice of the case requires, that a licensee shall be compensated for his stock on hand when acquired by the board, and that the compensation shall be a purchase price based upon the actual value of the goods, there

(1) [1896] A.C. 136.

is no express provision of the Act, and so far as I can perceive no implied provision, requiring that the value shall be fixed otherwise than with regard to the goods actually acquired, and as the value exists at the time of the acquisition.

There are several dates which figure in the case. The Intoxicating Liquor Act 1916 of the province, under which the appellant company was licensed, was passed on 29th April of that year; it was proclaimed on 18th April, 1921; the board representing the Lieutenant-Governor in the Board representing the Lieutenant-Governor in Council for the administration of the Act was appointed also on 18th April, 1921; there are the three letters in evidence which have been quoted, dated respectively 7th, 13th and 16th May, 1921; there is the date when the Customs Tariff Amendment came into operation, 10th May, 1921; there are the dates when the liquor in question was delivered, 21st and 25th June, 1921; there is the date when the liquor was paid for, 10th October, 1921, and, finally, there are the dates, 30th June, 15th July, and 31st October, 1921, respectively, when the appellant company ceased to do local and export business and when its licence was to terminate under the provisions of the Act of 1919.

Of these dates, that of the passing of the Act of 1916 can have no effect because that is the Act under which the appellant was licensed and which provides for the carrying on of his trade as a licensed vendor. Neither can the assent to the amending Act of 1919, nor the date of its proclamation, be taken as the date for ascertaining the value because, without mentioning other reasons, that Act in itself, while it authorizes the Lieutenant-Governor in Council to take over the stock, does not require that he shall do so. The chairman's letters of 7th and 13th May do not, for reasons to be stated, impose any obligation upon the board nor upon the appellant, except it may be to require the latter to furnish a list with prices of its stock on hand for the consideration of the Lieutenant-Governor; it is admitted by the case, and explained by the correspondence, that this request was not complied with previously to 10th May, and the only list in the case is that of 21st June, when the duty-paid goods mentioned therein were delivered.

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Section 3 provides alternative methods of fixing value; it may be arrived at by the Lieutenant-Governor in Council, if he proceed in due course of the law to ascertain and declare the value, or the valuation may be fixed by such other method as may be mutually agreed upon; but moreover by s. 5 it is affirmed that the right of the Lieutenant-Governor in Council to buy liquor for the purposes of the Act shall be as full and ample in all respects as the right of a licensed vendor under the Intoxicating Liquor Act, and the powers of the Lieutenant-Governor, which are exercised by the board, to acquire liquor for the purposes of the Act, either from licensees or others, whether or not they include power to acquire compulsorily, are therefore not limited in any manner which would exclude authority to purchase. It follows from the admissions that the liquor in question was acquired by the board, by authority of the legislature and by the appellant's consent, on and not before 21st June, 1921, when the delivery was made on terms of a price to be paid. The parties agreed that the price which the appellant had paid for the goods, the customs duties actually paid, the freight and insurance, and the minor charges which entered into the actual cost should be figured in the value; but the board, while admitting that the value of the goods was enhanced by an amount equivalent to the increase of customs duty, rejected the appellant's claim to be compensated for that, because it seems to have been considered by the board that this accretion of value took place only after the board had acquired the property, or the right to it.

It was suggested at the argument that the compensation to be paid was to include the actual value of the goods in so far only as the value did not exceed the cost; but by the admissions it is not the value, but the title to it, which is in dispute; it is expressly admitted that the value of the liquors was at the time of delivery greater by $24,755.64 than it was before 10th May. There is no sug gestion that the value was advanced or diminished after 10th May; and therefore the question must be answered favourably to the appellant unless, by the operation of the statute of 1919, or by the effect of the letter of the chairman of the board of 7th May, a time previous to 10th May is limited beyond which increase in the value

of the goods would not accrue to the benefit of the licensed vendor.

One of two methods of determining the value, so far as it was determined, must have been adopted; either, first, by judicial finding of the Lieutenant-Governor in Council under the first paragraph of s. 3; or secondly, by agreement. In my judgment the stated facts are very suggestive of an inference that when the parties came together they realized that the project of taking over the liquors was one which should be arranged by negotiation and agreement, and that it was by that method that the board acquired the stock; but that question is, for the present purpose, immaterial, because in either case the question here submitted was expressly reserved. If the Governor in Council found and declared the value, he did so after 10th May, and in like manner if the parties negotiated for sale at a price, their negotiations were concluded after 10th May.

The learned judge at the trial was of the view that the statute, c. 53 of 1919, operated as a notice to treat; and, applying the rule laid down in *Rex* v. *Hungerford Market Co.* (1), and subsequent decisions under the Land Clauses Act of 1845, found that the passing of the Act on 17th April, 1919, or the proclamation of it which followed, created an obligation upon the Government to acquire and upon the licensees to acquiesce in proper steps for the acquisition, leaving nothing to be determined but the actual value of the goods or the purchase price, which ought to be ascertained as of the coming into force of the Act; or, if the Act in itself did not so operate, that the letters written by the chairman of the board on 18th April and 7th May had the effect of determining the time of taking, and therefore he concluded that the compensation should be measured by the value as of a date not later than 18th April, or certainly not later than 7th May. Grimmer J., in the Appeal Division, disagreed with this view holding that the Act did not provide for compulsory taking, and that neither the proclamation of the statute nor the correspondence in proof was effective to define the time for ascertainment of value or purchase price. Nevertheless he reached a result in conformity with that at which the trial judge had arrived upon

(1) 4 B. & Ad. 372.

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the view that the licensee was entitled to receive only the cost of the goods, and that the cost had not been affected by the increase of duties. White J., while also of the opinion that the claim failed, considered that the taking was compulsory, and the learned Chief Justice, while agreeing in the result, expressed no reasons.

The statute itself, as has been said, contains no mandatory provision that the Lieutenant-Governor in Council shall take over the stock in trade of a licensee; he may or may not give notice calling for a list of the stock and the prices paid therefor with the object of arriving at the actual value; but even if such notice be given, it would appear that the licensee may nevertheless carry on his business as usual and dispose of his stock, or acquire new stock, and that his licence is to remain in operation until his entire stock shall have been taken over and paid for, or until 31st October, when the licence would by its own terms expire.

The letter written by the chairman of the respondent board to the appellant company of 7th May is the only communication from the board which might upon any possible interpretation have statutory effect. It does include a request conveyed, as is said,

> in accordance with the Intoxicating Liquor Act amended as passed April 17, 1919,

that the appellant deliver to the chairman a correct list of its stock of liquor on hand and in transit with a statement of the true price paid for each item, and it is said that in addition the cost of the freight may be stated; but the statute of 1919 provides for none of the steps to be taken by either party consequent upon demand for particulars of goods and prices such as were directed to follow upon notice to treat by the legislation which was considered in the cases upon which the learned trial judge relies, and in which it was held that the notice when given by corporations or trustees for public purposes, not directly representing the Crown, is of binding effect. Obviously there could be no proceedings, against the Crown or against the board in its capacity as exercising the powers of the Lieutenant-Governor in Council, to compel any action in consequence of the notice. The Crown was not bound to proceed to determine the value in the execution of any statutory powers; it gave no express notice of an intention to do so; and, its

determination of the value, if any, took place after 10th May, and was provisional and subject to the question submitted by the case. Therefore in my view, notwithstanding the chairman's letter of 7th May, whether or not it was received before 10th May, the appellant company retained the *jus disponendi* of its stock in trade unimpaired by any right which the Lieutenant-Governor in Council or the board had acquired in consequence of that letter.

In *The Queen* v. *The Commissioners of Her Majesty's Woods, Forests, etc.* (1), the Commissioners of Woods and Forests had given notice to a landowner under the powers of an Act for forming a royal park (9-10 Vict., c. 38) that they required his land for the purposes of the Act, and he had in consequence sent in his claim for compensation, to which the commissioners did not agree and he accordingly required to have a jury summoned to assess the amount, which they refused to do; the landowner obtained a mandamus commanding the commissioners to summon a jury, and the return stated that they acted only on behalf of Her Majesty under the provisions of the Act; that they had expended or appropriated the value of the funds which they had been able to raise; that they had no means of raising any further sums at present; and that they gave notice to the claimant and others only for the purpose of ascertaining what sum would be required to purchase the lands for the purposes of the Act, and to determine whether its objects could be effected, and that it seemed probable that the sum which they were authorized to expend would be exceeded.

The observations of Patteson J., pronouncing the judgment of the court, are apposite, and the present case seems to fall within them so far as concerns the effect of the notice. The learned judge said:

> If this were the case of a railway or other private company, no doubt the return would be insufficient because, notice having been given that the lands were required, and a claim sent in accordingly, a contract is entered into, and the parties stand in the relation of vendor and purchaser. If the company had not the means of paying for the lands, they should have abstained from giving notice to the owner. But a private company to whom an Act is granted for their profit differs materially from commissioners appointed under a public Act to do on behalf of the executive government certain things for the benefit of the public; and the

(1) 15 Q.B. 761.

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principle that imposes liabilities upon a private company, as arising in consideration of the statute granted to them, has no application in the case of such public commissioners. There may be reason for holding a notice to treat for a purchase, when given by a private company which has the option of taking land, to be a declaration of their option to take, and a contract or purchase, of which this court will compel specific performance, making the obligation on such a company reciprocal with the obligation on the landowner. But, in the case of commissioners for the public having a limited power of taking land provided the required quantity can be obtained for a given sum, a notice to treat for the purchase should be construed to be that which it is; the commissioners cannot ascertain whether the land can be obtained for a price unless they treat for the purchase. There is a duty under the statute to open the treaty; but it would defeat the intention of the legislature if the opening of a treaty was held to be the completion of the contract.

Steele v. *Corporation* (1); *Birch* v. *The Vestry of the Parish of St. Marylebone* (2).

Appellant owned the goods and had the same right to be paid for them, upon delivery, which an ordinary vendor of goods possesses; the statute provided that, upon payment of the purchase price to the vendor by the Lieutenant-Governor in Council, the liquor should become the property of the latter; if the statute provided for expropriation, and the goods were acquired in that manner, the appellant came under no obligation previously to 21st June when the provisional statement of value was made up and the goods delivered; if the transaction was a sale it was not completed until after 10th May. In the interval the property and the risk were the appellant's. It is admitted that the goods had then increased in value by an amount stated, and in my judgment it does not admit of doubt that the whole value was the appellant's asset for which the appellant was entitled to be paid. The appellant received from the Lieutenant-Governor in Council on 10th October, 1921, in respect of the liquor in question, $64,941.47, and by admission should be paid $24,755.64 more if, in the opinion of the court the appellant was entitled to be paid the value of the liquor at the time of delivery to the respondent. In my view the appellant was so entitled.

What I decide as matter of law in response to the question submitted is that neither the statute nor anything done under it, nor any of the facts admitted or to be inferred, operated to deprive the appellant company, on or

(1) 7 B. & S. 261. (2) 20 L.T. 697.

before the 10th May, of any right or title which it theretofore had to the liquor delivered to the board on 21st June, and from this it follows that the appellant was on 10th May solely entitled to any value which was at that time represented by the goods.

There are two subordinate questions as to interest and sales tax.

Interest is payable only by statute or by contract. *In re Gosman* (1); it is not payable as damages for detention of debt. *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.* (2). The provisions of the New Brunswick Judicature Act, ss. 24-26, cited at the argument, do not, in my view, impose a liability for interest; neither is there any contract for the payment of interest, and the claim for interest therefore fails.

As to the sales tax, upon the assumption that the transaction between the parties should be regarded as a sale of the goods by the appellant to the respondent, no reason is suggested why this sale was not subject to the tax. The only compulsory power which the Lieutenant-Governor in Council possessed to acquire the goods was under section 4, whereby it is provided that the liquor shall forthwith become the property of the Lieutenant-Governor in Council upon payment by him to the vendor of the purchase price. In fact, although the liquor was delivered by the appellant to the respondent board on 21st and 25th June, the price was not paid until 10th October following, and in the interval I should think that the Government was indebted to the appellant in the amount of the purchase, for the price of goods sold and delivered. It may be true that the vendor was influenced in the arrangement by the fact of the legislation under which the licenses were to be terminated, and by which the board was empowered to take over the stock in hand of the licensees, but if the parties reached an agreement, as I think they did, it would still be an agreement notwithstanding the conditions which operated to bring about the relationship of vendor and purchaser.

The appeal should be allowed and, in accordance with the submission, judgment should be entered for the appellant for $25,966.27, together with costs throughout.

(1) 17 Ch. D. 771.

(2) [1893] A.C. 429.

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IDINGTON J.—The appellant was licensed under the "Intoxicating Liquor Act, 1916," of New Brunswick, to sell by wholesale intoxicating liquors in said province in manner therein provided, and had been engaged in carrying on said business under said Act for some considerable time prior to the amending Act, 9 Geo. V, chapter 53, by which the legislature changed its system of using such licensed wholesale dealers for one substituting a board such as the respondent to carry on the like business as appellant and another had been doing to supply retail dealers.

The appellant in the course of carrying on said business had acquired a considerable quantity of intoxicating liquors. It evidently was the expectation of the legislature that the licensed wholesale dealers, seeing their substitute designed to take over the business, would be glad to sell their stock of liquor to the board to be created under said amending Act, and they made no imperative provision in the way of expropriating the stocks of liquor held by any such licensed wholesale dealers, but enacted as follows:—

1. The Lieutenant-Governor in Council of the Province of New Brunswick may take over and thereafter conduct the business of the wholesale vendors in this province, licensed to sell liquor under the "Intoxicating Liquor Act, 1916."

2. The Lieutenant-Governor in Council may appoint a board of three persons to represent the Lieutenant-Governor in Council in carrying out the provisions of this Act.

3. Each of the wholesale licensees shall, upon request in writing, deliver to the Lieutenant-Governor in Council a correct list of the stock of liquor on hand held by him, as well as any liquor purchased prior to the delivery of such request and in actual transit at the time, together with a statement of the true prices paid for each item of liquor mentioned in such statement, and in every case in which any such liquor has been purchased subject to a discount or allowance of any kind the same shall be correctly set forth in such statement, which shall be signed by the licensees, the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock on hand or in transit as aforesaid, and the said value so arrived at, with the cost of the freight added, together with the value of any equipment hereinafter mentioned, shall be deemed to be the purchase price of such liquor and equipment.

(*a*) Should there be any part of the stock on hand the value of which cannot be determined as aforesaid, such other method of fixing its value shall be adopted as may be mutually agreed upon.

(*b*) Any necessary equipment used by the licensee in carrying on such business may be purchased by the Lieutenant-Governor in Council at a price to be either mutually agreed upon or determined by valuation.

4. Upon payment over to the vendor of the amount of the purchase price by the Lieutenant-Governor in Council the said liquor enumerated in such list with the equipment, if any, shall forthwith become the property of the Lieutenant-Governor in Council and all right and title thereto shall thereupon be vested in the Lieutenant-Governor in Council as trustees free of all claims whatsoever, and the license held by such vendor under the said Act shall thereafter be null and void to all intents and purposes whatsoever.

There was a correspondence stated by the said respondent board, in April, 1921, shortly after its creation, with the appellant, looking for the information it and others of like licensees were respectively bound, by said section 3 above quoted, to furnish respondent.

Misapprehension on the part of the appellant, partly through a blunder on the part of respondent's manager failing to sign his letter, and the absence in Quebec of those composing the board (or the more active members thereof), in quest of knowledge from those in the latter province well qualified by experience to give them information bearing on the new functions of the respondent, caused delay in compliance with said section 3.

I cannot see the importance that counsel for respondent saw fit to attach thereto.

It is self-evident, I imagine, that a lapse of time must inevitably take place before the respondent could get into a position to carry on, and appellant meantime must unless a great many people were to be put to needless inconvenience. And the time for the licence to run had not expired.

Both parties hereto seem to have acted very reasonably after due allowance is made for the first misadventure I have referred to.

It so happened that all said section 3 requires was complied with, and then the appellant, as entitled to do, pointed out that by reason of the Dominion Parliament having doubled its tariff on such liquors that inevitably raised their actual value in New Brunswick beyond the original cost, and that the actual value prior thereto of the liquor in question could not be held by any fair-minded person at the same price as paid for them before the said increased tariff was enacted.

Hence the parties hereto differed, and could not agree upon the "actual value." Why not? Surely in the actual condition of things in Canada, he who in Canada had

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bought before the increased tariff had got something which, by that increase of tariff rate, became automatically worth, in actual market value, that much more. For he who had not had the foresight to look ahead and buy, must pay, when driven to buy in any open Canadian market, the cost price before the increase in tariff plus the new increase in tariff.

This result of changes in tariff affecting "the actual values" (which I hold means market values) of goods in general use, is so obvious and so well known and recognized that I am surprised to find any difficulty in correctly appreciating it.

If the tariff instead of being doubled had been obliterated, the actual value of the goods in question would have become that much less in value, and the appellant would inevitably have lost that much.

It is nothing new to find business men looking ahead and trying to measure the trend of public opinion and its probable effect on legislators possessed of the power to change the tariff up or down.

And for that very reason astute governments having the power of doing so maintain, on such a question when the acute stage is reached, absolute silence, and the change is made suddenly so that all will be treated fairly.

Of course if the tariff is moved up he having a large stock of goods will be counted lucky, but if down unfortunate.

The parties hereto not being able to agree on this single point settled all others according to the provisions above quoted, and left this point unsettled, but without prejudice to the appellant claiming for more if it could show an increase in way of actual value arising out of said incident.

The appellant then sued respondent for same and some other causes, and, like sensible men, agreed upon a stated case, which is set forth as follows (in which the exhibits named are not included). See page .

This case was duly submitted to the court in New Brunswick and was heard by Mr. Justice Barry, whose decision was against the appellant, following a train of reasoning which, with great respect, I cannot follow.

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He seems to proceed upon the theory, from the authorities he refers to, that this is a case of expropriation.

Yet he, after citing many such, speaks as follows:—

> Excepting only that they refer to the compulsory taking of lands instead of goods the authorities which I have quoted seem to me to be exactly applicable to the circumstances of the present case, for I can see no reason for the application of any different rule of compensation on the case of goods compulsorily taken from that applied in the case of lands. The plaintiff was not, it is true, obliged to part with its stock of liquors, but having parted with them and handed them over to the board representing the Government, it must be taken to have parted with them upon the terms and conditions stipulated in the Act and upon no other.

The learned trial judge thus expressly admits, and correctly so, that the plaintiff, now appellant, was not obliged to part with its stock of liquor.

With that admission the authorities he cites and upon which he founds his judgment can, I respectfully submit, be of no service in determining the issues in question herein.

For aught I can discover I see no reason in law why appellant could not have shipped its entire stock to Quebec and got from the Liquor Commission there the prices prevalent after the raising of the tariff.

I submitted that proposition to counsel arguing herein, but got no reason, nor any pretence that in law it was impossible.

Of course in such event it might be out the freight.

On appeal to the New Brunswick Court *en banc* Mr. Justice Grimmer, who was the only member of said court writing at length, was very emphatic in his view that the case could not be treated as one of expropriation.

He seems, however, to have reached the same conclusion by a process of reasoning that, I respectfully submit, I cannot adopt in the interpretation and construction of section three, above quoted from the said amending Act.

The expression therein of

> the object being to enable the Lieutenant-Governor in Council to arrive at the actual value of the whole stock in hand

seems to me to bear but one interpretation and that is "the actual value of the whole stock in hand" at the time the respondent was taking it over.

These words seem to me too clear for any other alternative as being had in view. And, therefore, I think this appeal should be allowed and the amount of $24,755.64 agreed upon by sections 8 of the stated case, and interest

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thereon from the date of delivery of the goods to the respondent to the date of judgment herein.

As to the item of $1,210.63, sales taxes thereon, I can see no reason why that should not be allowed.

The respondent's counsel, and some judicial expressions in the court below, suggested that there were evidently more items allowed in adjusting the supposed actual value than are explained, and hence enough had been paid.

I cannot understand that forlorn hope at all, for there were a great many items beyond those set forth in the stated case, which I am quite sure would be elements entering into the proper adjustment of the actual value which the respondent could be trusted to deal with, and no doubt properly did so.

It occurs to me that these very items having been allowed by those who knew what they were about is destructive of the arguments based on the price lists and on the adding of freight to goods in transit as if bearing on the goods long in stock.

Such a method of applying an Act such as this does not commend itself to me.

Some of us, including myself, had occasion some months ago to consider, in the case of *Versailles Sweets* v. *Attorney General of Canada* (1), a great variety of grounds for paying, and a greater variety for non-payment, of sales taxes and, I imagine, the officers in charge of that branch of the public service know a great deal more than ordinary counsel or judges who have not had their minds directed to the subject. And I am confident that they are not likely to be biased, and when they persist for a couple of years and finally threaten suit, and counsel cannot see their way to advise resisting or defending such a suit, I feel I have no right to interfere as the probabilities are that the officers were correctly advised and the items were chargeable and surely should be added to the price of goods being sold, or supposed to be sold, at actual value.

I think the appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacRae, Sinclair & MacRae.*
Solicitors for the respondent: *McLellan & Hughes.*

(1) [1924] S.C.R. 466.

ANDERSON LOGGING COMPANY.....APPELLANT; 1924

AND *Oct. 15, 16.
*Oct. 1.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income—Logging company—Profit—Sale of timber land—Evidence—Onus—Statute—Retroaction—Income and Personal Property Taxation Act, (B.C.) 1921, 2nd Sess., c. 48, s. 36.

Where the powers of a company, incorporated to take over as a going concern a logging business, included the power to acquire timber lands with a view to dealing in them and turning them to account for the profit of the company, and it bought a tract of timber land and sold it at a profit the same is not a capital profit but one derived from the business of the company and as such assessable to income tax under section 36 of the Income and Personal Property Taxation Act (B.C.) 1921, 2nd Sess., c. 48.

A party contesting the validity of an assessment upon income is bound to establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute; and it is only when these facts bring the matter into a state of doubt that the onus falls upon the Crown to show that the profit was earned in an operation which was a part of the business carried on by the assessed party.

But the above Taxation Act having no retrospective operation the assessment in this case in respect of profits made before the date of the enactment of the statute is illegal and should be reduced accordingly.

Judgment of the Court of Appeal ([1924] 2 W.W.R. 926) varied.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Downey J., Court of Revision, and sustaining the assessment of a profit made by the appellant company on a sale of a tract of timber as income under s. 36 of the Income and Personal Property Taxation Act, (B.C.) 1921, 2nd Sess., c. 48.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

E. P. Davis K.C. and *E. F. Newcombe* for the appellant. The $130,000 in question were the proceeds of the sale of the capital assets of the company and not income received by the company in the ordinary course of carrying on its business and, therefore, was not taxable under the Act.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret.

(1) [1924] 2 W.W.R. 926.

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Even if the sum in question must be considered "income" within the Act, it was income of the year 1920 in which the sale was made and, therefore, is not assessable.

If it is held that the appellant's contention in this last respect is wrong, then in any event only the sums of money which were received in the years 1921 and 1922, which amount to $66,269.28 can properly be assessed against the appellant.

The evidence shows that the object of the company was to log these timber properties, and that they were only sold when the company had sold its logging equipment and apparently given up its business.

The onus was upon the Crown to shew that the profit was earned in an operation which was a part of the business carried on in fact by the company. *Stevens* v. *Hudson Bay Co.* (1); *Tebreau Rubber Co.* v. *Farmer* (2); *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (3).

Killam for the respondent. The profit was property assessed as income, first according to the definition of income as contained in the Taxation Act, and also in view of the decisions rendered in similar cases. *Northern Assurance Co.* v. *Russell* (4); *Scottish Investment Trust Co.* v. *Surveyer of Taxes* (5); *California Copper Syndicate* v. *Harris* (6); *Stevens* v. *Hudson Bay Co.* (1); *Commissioners of Taxes* v. *Melbourne Trust Ltd.* (3).

The judgment of the court was delivered by:—

DUFF J.—The appellant company in 1920 sold its Thurlow Island timber limits at a price which was largely in advance of the moneys expended in acquiring them, part of which price was paid in 1920, part in 1921, and part, though not the whole of the residue, in 1922. The principal topic of controversy on this appeal is whether the profit accruing from this sale was, in whole or in part, assessable to income tax. The solution turns primarily upon the answer to be given to the question whether or not the profit falls within the category of "income" within the meaning of the British Columbia statute. A subsidiary

(1) [1909] 101 L.T.R. 96.
(2) [1910] 5 T.C. 658.
(3) [1914] A.C. 1001.
(4) [1889] 2 T.C. 571.
(5) [1893] 2 T.C. 231.
(6) [1904] 5 T.C. 159.

question, turning upon the effect of a statute of 1921 that authorizes the assessor to enter upon the roll of one year the amount of assessable income received during any previous year but not included in the statutory return made by the person receiving it, will also have to be disposed of.

In dealing with the major question it may be assumed, as it was assumed on the argument, that the distinction between the accretions to capital, such as the capital profit realized upon the sale of a capital investment, and the profit derived from the labour, or capital, or both combined, in carrying on or carrying out a venture or a business for profit, is a distinction both admissible and proper under the terms of the British Columbia statutes of 1911 and 1917.

The appellant company was incorporated under the British Columbia Companies Act of 1907, and its objects, declared in its memorandum of association, were; to take over as a going concern a certain logging business carried on in the state of Washington, with a view to adopting a specified agreement identified by reference to the articles of association, and to carry the agreement into effect; to acquire by purchase or otherwise timber licences, timber leases and timber lands, and to sell and deal in these; and to carry on a general business as loggers and dealers in logs and timber of all sorts. The company was also empowered to carry on any other business capable of being conveniently carried on in connection with the business already mentioned; to make arrangements, by way of partnership or otherwise, with others carrying on any of these businesses; and to acquire the shares and securities of any joint stock company so engaged, and generally to deal with these. There are general powers to buy and sell lands and other property, to borrow money and create securities of various kinds, and, finally, there is power to distribute any property of the company among the members in specie.

It is sufficiently clear from the memorandum of association that one of the substantive objects of the company was to acquire timber lands and timber rights with a view to dealing in them and turning them to account to the profit of the company. The nature of the business actually carried on by the company from its inception down to 1916

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is not disclosed. We learn of one transaction and one only —the purchase of the limits already mentioned, in 1910. Whether the logging business in Washington referred to in the memorandum of association was actually taken over, and, if taken over, whether it was carried on or resold, we do not know; nor do we know anything of the terms of the agreement which the company was to carry into effect on taking over that business. In 1916 the principal partners of the company, Messrs. Anderson and Jeremiason, arranged with one Kiltze for a right of way through his property, a lot adjoining the Thurlow Island limits—a right of way required for the convenient exploitation of the limits. At about the same time, apparently, the company purchased from Kiltze the timber on his lot, this timber being afterwards sold to a Mr. P. B. Anderson. In 1917 the company entered into an arrangement with the same Mr. P. B. Anderson, by which Anderson undertook to remove all timber from the limits, paying for the timber so taken off, as well as all that ought to be taken off but should be left standing, at the rate of $2.50 per thousand feet, board measure; to manufacture the timber into logs, and to sell them at the best price obtainable, and to pay to the company one-half of the moneys realized from such sales. Anderson proceeded to carry out the agreement, and did so, apparently without interruption, until the year 1920, when he bought the timber outright under the agreement already mentioned, at the price of one hundred and eighty thousand dollars odd, $80,000 being paid at the date of the agreement, and $50,000 being payable in each of the years 1921 and 1922.

For the purposes of this appeal it will not be necessary to consider critically the words of the British Columbia definition of "income." It may be assumed, as it was assumed on the argument—for the purposes of this appeal only—that the tests which have been applied in the decisions of the courts upon controversies arising under the Income Tax Acts of the United Kingdom are those by which the liability of the appellant company is to be determined.

The principle of these decisions can best be stated for our present purpose in the language of Lord Dunedin in his

judgment delivered on behalf of the Judicial Committee, in *Commissioner of Taxes* v. *The Melbourne Trust, Ltd.* (1),

> It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit. * * * The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris* (2). It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business;

or, in the language of the judgment from which this quotation is made, which follows in sequence after the passage cited:

> What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

or, in the form adopted by Sankey J.—in *Beynon* v. *Ogg* (3)—from the argument of the Attorney General—was the profit in question

> a profit made in the operation of the appellant company's business?

The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

On behalf of the appellant company it is contended, first, that the onus was upon the Crown to shew that the profit

(1) [1914] A.C. 1001, at pp. 1009 and 1010.
(2) 6 F., 894; 5 T.C. 159.
(3) [1918] 7 T.C. 125, at p. 132.

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was earned in an operation which was a part of the business carried on in fact by the company; and, secondly, that from what is described as the isolated case of the purchase and sale of these timber limits no inference as to the course of the company's business can properly be drawn.

First, as to the contention on the point of onus. If, on an appeal to the judge of the Court of Revision, it appears that, on the true facts, the application of the pertinent enactment is doubtful, it would, on principle, seem that the Crown must fail. That seems to be necessarily involved in the principle according to which statutes imposing a burden upon the subject have, by inveterate practice, been interpreted and administered. But, as concerns the inquiry into the facts, the appellant is in the same position as any other appellant. He must shew that the impeached assessment is an assessment which ought not to have been made; that is to say, he must establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute, or which bring the matter into such a state of doubt that, on the principles alluded to, the liability of the appellant must be negatived. The true facts may be established, of course, by direct evidence or by probable inference. The appellant may adduce facts constituting a *prima facie* case which remains unanswered; but in considering whether this has been done it is important not to forget, if it be so, that the facts are, in a special degree if not exclusively, within the appellant's cognizance; although this last is a consideration which, for obvious reasons, must not be pressed too far.

Making all such allowances, however, it seems reasonable to conclude in this case that the judge of the Court of Revision could properly hold that the appeal must be dealt with on the hypothesis that the company's business included that of making a profit by buying timber limits with the intention of turning them to account (and by selling them, if necessary) in such a manner as might seem most convenient and profitable; and that the timber limits in question were not purchased solely with the view to logging them.

In support of the suggestion that the principal business of the company was in fact the business of logging there

is, apart from the memorandum of association, no evidence entitled to appreciable weight, and hardly any which can properly be considered at all. A witness was called who at one time was secretary of the company, but whose connection with the company, according to his own statement, began later, at all events, than the year 1920. He was asked the question—"What has been the principal business of the company?" and his answer was "Logging." The balance sheets themselves shew that the company was not in possession of any logging equipment after the year 1917 (there is nothing to shew that it ever had any); and in the income tax return made in the year 1922, signed by this witness, as well as by the president of the company, the business of the company is said to be "timber investments." Counsel for the Crown very properly declined to cross-examine him, on the ground that he had no personal knowledge of the relevant facts. It is not unimportant to remark that neither of the principal partners of the company, who could have given a history of the company's affairs from its inception, was called as a witness nor, as has already been mentioned, was any but the most meagre evidence adduced as to the character of the company's operations before 1916.

In support of the contention that the limits were in fact bought with the exclusive object of logging them, the only evidence is the evidence of the same witness, who had and could have no personal knowledge of the design of the directors of the company in purchasing the limits, while the gentlemen who could have given information on the subject, both authentic and exact, were not examined. The witness deposed, it is true, to a conversation in 1916 with these two gentlemen, which was relied upon as indicating that at that time they contemplated logging the property. The conversation, as narrated by the witness, is equally consistent with the existence of an intention to acquire a right of way over adjoining property, affording improved facilities for working the limits, in order to enhance the value of the timber, and with a view to realizing that value in any manner in which it might most profitably be realized, by sale or otherwise; and could afford at the highest only the most shaky basis for the suggested inference, in

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the absence of the direct evidence which could have been and was not given, if the fact was as suggested.

As to the suggestion that the purchase and sale of these limits was only an isolated transaction of its kind, it will be necessary to discuss whether, assuming it to be the fact, that could assist the appellant company. But while considering what are the findings of fact upon which the examination of the questions raised by the appellant must proceed, it is to be observed that, strictly, this transaction was not an isolated transaction. The evidence disclosed, rather by accident, another transaction in timber, a purchase apparently in the year 1916, from the witness Kiltze, and the sale of the timber so purchased to the Mr. P. B. Anderson already mentioned. This transaction, it is true, in itself, without any further explanation, has not much significance. The purchase may very well have been prompted by the circumstance that the timber adjoined the company's limits and could profitably be worked along with them, thus, in any event, adding to the value of the limits; this minor transaction constituting, one might perhaps say, a mere incident in the larger one. But, on the other hand, there is the investment in the shares of the Standard Lumber Company, of which no explanation is given; and when these facts are related to the circumstance that in 1922 the business of the company was described as the business of " timber investments," words fairly descriptive of a category of investments embracing standing timber, as well as shares in timber companies, one can hardly, in the absence of explanation from the appellant company, proceed on the assumption that the venture in question was the sole transaction of the kind in the history of the company.

Mr. Davis, who argued the appeal with all his usual ingenuity and force, sought to bring the transaction under discussion within the analogy of a sale by a trader or manufacturer of his premises or part of his plant. In the case of a joint stock company incorporated under the British Columbia " Companies Act," the recognized distinction has full play between capital which is not available for distribution among the shareholders—except in cases in which a special statutory procedure is followed, in which case the

company is entitled to reduce its capital, whether share capital or paid-up capital—and surplus assets which are legally susceptible of distribution as dividends. Upon this distinction all surplus assets, over and above the paid-up capital, are so distributable if the governing body of the company is minded to distribute them. And it may often happen that the proceeds realized from the sale of business premises or part of a manufacturer's plant are surplus assets in this sense, which, for the purpose of considering the legal authority of the company to distribute such proceeds as dividends, would not fall within the denomination "capital." A distinction, however, between "capital" in the popular sense, in which the word is employed as the antithesis of "income," and this stricter conception of the law of companies, appears to be well recognized in the decisions upon the incidence of the income tax; and without expressing an opinion upon the point, it may be assumed that the distinction is not abrogated by the statute under which this tax, now in question, is imposed. Sales of a business premises or a manufacturing plant, where the proceeds are to be reinvested in the purchase of a new plant or new premises, would, as a rule, no doubt fall within the first alternative of Lord Dunedin's test, "change or realization of investment," even although the money realized should, in whole or in part, be lawfully distributable among the shareholders as dividends. The company's limits having, it is said, been purchased with a view to logging them, and the sale having taken place in execution of a resolve on the part of the company to abandon that branch of its business (evidenced, it is suggested, by the absence of all reference to the logging plant in the annual balance sheets produced), the facts of this case, it is argued, bring it within the same category.

In view of the terms of the British Columbia definition, assuming the limits had been bought with no definite intention of realizing a profit out of them otherwise than by logging them—that is, through logging operations carried on by the company itself in which the timber would be cut down, converted into logs and sold—it may be open to question whether the judge of the Court of Revision would have been entitled, having regard to the memorandum of

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association and the other circumstances mentioned, to treat the profits as a capital profit and not assessable to income tax. The point does not strictly arise on this appeal, and it is unnecessary to consider or discuss the question whether it would be a proper reading of the words already quoted to treat them as contemplating a profit made by a joint stock company in any profit-making "venture" falling within any of the different kinds of business or venture the company assessed is authorized to engage in. Most, if not all, of the decisions to which we have been referred, in which the profit in question arose from the purchase and sale of a single property or of the totality of a stock in trade of a given class, have been cases in which sale was held to have been definitely contemplated from the outset as one, at least, of the modes of dealing by which the expected profit was to be earned. In the *California Copper Syndicate's Case* (1), the dealing which was the source of profit under discussion was a sale of property which, it was found as a fact, had been purchased with the "sole object" of reselling it at a profit. In *Beynon* v. *Ogg* (2), the wagons, from the sale of which the profit there in debate was derived, were purchased, it was also found as a fact, as a speculation with the same expectation and object. In *The Commissioner of Taxes* v. *Melbourne Trust, Ltd.* (3), already referred to, the object of the company was to take over, nurse, develop and realize the assets out of the sale of which the profit in question arose.

It is perhaps open to doubt whether so much emphasis would have been laid upon the circumstances that the property was acquired solely with a view to selling it if the statute to be applied had been expressed in the language of the British Columbia definition. Two recent authorities not mentioned in the argument seem to suggest that in these cases this circumstance was, perhaps, over-emphasized.

In the *Commissioners of Inland Revenue* v. *Korean Syndicate* (4), the syndicate was formed by an association of persons with the object, as expressed in the memorandum of association, of acquiring concessions and turning

(1) 5 T.C. 159.
(2) 7 T.C. 125, at p. 130.
(3) [1914] A.C. 1001.
(4) [1921] 3 K.B. 258.

them to account for the profit of the shareholders. The company acquired a concession in Korea, giving it the right to prospect over a large area and the exclusive right of working minerals within a particular district in that area. The original plan was that the syndicate should work the concession with its own capital, but after proceeding in this way for some years, it was considered more advantageous to deal with the concession in another way, and in the result it was handed over to another syndicate to work it, on terms of making annual payments. In discussing the question whether or not the syndicate was assessable in respect of these annual payments, Atkin L.J. says:

> It (the syndicate) has acquired concessions, and it has turned them to account, and the profits that arise in this matter are profits that arise from its so turning them to account. It seems to me that it does not at all matter how it chooses to turn them to account.

In *Gloucester Railway Carriage and Wagon Co.* v. *Commissioners of Inland Revenue* (1), the controversy turned upon the character of profits realized by the company from the sale of wagons which had been used in a branch of its business concerned exclusively with the letting of wagons on hire, the principal business of the company being the manufacture of such vehicles. It was found by the commissioners that,

> as the main object of the company was to make a profit in one way or another out of making wagons and rolling stock, no sharp line could be drawn between wagons sold, wagons let on hire-purchase, and wagons let on simple hire (2),

and that the sale of these wagons was therefore a profit-making operation in the course of the company's business. The essential conditions of assessability (where a profit proposed to be assessed is the profit derived from a sale of part of the company's property) appear to be that the company is dealing with its property in a manner contemplated by the memorandum of association as a class of operation in which the company was to engage, and, moreover, that the governing purpose in acquiring the property had been to turn it to account for the profit of the shareholders, by sale if necessary.

Reverting to the contention already mentioned, that the transaction with which we are concerned being an isolated transaction it cannot be brought within the second alterna-

(1) [1924] 40 T.L.R. 435. (2) 129 L.T. 691, at p. 694.

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tive of Lord Dunedin's test, this rule would have excluded from the scope of the tax the profits under consideration in the *California Copper Syndicate's Case* (1) and in *Beynon* v. *Ogg* (2); and on principle it is not easy to understand why a profit made out of a profit-making venture which, as such, is within the scope of the memorandum of the association, is not an operation in execution of a profit-making scheme within the contemplation of the decisions, merely because that venture has been the only transaction of its kind in the history of the company.

The sole *raison d'être* of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the memorandum of association, *prima facie*, at all events, the profit derived from it is a profit derived from the business of the company.

Whether a single speculation by an individual, having no relation to his ordinary calling or business, from which a profit has been derived, could be a profit-making venture within the meaning of the British Columbia statute, or an adventure within the meaning of the English Act, is a question we are not required to consider. There are obvious distinctions for this purpose between the transactions of a joint stock company and the transactions of an individual, distinctions which may, according to the circumstances, affect the incidence of income tax. As Lord Sterndale M.R. said, in the *Korean Syndicate's Case* (3),

> I do not admit, either, that there can be no difference for this purpose between an individual and a company. If once you get the individual and the company spending money on exactly the same basis, then there would be no difference between them at all. But the fact that the limited company comes into existence in a different way from that in which an individual comes into existence is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by obtaining concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not.

The observation of Hamilton J. (Lord Sumner), in *Liverpool and London and Globe Ins. Co.* v. *Bennett* (1), is also in point.

(1) 5 T.C. 159. (2) 7 T.C. 125.

(3) [1921] 3 K.B. 258 at p. 273.

I am of opinion (said that learned judge), that this analogy fails altogether and that the company's business cannot be split up in this way. The private individual may save to provide for his old age or his family; he has leisure to enjoy, he has ambitions to gratify, and his existence in fact can be separated into his private and his trading life. Nothing of the kind can be done with an insurance company. Its existence is limited by the scope of its memorandum and articles. It is a trading company and a trading company alone. It has no interests and no field of operations outside its business.

Mr. Davis relied mainly on two authorities: *The Tebrau Rubber Syndicate's Case* (1) and *Stevens* v. *Hudson's Bay Company* (2). It is undeniable that Lord Salvesen's judgment in the first of these cases contains dicta which give some support to the contention that, assuming the timber limits in question were purchased with the primary object of logging them, though for turning them to account for profit by sale if necessary, the profits derived from the sale would not be assessable. But these are dicta only, and they are expressed in such a way as to make it at least doubtful whether Lord Salvesen intended to lay down a general proposition applicable to cases other than those in which the whole undertaking of the company is disposed of. Lord Johnston, at all events, proceeds upon the ground, as already mentioned, that the profit was realized in a transaction that involved the winding up of the company. It was not a sale in carrying on, or carrying out, the business of the company but a sale inviting the abandonment of it. Lord Salvesen appears to have been disposed to take a somewhat more restricted view of the scope of the statutory provisions he was applying that subsequent decisions would appear to warrant. *The California Copper Syndicate's Case* (3), in respect of which he seems to have entertained considerable doubt, was in principle approved by the Judicial Committee in the *Melbourne Trust Case* (4) already referred to; and if the view of his judgment is that advanced on behalf of the appellants, it would be difficult indeed to reconcile it with the judgments, or with the decision, in the *Korean Syndicate's Case* (5).

As to the *Hudson's Bay Company's Case* (5), the profit in question arose from a sale of land owned by the Hudson's Bay Company, the title to which was derived from the

(1) 5 T.C. 658.
(2) 101 L.T.R. 96.
(3) 5 T.C. 159.
(4) [1914] A.C. 1001.
(5) [1921] 3 K.B. 258.

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original grant, the land being included in those reserved under the well-known arrangement with the Canadian Government, through which that Government acquired ownership, speaking generally, of the lands in the Canadian Northwest. The principle of the decision is made clear by the judgments of the Master of the Rolls and Lord Justice Farwell. The transaction was considered to be analogous to a sale by an individual of ancestral lands or of pictures from his picture collection, bought as part of the collection. It was not a sale in execution of a profit-making enterprise, either " adventure," or " trade," or " business." The Master of the Rolls likened the position of the Hudson's Bay Company, which came into being under a charter of Charles II, to that of an individual, and the Master of the Rolls and Farwell L.J., dwelt upon the difference between a chartered company, with unlimited powers (in relation to which the familiar distinction above adverted to, with respect to inviolable capital, and surplus assets distributable among the shareholders as dividends, has no meaning), and a company formed under the Joint Stock Companies Act.

The principle of this decision can have little application to the facts of the present case. The view taken by the Court of Appeal was that it was no part of the business of the Hudson's Bay Company to make a profit by buying and selling lands; that the transactions out of which the profits arose were merely conversions of part of the company's capital into another form; and therefore fell within the first of the categories mentioned in the citation from Lord Dunedin's judgment.

For these reasons, the profits now in question were assessable in the years in which they were realized; but the statute of 1921, having obviously no retrospective operation, gave no authority to the assessor to make any assessment in respect of moneys received before the enactment was passed, and the assessment must be reduced accordingly to $66,269.28. As the appellant company achieves a substantial success, it is entitled to its costs.

Appeal allowed with costs.

Solicitors for the appellant: *Davis, Pugh, Davis, Hossie & Ralston.*

Solicitors for the respondent: *Killam & Beck.*

HIS MAJESTY THE KING.....APPELLANT; 1924

v.

CHARLES BELL .....RESPONDENT.

*Nov. 5.
*Dec. 1.

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

Appeal—Jurisdiction—Income War Tax—Penalty—Criminal matter—Income War Tax Act, (D.) 7-8 Geo. V, c. 28, ss. 8, 9; 9-10 Geo. V, c. 55, s. 7; 10-11 Geo. V, c. 49, ss. 11, 13; 11-12 Geo. V, c. 33, s. 4—Supreme Court Act, R.S.C. (1906), c. 139, ss. 36, 41 (b)—Criminal Code, ss. 706, 761, 1024 (a), 1029.

Section 9 (1) of The Income War Tax enacts that for every default in complying with certain sections persons in default "shall be liable on summary conviction to a penalty of $25 for each day during which default continues." The respondent, having pleaded guilty on an information laid for a breach of section 8 of the Act, was fined $3 per day, the magistrate holding that he could, in his discretion, impose a lesser penalty; and the decision was affirmed by the Appellate Division. The appellant moved for special leave to appeal to this court.

Held, that special leave to appeal to this court could not be granted.

Per Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.—The proceeding in this case does not fall within the civil jurisdiction of this court under s. 41 (*b*) of the Supreme Court Act, but is a "criminal cause" within the meaning of the exception in s. 36 of that Act.

Per Duff J.—The proceeding being in form a criminal proceeding and the judgment not being a mere order for the payment of money, the right of appeal to this court, if any, must be found in the provisions of the Criminal Code.

MOTION for special leave to appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the decision of a police magistrate imposing, under s. 9 (1) of The Income War Tax Act a less penalty than $25 for each day's default by the respondent in complying with s. 8 of said Act.

The material facts of the case are fully stated in the judgments now reported.

C. F. Elliott for the motion.

D'Arcy Scott contra.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

THE CHIEF JUSTICE.—By s. 8 of the Income War Tax Act, 1917, as enacted in 1920 (10-11 Geo. V, c. 49, s. 11),

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 20 Alta. L.R. 438; [1924] 2 W.W.R. 616.

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the duty is imposed upon any person who has not made a return, or a complete return as directed by that statute, of delivering to the Minister of Finance, upon demand by him, such information, additional information or return as he may require. For default in complying with the Minister's demand such person by s.s. 1 of s. 9 of the statute (as amended by s. 7 of c. 55 of the statutes of 1919, s. 13 of c. 49 of the statutes of 1920, and s. 4 of c. 33 of the statutes of 1921), is made liable on summary conviction to a penalty of $25 for each day during which such default shall continue.

Admittedly in default under s. 8, the respondent on conviction was fined $3 per day, the magistrate taking the view that s. 1029 of the Criminal Code applied and gave him discretion to impose a pecuniary penalty not exceeding $25 a day. The informant insisting that only the fine nominated in the statute of $25 a day could be imposed, at his instance a case was stated by the magistrate under s. 761 of the Criminal Code for the opinion of the Appellate Division of the Supreme Court of Alberta. That court upheld the magistrate's decision and supported its conclusion by reference to *Rex* v. *Thompson Mfg. Co.* (1). The contrary view was taken by the Supreme Court of Nova Scotia in *The King* v. *Smith* (2). This conflict might have presented matter for an appeal by leave of a judge of this court under s. 1024 (*a*) of the Criminal Code, had the case been otherwise proper for the application of that provision. But the proposed appeal is not by a provincial Attorney General, or by a person convicted, from a judgment of a court of appeal setting aside or affirming a conviction. Section 1024 (*a*), therefore, does not apply.

In its present application the Crown would treat the case not as falling under the sections of the Criminal Code providing for appeals, but rather as coming within the civil jurisdiction of this court, and, having been refused leave to appeal by the Supreme Court of Alberta, now moves for leave under clause (*b*) of the provisions of s. 41 of the Supreme Court Act. The applicability of s. 41 is expressly restricted to cases within sec. 36 and by that section jurisdiction to entertain appeals "in criminal causes" is ex-

(1) [1920] 47 Ont. L.R. 103. (2) [1923] 56 N.S. Rep. 72.

cluded. We are thus confronted with the question whether the proceeding under the summary conviction provisions of the Criminal Code, made applicable by s. 706 of the code and s. 9 of *The Income War Tax Act*, to enforce the penalty imposed by s. 9 for a violation of s. 8 of the latter statute in which the defendant was convicted and fined, is a "criminal cause" within the meaning of the exception in s. 36 of the Supreme Court Act.

A difference of opinion in regard to the purview of the word "criminal" in s. 36 in *Re McNutt* (1), was settled by the judgment of the majority of this court, as then constituted, in *Mitchell* v. *Tracey* (2), where it was determined that

an application for a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violating the provisions of the Nova Scotia Temperance Act arose out of a criminal charge

and could not be made the subject of an appeal under the Supreme Court Act. In 1921 this court, following its decision in the case last mentioned, unanimously declined to entertain an appeal in the case of *The King* v. *Nat Bell Liquors Ltd.* (3); and, on appeal by special leave, their Lordships of the Judicial Committee (4) affirmed our lack of jurisdiction. The importance of this decision is that it finally determined that the word "criminal" in s. 36 of the Supreme Court Act is employed in the broad sense ascribed to it in *Mitchell* v. *Tracey* (2). Compare *Ex parte Wood-Hall* (5); *Ex parte Schofield* (6), and *Provincial Cinematograph Theatre* v. *Newcastle Profiteering Committee* (7). Lord Sumner, quoting the language of one of the judgments delivered in *Re McNutt* (1), said, at page 186 (4):—

Their lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil" and "connotes a proceeding which is not civil in its character."

His Lordship added:

After all, the Supreme Court Act is concerned not with the authority, which is the source of the "criminal" law under which the proceedings are taken, but with the proceedings themselves.

(1) [1912] 47 Can. S.C.R. 259.
(2) [1919] 58 Can. S.C.R. 640.
(3) [1921] 62 Can. S.C.R. 118.
(4) [1922] 2 A.C. 128, at p. 167.
(5) [1888] 20 Q.B.D. 832.
(6) [1891] 2 Q.B.D. 428.
(7) [1921] 125 L.T. 651.

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We have, therefore, to inquire whether the proceeding against the respondent was in its character civil or was criminal in the sense indicated.

There has been some difference of opinion in England as to whether a proceeding to enforce by summary conviction penalties imposed for contraventions of statutory law not ordinarily regarded as criminal should be deemed criminal in determining the admissibility of the evidence of the accused, the right of appeal to the court of criminal appeal and similar questions. Reference may be made to *Attorney General* v. *Radloff* (1); *Osborne* v. *Milman* (2); *Attorney General* v. *Bradlaugh* (3); *Re Douglas* (4); *Cattell* v. *Ireson* (5); *The King* v. *Hausmann et al* (6). But none of these cases appears to be at all so closely in point as the decision of the Court of Appeal (Bowen and Kay, L.JJ.) in *The Queen* v. *Tyler & The International Commercial Coy., Ltd.* (7).

Section 47 of the English Judicature Act (1873) excludes from the jurisdiction of the Court of Appeal an appeal from a judgment of the High Court in any criminal cause or matter. By s. 26 of the Companies' Act, 1862, every company under the Act having a capital divided into shares was required at least once a year to make within a prescribed period a list of shareholders with certain particulars and to forward a copy thereof to the registrar of joint stock companies. By s. 27 it was provided that for default the company should incur a penalty not exceeding £5 for every day during which such default continued and that every director and manager knowingly and wilfully authorizing such default should incur a like penalty. On information laid before him charging the co-defendant company with default under s. 26, Alderman Tyler, a city magistrate, refused a summons. The appellant obtained a rule nisi for a mandamus. The Queen's Bench Division discharged the rule. The applicant appealed to the Court of Appeal and its jurisdiction was challenged under s. 47. The court held that the judgment of the Queen's Bench

(1) [1854] 10 Ex. 84.
(2) [1887] 18 Q.B.D. 471.
(3) [1885] 14 Q.B.D. 667.
(4) [1842] 3 Q.B. 825.
(5) [1858] 27 L.J.M.C. 167.
(6) [1909] W.N. 198.
(7) [1891] 2 Q.B. 588.

Division was a judgment in a criminal cause or matter and rejected the appeal.

Bowen L.J. said that s. 26 created a duty breach of which would be disobedience of the law, and, therefore, an offence, which, unless the statute otherwise provided, would be indictable. The company might not escape the duty by paying the penalty; the duty imposed was positive, and the penalty provided was punishment for the offence committed by a breach of it.

Kay L.J. regarded the duty imposed under s. 26 as very important in the interest of the public as well as of the shareholders; the penalty was not intended to be an equivalent for the omission to perform the duty since it was "£5 a day during which the default continues"; the penalty was of such a character that it clearly was intended as a punishment such as would compel the company to fulfil the duty. It was inflicted by way of punishment and not as a compensation for the breach.

The appeal was rejected on the ground

that the Court of Appeal has no jurisdiction to hear matters which belong to the criminal jurisdiction of the courts of the country, the intention of the Judicature Act being to keep that class of case beyond the scope and reach of the Court of Appeal.

Almost equally in point is *The Mayor etc. of Southport* v. *The Birkdale Urban District Council* (1), heard by Lord Esher M.R., and Lopes and Chitty L.JJ. A local Act provided

that if it shall at any time be proved to the satisfaction of any two justices * * * that the illuminating power of the gas supplied by the corporation did not when tested * * * equal the illuminating power by this Act prescribed

the corporation shall forfeit such sum, not exceeding £20, as such justices shall determine, to be paid to the local board. Upon information, and after hearing, the justices convicted the corporation and fined it £10, and then stated a case for the opinion of the High Court which reversed the decision of the justices and set aside the conviction. The informant appealed and a preliminary question was as to the jurisdiction of the Court of Appeal under s. 47 of the Judicature Act. The court unanimously held that the judgment appealed against was a judgment in a criminal cause or matter and as such non-appealable. Lord Esher said:

(1) [1897] 76 L.T. 318.

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There were an information, a summons, and a conviction. It is contended that what was asked for was the payment of a debt. It is impossible to maintain that contention. Nothing was due to any one from the corporation for which an action could be brought * * * It is impossible to say that they did not determine that the corporation must pay £10 by way of penalty for disobedience to the Act of Parliament.

Lopes L.J. said:

There is every element and incident of a criminal matter. The proceedings were commenced by information; a summons was issued; there was an appearance before justices who would adjudicate under the provisions of Jervis's Act (11-12 Vict., c. 43); and the proceedings end in a conviction and the imposition of a penalty under s. 40 of the local Act. Can anything be more like a criminal matter than that? The proceedings were before a criminal tribunal, and commenced and ended in the same way as ordinary criminal proceedings. * * * Putting aside the procedure, and looking only at the provisions of s. 40 of the local Act, by which a duty is imposed on the corporation, disobedience to that duty by the corporation is a misdemeanour at common law and is indictable. Looking at the case from that point of view, it is impossible to say that disobedience to the provisions of s. 40 is not a criminal offence. It has been argued that imprisonment could not follow, and that therefore this is not a criminal matter. That is so in this case, because the proceedings are against a corporation. But if the proceedings had been against an individual, it would be impossible to say that in this case imprisonment might not follow. That contention is dealt with in *The Queen* v. *Tyler* (1) and altogether fails.

Chitty L.J. added:

Both in form and substance these proceedings were criminal. They were commenced by information and summons; there was a conviction, and the imposition of a penalty. A case was stated for the opinion of the High Court and the appellants entered into recognizance to prosecute the appeal. As to the form, there cannot be any doubt. As to the substance, the conclusion is the same.

We think it clear that s. 8 of the *Income War Tax Act* imposed a duty in the public interest; that default in performing that duty constituted an offence against the public law; and that Parliament provided for the infliction of a prescribed punishment by a tribunal which ordinarily exercises criminal jurisdiction and by procedure enacted by the Criminal Code. *Clifford* v. *O'Sullivan* (2).

But, although a civil liability might be imposed, if Parliament provides for its enforcement by a proceeding in its nature criminal, that that proceeding would be a criminal cause within the purview of s. 36 of the Supreme Court Act would seem to follow from the judgment of the English Court of Appeal in *Seaman* v. *Burley* (3). Lord Esher, in

(1) [1891] 2 Q.B. 588. (2) [1921] 2 App. Cas. 570, at p. 580.
(3) [1896] 2 Q.B. 344.

holding that a judgment on a case stated by justices on an application to enforce payment of a poor-rate by warrant of distress was a judgment in a criminal cause or matter within s. 47 of the Judicature Act, said, at page 346:

It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause. That it is a question of procedure may be easily seen by taking the case of an assault. An assault may be made the subject of civil procedure by action, in which case there may be an appeal to this court; or it may be made the subject of criminal procedure by indictment, in which case there cannot be such an appeal. This seems to me to be contrary to the argument employed by the counsel for the appellant to the effect that the question depends upon whether the origin of the proceeding, i.e., the matter complained of, is in its nature criminal or not. In each case the thing complained of is the same, namely, the assault; but there is or is not an appeal to this court according as the procedure to which recourse is had is civil or criminal. Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this court.

Lord Justice Kay said, at page 349:

If I followed the argument correctly, it was that, where non-fulfilment of a liability is a criminal act, the proceeding to enforce it may be treated as criminal, but that where it is not a criminal act, the proceeding cannot be so treated. It appears to me that, if there be a provision in a statute that that which is merely a civil liability may be enforced by a proceeding in its nature criminal, that proceeding is none the less criminal for the purpose of s. 47 of the Judicature Act, 1873, because it is applied to a civil liability. If the proceedings intended by a statute to enforce a civil obligation are in the nature of criminal proceedings, then there cannot I think, under s. 47, be an appeal to this court. I think that this distinction is admirably dealt with by Cotton L.J. in *The Queen* v. *Barnardo* (1). He there said: "Section 47 does not mean that no appeal shall lie when the act which originates the proceedings in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding. In *Ex parte Bell Cox* (2), it was held that an appeal lay from the granting of a habeas corpus, because the proceeding in which it was granted was a civil proceeding. In *Ex parte Alice Woodhall* (3), it was held that the refusal of a habeas corpus could not be appealed from, because the refusal was in a criminal proceeding. This shews the distinction. In my opinion the question is, not whether the act which is said to have been done by Dr. Barnardo is one for which he was liable to be indicted, but whether the proceeding in which the order was made was a criminal cause or matter." I take that to be the true distinction. Therefore it does not matter whether the non-payment of the rate is a criminal act or not. If the proceeding against the person who does not pay the rate is in its nature criminal, there cannot be an appeal to this court in it. I think the

(1) [1889] 23 Q.B.D. 305 at p. 308. (2) [1887] 20 Q.B.D. 1.
(3) 20 Q.B.D. 832.

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result of the decisions is that the question whether there is such an appeal does not depend on the nature of the obligation, but on the nature of the proceedings.

Lord Justice Smith delivered judgment to the same effect.

In *The Queen* v. *Whitchurch* (1), Brett L.J. said, at p. 537:

> I am of the opinion that we have no jurisdiction to entertain this appeal, because the legislature has treated the matter as criminal. By the Public Health Act, 1875, certain things are prohibited, and certain other things are directed to be done by the owners or occupiers; and it has been enacted that if a default occurs, the person in default shall be subject to a penalty recoverable before justices by Jervis's Acts. The legislature has decreed that a penalty shall be imposed on a person offending against the provisions of the Public Health Act, 1875; and it has been decided in *Mellor* v. *Denham* (2) that to treat the matter in that manner is to treat it as a criminal matter.

The observation of Lord Sumner in the *Nat Bell Liquors Case* (3), at p. 168, that:

> the Supreme Court Act is concerned * * * with the proceedings themselves,

indicates that the words "criminal cause" in s. 36 of that Act have the same purview and effect as was given to the words "criminal cause or matter" in s. 47 of the English Judicature Act in the two cases last cited. But see *Rex* v. *Governor of Brixton Prison* (4).

Whenever a statute imposes a penalty by way of punishment for non-observance of a behest which it enacts in the public interest and the prescribed penalty is made enforceable by criminal procedure, these proceedings fulfil the two conditions connoted by the word "criminal" as used in s. 36 of the Supreme Court Act. *Clifford* v. *O'Sullivan* (5). A decision by a judicial tribunal of any question raised in or with regard to them, at whatever stage it arises, is a decision in a criminal cause; *Ex parte Woodhall* (6); and, as such, is within the exception in s. 36; and the existence of an alternative remedy of a civil nature would not affect that conclusion. *Queen* v. *Whitchurch* (1).

Leave to appeal must, therefore, be refused with costs.

IDINGTON J. concurred in the result.

(1) [1881] 7 Q.B.D. 534.
(2) [1880] 5 Q.B.D. 467.
(3) [1922] 2 A.C. 128.
(4) [1910] 2 K.B. 1056, at pp. 1064-5.
(5) [1921] 2 A.C. 570, at p. 580.
(6) 20 Q.B.D. 832, at p. 838.

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DUFF J.—It is rather important to notice that the sole point for consideration is whether or not the proceeding out of which this appeal arises falls within the description " criminal cause " in the sense in which those words are used in s. 36 of the Supreme Court Act. Happily, in my view, it is unnecessary to discuss the scope of such words as " crime " and " criminal cause " in the abstract; an enticing subject, perhaps, for logomachy, but, in my view of the effect of s. 36, of little importance here. Nor, according to the opinion I have formed, is it necessary to consider whether default in making a return or supplying information pursuant to ss. 7 and 8 of the Income War Tax Act is for all purposes a criminal offence. The penalty imposed by s. 9 is recoverable in the Exchequer Court; and besides the consideration that proceedings on the Revenue Side of the Exchequer Court, now on the Revenue Side of the King's Bench, for the recovery of penalties for smuggling have been definitely held not to fall within the category of criminal proceedings, *In re Hausmann* (1), there is the circumstance that the Exchequer Court of Canada is not and probably cannot be a court of criminal jurisdiction. These considerations suggest, perhaps, that proceedings under the Income War Tax Act for the recovery of penalties for such defaults as are here in question, if considered from the point of view of that Act alone, lie in very debatable ground; on

the boundary line which divides civil from criminal matters

to use the phrase of Lindley L.J., in *Attorney General* v. *Bradlaugh* (2).

We are here, however, concerned only with the proper application of a particular phrase in a particular statute; and that question is capable, in my view, of being decided upon a ground that can be stated very briefly. For the purpose of determining the scope of the proviso to s. 36 of the Supreme Court Act, under which appeals in criminal causes are limited to the appeals provided for by the Criminal Code, it is necessary, I think, to read that section in light of the enactments of the Criminal Code. The subject of appeals, as affecting summary convictions under Part 14, as well as other convictions, where the proceeding leading

(1) [1909] 3 Cr. App. Cas. 3. (2) 14 Q.B.D. 667 at p. 714.

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to the conviction is in form a criminal proceeding, and the judgment is not a mere order for the payment of money (including appeals to the Supreme Court of Canada, as well as to the Privy Council), is a subject dealt with in the Criminal Code as a branch of Criminal Law and Procedure; and there, I think, the Supreme Court Act leaves that subject. Consequently, the right of appeal to this court, if any, in this and in similar cases, must be found in the provisions of the Criminal Code.

I am dealing, of course, it is perhaps advisable to say, solely with cases in which the proceeding is a proceeding authorized by a statute of the Parliament of Canada. What I have said is in no way inconsistent with either the decision or the judgment in *The King* v. *Nat Bell* (1).

Leave to appeal should be refused.

Motion dismissed with costs.

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*Oct. 24, 27.
*Dec. 9.

GEORGE BALL (DEFENDANT).....APPELLANT;

AND

PHILIP P. GUTSCHENRITTER AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of land—Vendor and purchaser—Reservations in original grant from Crown—Disclosure by vendor—Land Titles Act, R.S. Sask. (1920) c. 67, s. 60.

In an action for specific performance of an agreement for the sale of land, dated in April, 1920, two defences were set up, the second of which was the alleged inability of the vendors to make title owing to the existence of reservations in certain original Crown grants dated in 1906 and 1907. The agreement for sale contained a covenant by the vendors "to convey the lands to the purchaser by good and sufficient deed or transfer" but contained no words of exception or limitation such as "subject to the conditions and reservations contained in the original grants from the Crown." The agreement also contained a covenant by the purchaser accepting the title of the vendor.

Held, affirming the judgment of the Court of Appeal (18 Sask. L.R. 443), Idington J. dissenting, that, in the circumstances of this case and in view of the provisions of section 60 of the Land Titles Act, the vendor was under no obligation to caution the purchaser about the reservations in the original grant to which his title was normally subject

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1922] 2 A.C. 128.

and that the purchaser ought to have inquired himself about the nature of the title the vendor could give.

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BALL v. GUTSCHENRITTER.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) affirming on equal division of the court the judgment of the trial judge (2) and maintaining the respondents' action for specific performance of an agreement for the sale of land.

The material facts of the case are fully stated in the judgments now reported.

Stapleton for the appellant.

Jonah for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—This appeal arises out of an action brought by the respondents against the appellant for specific performance of an agreement of the 14th April, 1920, for the sale and purchase of a farm in Saskatchewan, by payment of the balance of principal and interest due under the terms of the contract and in default thereof for cancellation of the agreement and forfeiture of the moneys already paid. There were two defences: First, that the appellant was induced to enter into the contract by misrepresentations of the respondents as to the adaptability of the land to agriculture; and, secondly, that the respondents were unable to make a title to the property. Respecting the first of these defences, the learned trial judge held that there had been no misrepresentation, and, moreover, that the appellant had relied exclusively upon his own investigations as to the character of the farm. As to the questions of fact raised by this defence it seems sufficient to say that, having regard to the letters written by the appellant after he had enjoyed possession of the land for a considerable period, it is impossible to hold that the learned trial judge took an extreme view in thinking that the evidence of the appellant was not of sufficient weight to justify a finding in his favour.

As to the second defence, which was based upon alleged deficiencies in the respondents' title, the complaint of the

(1) [1924] 18 Sask. L.R. 443; [1924] 2 W.W.R. 128.

(2) 17 Sask. L.R. 422; [1923] 3 W.W.R. 619.

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Duff J.

appellant is concerned with reservations in the patents that were the source of the respondents' title to part of the land, and with a proviso in the same instruments. The proviso and the reservations, which form the principal ground of complaint, are set forth in the following extract:—

> Saving and reserving, nevertheless, unto us, our successors and assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may be hereafter found on or under, or flowing through or upon any part of the said parcel or tract of land; also reserving all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same, and for this purpose to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same; and also reserving thereout and therefrom all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to the said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of fishery and fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights.
>
> To have and to hold the said parcel or tract of land unto the said Thomas Ross, his heirs and assigns forever.
>
> Provided, and, in pursuance of section 5 of the Northwest Irrigation Act, 1898, it is hereby declared that these presents shall not vest in the said Thomas Ross, his heirs and assigns, any exclusive or other property or interest in or any exclusive right or privilege, with respect to any lake, river, stream or other body of water, or in, or with respect to any water contained or flowing therein, or the land forming the bed or shore thereof.

As to part of the land, the patents contain no reservation of minerals, the subjects of complaint being reservations affecting navigable waters, rights of fishery and ancillary rights.

Section 5 of the Irrigation Act of 1898, referred to in the last paragraph of the above extract, in terms directs that after the passing of the Act, except in pursuance of some agreement or undertaking then existing, no grant shall be made by the Crown of lands or of any estate, in such terms as to vest in the grantee any exclusive or other right or interest of the character described in the proviso contained in that paragraph; and the effect of s. 5 is, that no property or exclusive interest in any stream or other water within the contemplation of that section, which, of course, includes navigable waters, or in the bed of such stream or water, can be lawfully granted by the Crown after the passing of the Act. In view of this enactment, the reservation of rights of navigation in navigable waters is, perhaps,

otiose, and was inserted, it may be assumed, in compliance with the requirements of some order in council, passed prior to the date of the Irrigation Act, which has not been called to our attention. The reservations respecting fisheries and minerals are those required by orders in council passed under the authority of the Dominion Lands Act, dated, respectively, the 19th March, 1887, and the 17th September, 1889.

As regards reservations touching streams and other waters, and the beds thereof, and fishing and navigation, the enactment contained in s. 5 of the Irrigation Act, already referred to, seems to preclude the possibility of a patentee from the Crown, in the absence of some agreement to the contrary in existence at the time of the passing of the Act, acquiring any such exclusive right to any natural stream or water or its bed as would prevent the Crown or its licensees exercising such rights as those reserved in the patents. Subject to the exception mentioned, all grants acquired from the Crown since the date of the Act are, by the general law, subject to that limitation; and there would appear to be no authority except the authority of Parliament from which such exclusive rights could be derived.

It is by no means clear that it would be impossible for a patentee under a patent reserving mines and minerals, or his successor in title, to obtain a grant of the minerals reserved, including coal; and, without expressing any opinion on the point, it may, for the purposes of this appeal, be assumed that there would be no insuperable legal impediment in the way of acquiring such a title.

Under an agreement for the sale of land, a purchaser acquires (unless his rights are expressly or impliedly restricted), a right to receive a good title in fee simple to all the subjects, *usque ad coelum et ad inferos* (within the description of the parcels), denoted by the term "land" in English law; as well as the right to have the vendor's title disclosed to him in a proper abstract of title, and to have the abstract verified by sufficient proofs. Juridically, this right has been ascribed to the force of a contractual term implied from the character of the agreement itself; and, on the other hand, it has also been described as a right given *ab extra* by the law. Whatever the juridical basis of

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the right may be, it is settled that it may be limited, or entirely displaced, by the fact of the purchaser's knowledge at the time of entering into the agreement that the vendor's title was affected by some flaw or deficiency which it was not in his power to remove—a qualification of the purchaser's right, which, however, does not come into play where the agreement itself contains a specific stipulation requiring the vendor to give a good title. In such cases, the matter is ruled exclusively by the terms of the contract, the purchaser's rights being subject to such qualifications only as are stated expressly or as arise by necessary implication from the words themselves of the contract, properly construed. For the purposes of this appeal it will be unnecessary to consider a question of some importance, whether, namely, under an open agreement for sale, that is to say, an agreement containing no express stipulations governing the obligations of the vendor as touching the subject of title—the vendor's title being a registered title governed by the Land Titles Act of Saskatchewan—the purchaser can demand any better or other title than that received by the grantee under the original grant from the Crown. That is a question which does not arise, and no opinion is expressed concerning it. The agreement under consideration deals with the subject of title, the pertinent stipulation being in these words:

> And he covenants and agrees with the purchaser that upon the full, prompt, faithful performance by the purchaser of said and every of said covenants and agreements by him to be performed, kept and fulfilled, and upon payment of the money and sums of money above mentioned in the manner and at the time specified; then and in such case the said vendor will convey the said land and premises to the purchaser by good and sufficient deed or transfer, prepaid by the vendor's solicitor at the expense of the purchaser.
>
> And it is further agreed that the purchaser hereby accepts the title of the vendor to the said lands and shall not be entitled to call for the production of any abstract of title or proof, or evidence of title or any transfer papers, or documents relating to the said property other than those which are now in the possession of the vendor.

Stipulations exonerating the vendor from his obligation under a contract for the sale of land to vest in the purchaser a good title to the subject of the sale, or limiting that obligation, are very strictly construed.

The condition before us is couched in very general terms, and it is impossible to say that its language is calculated to

inform the purchaser that he is assuming the risk of being saddled with a title which no purchaser from him would accept, or that he is renouncing his rights arising from the vendor's duty on the treaty for sale to disclose to him the facts touching the nature of his title, or to direct his attention to this duty at all; it has been held, rightly it would appear, that a condition expressed in the terms of this stipulation must be read and applied subject to that right; *In re Haedicke and Lipski's Contract* (1); it does not relieve the vendor from his obligation to disclose facts which it would be his duty to disclose in the absence of it.

The concrete question before us is this: Are the defects of title now set up by the appellant within the scope of the rule imposing upon the vendor this duty of disclosure? The disabilities of the patentee arising from the reservations in the patent are, unquestionably, defects of title and, in point of verbal construction, come within the scope of the qualification. Is the vendor precluded from opposing to the purchaser's objection grounded upon these defects the purchaser's own agreement to accept his title, by reason of his failure on the treaty for sale to acquaint the purchaser with the terms of the patents?

The vendor's duty of disclosure, broadly speaking, rests ultimately upon considerations analogous to those which give rise to the corresponding duty in the case of some other classes of contracts—insurance, for example. One of the parties to the negotiation in such cases may ordinarily be supposed to have exclusive cognizance of certain matters material to the contract; and both justice and convenience seem to require that upon that party there shall rest—and therefore the law imposes upon him—a duty of disclosure in relation to such matters. *In re Banister* (2); *In re Marsh and Granville* (3); *Reeve* v. *Berridge* (4).

The general principle is that the vendor, who is presumed to know the state of his title, must inform the purchaser of all material defects in his title which are within his exclusive knowledge, and which the purchaser would not be expected to discover for himself with the care commonly

(1) [1901] 2 Ch. 666.
(2) [1879] 12 Ch.D. 131, at p. 136.
(3) [1882] 24 Ch. D. 11.
(4) [1888] 20 Q.B.D. 523 at p. 528.

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used in such transactions and with the opportunities of investigation available to him. *Carlish* v. *Salt* (1).

The principle has been frequently applied, and is admirably illustrated in cases in which the vendor is a lessee, and the lease is the subject of the sale. The vendor is not expected to be at pains to disclose the terms of a lease which contains only the ordinary typical terms; of these the purchaser may be presumed to have notice through the nature of the transaction itself. Anything in the terms of the lease unusual or exceptionally onerous affecting the lessee, however, he is expected to disclose. Such terms are material in the sense that they may affect the mind of the proposed purchaser as to the desirability of the bargain; and the vendor will, as a rule, not only be cognizant of the terms of his own lease, but will, as well, be aware of the fact that the purchaser will be, and must remain, in ignorance of such terms, unless they are made known to him by or on behalf of the vendor himself. It is a convenient, as well as a just rule—a rule conducive to fair and honest dealing—to require the vendor, whose lease contains unusually disadvantageous conditions, to disclose that fact, or, at all events, to invite the purchaser to examine the lease, and to give him full opportunity of informing himself about it. *Molyneux* v. *Hawtrey* (2).

In considering the scope of this obligation of disclosure as affecting the present controversy, it is most important to remember that the application of the principle has been dictated by these general assumptions—that, in the normal course of affairs, the vendor will know, and the purchaser will be ignorant of, any material defects in the vendor's title.

The learned Chief Justice of Saskatchewan has set forth in his judgment certain facts touching the origin of land titles in that province, which are most pertinent at this point. Many million acres have been given to the Canadian Pacific Railway Company and other railway companies as land grants, without any reservation of minerals or mining rights; lands granted by the Crown prior to January, 1890, and lands entered for as homesteads before

(1) [1906] 1 Ch. 335, at pp. 340 and 341.

(2) [1903] 2 K.B. 487.

the regulations of 1889, as well as lands included in those reserved to the Hudson's Bay Company, were not subject to any such reservation. And the titles to these in great part are free from any restriction or burden arising from the enactments of the Irrigation Act or affecting rights of fishing. And it follows, of course, as the learned Chief Justice says, that it cannot be presumed, with regard to any parcel of land in the province, that it was granted by the Crown with all or any of the reservations to which the respondents' title is subject. On the other hand, by s. 60 of the Saskatchewan Land Titles Act, c. 67, R.S.S. 1920:

> Any certificate of title granted under the Act shall, unless the contrary is expressly declared, be subject to
>
> (*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown.

As Lord Haldane says, in *Grand Trunk Ry. Co.* v. *Robinson* (1), the law imputes to people who are subject to it the duty of knowing its principles; and purchasers of land in Saskatchewan registered under the Land Titles Act there, must have their rights determined on the footing that such purchasers act with knowledge of this provision of that enactment. Knowledge, generally, of the provisions of statutes and orders in council affecting land titles in that province must be imputed to them. That is to say, the rights of parties to dealings in lands must be determined on the footing that such knowledge exists; the purchaser must, for example, be assumed to know that any title to land acquired in the ordinary way by homestead entry since 1889, embracing, admittedly, much the greater part of the Crown granted agricultural land of the province, is subject to precisely the same reservations affecting fishing and minerals as those affecting the respondents' title, and to be aware of the enactments of the Irrigation Act. For the same reason, knowledge must also be ascribed to both parties of the fact that, in the ordinary course the precise character of such reservations can be ascertained by inspection of the documents in the Land Registry.

In view of these considerations, is the vendor, possessing the ordinary, the typical, title, derived through homestead entry made since the date (the year 1889) mentioned—the title under which the agricultural lands of the province are

(1) [1915] A.C. 740 at p. 748.

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for the most part held—under an obligation to caution his purchaser about the reservations in the original grant to which such a title is normally subject? On the contrary, it would appear, indeed, that in such circumstances the whole basis of the duty of disclosure, as touching such facts as the existence of these reservations, disappears. The plain common sense of the business seems to be that a purchaser, if at all concerned to have a title of a different character—in other words, if concerned to have a title more absolute than this typical title—might be expected himself to inquire about the nature of the title the vendor could give.

We were referred to a judgment of the Saskatchewan Court of Appeal in *Western Canada Investment Co.* v. *McDairmid* (1), in which it appears to have been laid down that an acceptance of title couched in terms similar to those now in question is limited in its operation to such defects of title as the purchaser is aware of or ought to be deemed in law to be aware of. This proposition is too broadly stated. As already intimated, so long as the vendor has made no default in his duty of disclosure (and subject to the effect of special circumstances upon the vendor's right to specific performance), the condition is an adequate shield against objections on the ground of defects in title. He is disabled from using it as such a shield when the purchaser has remained in ignorance of the defect by reason of his default in that duty—and only then. This is the basis of the decision of Byrne J., in *Re Haedicke and Lipski's Contract* (2). The language of the Master of the Rolls in *Bousfield* v. *Hodges* (3), does, at first sight, lend some support, perhaps, to the appellant's contention. But the key to the meaning of the Master of the Rolls is in the phrase "kept back," in which he refers to the kind of conduct he is thinking about—conduct which would make it unfair to insist upon the condition—conduct falling short of the standard to which a conscientious seller would be expected to conform, when exacting such a condition from a purchaser. *Jenkins* v. *Hiles* (4); *Re Haedicke and Lipski Contract* (2), at page 670.

(1) [1922] 15 Sask. L.R. 142.
(2) [1901] 2 Ch. 666.
(3) [1863] 33 Beav. 90.
(4) [1802] 6 Ves. 646.

These reasons are sufficient to shew that the appeal should be rejected; but it is, perhaps, desirable to emphasize the fact that there is nothing in the circumstances of the property which could give to the reservations in the patent any special significance or importance which was not as well known to the appellant as to the respondents. The fact that a considerable stream of water traverses the property for half a mile was repeatedly mentioned during the argument but this was, of course, patent and fully known to the appellant; nor was there anything else in the particular circumstances of the case which could lend support to a charge that the vendor, in insisting upon the conditions in his contract, was acting unconscientiously or unfairly.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—By an agreement in writing dated the 14th April, 1920, the respondents agreed to sell to the appellant, and the latter agreed to buy from the former, the whole of section one and the south half of section two, and the east half of the southeast quarter of section three in township twenty-six in range twenty-eight west of the second meridian in the province of Saskatchewan, in the Dominion of Canada, containing one thousand and forty acres, more or less, according to Dominion survey thereof, at and for the price of fifty-two thousand dollars, of which twelve thousand dollars was paid in cash.

The balance was to be paid on the crops payment plan, by which the respondents were to receive each year one half the specified crop.

The agreement is on a printed form which in part is not filled up and thus indicates haste and want of proper precaution at the very outset.

The purchaser, now appellant, had recently come from Ontario on the lookout for land and was an entire stranger regarding the country, except having once passed through on a trip.

The venture he made in said purchase seems to have been unfortunate, for, after farming the place for three years in succession, he was further behind than when he started, and, in February, 1923, the respondents brought this action for specific performance and other alternatives in way of relief.

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The appellant set up many defences and also counterclaimed on several grounds.

The learned trial judge decided against him on all grounds except a trivial one, and gave judgment for the respondents with costs.

From that judgment the appellant appealed to the Court of Appeal of Saskatchewan.

The learned Chief Justice and Mr. Justice Martin were in favour of allowing the appeal on the ground that the respondents could not make the title they had covenanted with the appellant to convey.

Justices Lamont and McKay took the opposite view and the court being thus equally divided the said appeal failed and was dismissed without costs.

Hence this appeal in which the appellant relies upon the ground he had set up at the trial, of misrepresentation as to the quality of the land and in other respects, as well as the impossibility of the respondents making the title they had covenanted to make.

As to the ground of misrepresentation, I am unable to say that it is wholly unfounded for I have not considered all the evidence as fully as I should have done if necessary to determine this appeal.

It seems, however, difficult to rely upon it in face of the appellant continuing to work the farm so long after he must have realized how much he had been misled, instead of repudiating his purchase or complaining in any way to respondents.

Moreover, I have arrived at such a decided opinion, for the reasons respectively assigned by the learned Chief Justice Haultain and Mr. Justice Martin in the court below in support of the ground taken by them, that by reason of the reservation of minerals in the Crown grant this appeal should be allowed.

The said learned judges have between them so fully covered the ground that I do not feel disposed to repeat at length their reasoning here, and cite the leading authorities cited by them and, indeed, see no useful purpose to be served by doing so.

The reasons assigned by respondents' counsel seem to me to rest, in the last analysis, solely upon an implied presumption in law that any vendee buying land in Saskatche-

wan and elsewhere in our western provinces since 1907, must have knowledge of the fact that minerals therein are reserved to the Crown, though in fact there are many millions of acres in that and other western provinces to be bought, as was part of this very purchase herein, free from any such reservation.

There is, I respectfully submit, no reasonable ground for such presumptions under such circumstances. No case is cited that on examination will support such a pretension.

With great respect I cannot follow that train of thought in face of the well known facts.

Test it in many obvious ways, for example, by applying the converse implication, and attribute to the vendors knowledge of the fact, though non-existent.

What right have such vendors of such like lands to pretend they are free from such reservations, when in law they must know, if granted since 1907, that they are subject thereto.

How such a train of thought can be properly pressed upon us puzzles me much in view of the actual condition of the litigation that has arisen in the west as illustrated by the following remarks of Mr. Justice Mackenzie in the case of *Burke* v. *Popoff* (1):—

> It has been repeatedly held in Alberta that a coal reservation constitutes a valid objection to title by one who has entered into an agreement to purchase land not subject thereto. See *Greig* v. *Franco-Canadian Mtge. Co.* (2); *Innis* v. *Costello* (3); *Universal Land Sec. Co.* v. *Jackson* (4); *Crump* v. *McNeill* (5).

The certificate of title under section 60 of the Land Titles Act, is relied upon by respondents' counsel. I submit that does not help us as an argument for respondents herein. It simply puts purchasers on their guard to investigate when that stage, in the course of carrying out a purchase, is reached.

A vendor is thereby bound to have all that, and other eight sub-clauses of the said section cleared up when that stage is reached, if not already made so.

(1) [1923] 2 W.W.R. 648, at p. 651.
(2) 10 Alta. L.R. 44; 10 W.W.R. 1139; 34 W.L.R. 1102.
(3) 11 Alta. L.R. 109; [1917] 1 W.W.R. 1135.
(4) 11 Alta. L.R. 483; [1917] 1 W.W.R. 1352.
(5) 14 Alta. L.R. 206; [1919] 1 W.W.R. 52.

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This is one he cannot clear up and a prudent vendor should make it clear, as is often done, by expressing the reservation in his agreement of sale.

I have considered all the authorities cited by respondents' counsel, as well as those in Mr. Justice Lamont's judgment, and I fail to see how respondents are helped thereby.

At first blush I was inclined to think there might be some consolation for the respondents in the apparent acknowledgment, in the articles of agreement, of the respondents' title, but that is swept away by *In re Haedicke and Lipski's Contract* (1), *following Bousfield* v. *Hodges* (2), which I am glad to see frankly presented in respondents' factum, though I cannot adopt the reasoning by which it is sought to be averted.

A great many decisions and authorities bearing upon this aspect of the case are collected in the judgment of Mr. Justice Elwood, in the case of *Strickee* v. *Ruckeman* (3).

The defendant herein as the purchaser, as in many of these cases so cited, was ignorant of the title and of the reservation until his solicitor apparently discovered it in the course of this litigation.

I think, in light of the said authorities and many others that could be discovered, the ignorance of the defendant was quite excusable.

I must conclude, for the foregoing reasons, that this appeal should be allowed with costs subject to the reasonable conditions proposed by Mr. Justice Martin to be imposed upon the appellant, and, in the event of the parties being unable to agree thereon, that a reference be directed to determine same.

Appeal dismissed with costs.

Solicitors for the appellant: *Stapleton & Gerrand.*

Solicitors for the respondents: *Cross, Jonah, Hugg & Forbes.*

(1) [1901] L.R. 2 Ch. 666. (2) 33 Beav. 90.
(3) 7 Sask. L.R. 371.

CANADA STEAMSHIP LINES, LIMITED (PLAINTIFF) ..... APPELLANT;

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*Nov. 21.
*Dec. 9.

AND

STEAMER *JOHN B. KETCHUM II* (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Seamen—Collision—Action in rem—Navigation.

A collision occurred between the C. owned by the appellant company and the K. on the St. Lawrence, off shore near Graveyard Point; the former coming down stream and the latter going up. The C. having the right-of-way under rule 25 exercised her right to elect for the north side of the channel and gave a two-blast signal to the K. in ample time to warn the K. of her election to proceed to port, which was not answered. When about 1,000 feet apart, the C., perceiving that the K. did not answer nor comply with her signal and that the K. was on a course nearly at right angles to the C., sounded the danger signal, immediately followed by a two-blast signal, answered by the K. with two-blast, putting her helm to starboard and reversing her engines at full speed astern, instead of putting her helm hard astarboard. The C. starboarded and then ported her helm to avoid grounding and struck the K. amidship.

Held, that the C. coming down with the current had the right to elect which side she would take, under rule 25 of the rules for navigating the St. Lawrence above Montreal and that the K. was wholly responsible for the collision and the damages which ensued.

Held also that a defendant's negligence may cease to operate as the efficient cause of an accident which would not have happened in the absence of it, if notwithstanding the defendant's negligence the accident be directly and proximately brought about by some supervening negligent act or omission by the plaintiff but that principle does not apply in the circumstances of this case where the defendant's negligence operated from beginning to end and step by step in natural and obvious sequence so as to render escape from its consequences impossible or so hazardous as not to commend the attempt to reasonable judgment.

Judgment of the Exchequer Court of Canada Quebec Admiralty District ([1924] Ex. C.R. 196) reversed.

APPEAL from the decision of the Exchequer Court of Canada, Quebec Admiralty District, Maclennan L.J.A. (1), dismissing with costs the appellant's action and maintaining with costs the counter-claim of the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 196.

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

Holden K.C. for the appellant.

Smythe K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.), was delivered by

NEWCOMBE J.—On the morning of 8th December, 1923, shortly after 7 o'clock, when the SS. *Cataract* belonging to the appellant company and laden with grain from Pt. Colborne, was going down the St. Lawrence and had reached a position in the river opposite or a little above the lock of Farran's Point canal between Croil Island and the mainland, she sighted the respondent vessel, the SS. *John B. Ketchum II*, which was coming up and was then somewhat below, or perhaps nearly opposite, Graveyard Point on the north bank, at a distance of half a mile or upwards below the *Cataract*. The *Cataract* is a vessel of 839 tons gross register, 180 ft. long and 36 ft. beam, while the *Ketchum* which was light, drawing 11 ft. aft and 2 ft. 2 inches forward, is a vessel of 1,103 tons gross register, 193 ft. in length and 42 ft. beam. The *Cataract* upon sighting the *Ketchum*, having the right-of-way under rule 25 of the rules for navigating the St. Lawrence river above Montreal, exercised her right to elect for the north side of the channel, and gave the proper signal of two blasts to indicate that she was directing her course to port. This course required that the *Cataract* should follow the current, which for the intervening distance flowed at the rate of six to eight miles, and she proceeded at her full speed of six or seven miles. The *Ketchum* at the time made no answer to this signal, neither did she direct her course in conformity with it. She was coming also at full speed, although against the current and her captain estimates her speed at nine miles. Therefore the vessels were approaching each other at a speed of not less than fifteen miles, allowing for the effect of the current.

Between the place where the *Cataract* gave her two blasts and Graveyard Point there is a considerable expansion of the river; the current which is strong sets in the

general direction of the north bank and the *Cataract* directing her course with the current, kept to the north side of the channel. At this place the north bank trends northerly for a considerable distance when it bends somewhat abruptly to the southeast and continues generally in that direction to Graveyard Point; therefore as the *Cataract* proceeded northward along the bank, she was heading directly to that part of the bank above Graveyard Point which going down stream runs in a direction approximately southeast.

If the *Ketchum,* when she passed the point, had proceeded by a direct course to the entrance of the canal where she intended to go, the ships would have passed starboard to starboard at a safe distance, because the *Cataract* following the bank and going further into the bay as she progressed would have been well to the north of the course of the *Ketchum.* The latter vessel, however, instead of pursuing the direct course, which would also have been responsive to the signal of the *Cataract,* rounded the Point and proceeded to the northwest also along the bank and into the bay on a course precisely opposed to that which the *Cataract* coming down was pursuing. The *Cataract,* perceiving that the *Ketchum* did not answer nor comply with her signal, and that the *Ketchum* was on a course which was likely to bring the vessels into collision, when at a distance from the *Ketchum* estimated at about 1,000 ft. more or less, gave the danger signal of five or six blasts and followed this by repeating her two blasts, thereby expressing her intention to hold her course on the port hand. Then the *Ketchum* answered with two blasts, indicating acknowledgement and acceptance of the election of the *Cataract* to hold the north bank, and that the *Ketchum* accordingly would direct her course to port. There was thus in the language of the signals verbal understanding and agreement which apparently would have been safely executed if, even at that time, the *Ketchum,* going up steam at full speed, had put her helm hard a starboard. Instead of this the *Ketchum* although she starboarded, reversed at full speed, the natural consequence being that, by the action of the screw and the effect of the strong current on the ship's bow, she swung to starboard instead of to port projecting her stem further into the space between

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the *Ketchum* and the bank through which the *Cataract* might have found her passage, and practically presenting her broadside to the down coming *Cataract*. The *Cataract* in the meantime, having come close to the bank ported her helm sufficiently to keep off the land and endeavoured to pass between the *Ketchum* and the bank. In this effort she was unfortunately unsuccessful owing to the manoeuvres of the *Ketchum*, and her stem came into contact with the port bow of the *Ketchum* about 30 or 35 ft. abaft the stem of the latter, causing considerable damage.

What happened is thus very briefly summarized by the statement that the *Cataract* having the right-of-way and having twice signalled to the *Ketchum* that she would direct her course to port followed that course along the north bank, and maintained her speed to the moment of collision, while the *Ketchum*, receiving the signal, at first paid no attention to it, and then, having replied, though late, with two blasts, indicating that she would pass, as the *Cataract* desired, on the starboard hand of the latter, altered her course to starboard, and thus occupied space through which the *Cataract* might otherwise have found her way.

The circumstances attending the collision were investigated by order of the Governor in Council under the provisions of part X of the Canada Shipping Act by the Dominion wreck commissioner, assisted by two nautical assessors. Each vessel was represented by counsel upon the inquiry and the witnesses from each vessel were examined by the court and also examined and cross-examined by counsel. The hearing took place at Montreal on 19th and 20th November and 18th December, 1923, and the depositions of the witnesses were taken down and extended. Subsequently on 29th February, 1924, the appellant company instituted this action against the *Ketchum* in the Exchequer Court on its admiralty side, claiming damages, and the parties, by memorandum of 11th April, agreed that all evidence and exhibits produced at the inquiry should be and become part of the record in the case, to be used as if the witnesses had testified in open court, subject however to the right of the parties to recall the witnesses or to call new witnesses. Pursuant to this agreement the official transcript of the evidence taken before the court of inquiry was used at the trial of the Admiralty action,

and it was upon this evidence that the findings of the court were based. It does not appear that any of the witnesses was recalled, or that any new witnesses were examined.

In view of the facts, it might naturally have been anticipated that the *Ketchum* would bear the whole responsibility for the collision and the damages which ensued, but remarkably enough the learned local judge in Admiralty who tried the cause, while finding that

> there is no excuse for the *Ketchum* refusing to obey the signal, and her persistence in following her course heading for the north shore was improper and wrongful,

found nevertheless that

> this collision would not have happened if the *Cataract* had not ported her helm after she gave the second two-blast signal and just before the collision.

He asks, "Was that negligence?" And he answers:

> The master of the *Cataract* saw the *Ketchum* going astern and there was an open space of 250 or 300 ft. between the shore and the *Ketchum* through which the *Cataract* could have passed. The porting immediately before the collision against the *Cataract's* own signal of two blasts when there was sufficient room for her to pass, in my opinion, was gross negligence and was the proximate cause of the collision and in this opinion one of my assessors concurs.

Moreover, the local judge says:

> While the *Ketchum's* failure to observe the rule cannot be too strongly condemned, her course and conduct were perfectly apparent to the *Cataract* for a considerable time and distance, while the latter vessel carried on in a course which her master admitted was dangerous, when he might by porting have avoided the collision by passing the *Ketchum* port to to port. Porting then would have been a precaution required by the special circumstances to avoid immediate danger under rules 37 and 38. In failing to port at that time the master of the *Cataract,* in my opinion, failed to show ordinary care, and in this conclusion one of my assessors concurs. Later, when the *Cataract* gave the danger signal and two-blasts on her whistle, although she first starboarded intending to pass the *Ketchum* starboard to starboard and having plenty of room to do so, she deliberately and improperly ported and brought about the collision. As her master frankly admitted he preferred to hit the *Ketchum* than to have the *Ketchum* hit the *Cataract,* although he had ample room to cross the bows of the *Ketchum* then going astern and backing out of his course.

The local judge therefore found that the collision was directly attributable to the fault of the *Cataract* notwithstanding the antecedent negligence of the *Ketchum,* for two reasons: First, because the *Cataract,* although she had elected to pass to starboard and consequently had taken that side of the channel which was on her port hand, should nevertheless have reversed her signal and attempted to pass port to port when it became apparent to the *Cataract* that

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the *Ketchum,* disregarding the *Cataract's* signal, was persisting in her course against the current along the north bank; and secondly, because, as it is found, the *Cataract* after giving the danger signal and the second two blasts deliberately and improperly ported and brought about the collision. These findings against the *Cataract* have, in my judgment, no justification either in law or in fact. The rule applicable to the St. Lawrence in this locality is explicit that

> when two steamers are meeting, the descending steamer shall have the right-of-way, and shall before the vessels shall have arrived within a distance of one-half mile of each other give the signal necessary to indicate which side she elects to take.

The *Cataract* complied with this rule in every respect, and was therefore entitled to the passage for which she had elected and which she had notified to the *Ketchum* in the prescribed manner. The interval between the *Cataract's* first signal and the collision was very brief, it would not, having regard to the speed with which the vessels were approaching each other, have appreciably exceeded two minutes. It is true that the *Ketchum* did not answer the signal nor promptly change her course as it was her duty to do, and her neglect to do so led to the danger signal and the repetition of the two blasts from the *Cataract* as the distance between the two vessels diminished and the space for manoeuvre became more limited. At that time in the opinion of the Master of the *Cataract,* if the *Ketchum* had starboarded her helm in accordance with her signal the ships would have gone clear. The wreck commissioner, a skilled and experienced mariner, who presided at the court of inquiry, examining the master of the *Cataract* elicted the following information:

> Q. Then you had no answer from that two-blast whistle signal?—A. No. sir.
>
> Q. Was there any alteration of course on the part of the *Ketchum?*—A. No. There was not. He was just coming right on over.
>
> Q. When he altered his course how much distance had you covered?—A. The first time I noticed him altering his course was when I blew the danger signal and the two blasts and he answered with two blasts.
>
> Q. What distance were you from each other when you blew the danger signal?—A. I would say probably one thousand feet or probably a little bit more.
>
> Q. What distance were you in angleways, obliquely from each other? I mean to say how many points on your starboard side would she be when you blew the danger signal?—A. I would judge she would be about four points.

Q. Well then it would only require a starboard helm on the part of the *Ketchum* to clear you?—A. Yes, sir.

Q. But she advanced on a port helm—that you noticed?—A. No, the first movement I noticed was his engines started to go full speed astern and that had a tendency to cant him across my bow.

Q. There was no wind?—A. No.

Q. You were loaded and she was light?—A. Yes.

Q. And she would turn very quickly over to starboard with a full speed astern?—A. She was turning quite a bit.

Q. You were about one thousand feet from each other?—A. I would say about one thousand feet sir, probably a little more or a little less.

Q. At that time when you saw her going full speed astern which way did you put your helm?—A. I starboarded my helm to go as much as I could to the bank of the river. She was coming pretty fast and we were going down pretty fast.

Q. One thousand feet—full speed astern—and I suppose the *Ketchum* is no more than nine miles an hour, if she is that? Did she stop her way very quickly?—A. She had not stopped her headway when she struck.

Q. When you collided with each other, how fast was she coming do you think?—A. I could not just say how fast she was coming.

There is no substantial difference between the testimony of the *Cataract* and that of the *Ketchum* as to the relative position of the two ships when the *Cataract* blew the second two blasts, and it is observable that the wreck commissioner having in mind this situation, as described by the master of the *Cataract,* put his question in a form which is suggestive of no doubt on his part that having regard to the bearings, speed and distance of the two ships a starboard helm on the *Ketchum,* even at the time of the danger signal, would have carried her clear. In any case it was a starboard helm on the *Ketchum* which the *Cataract* was entitled to anticipate, and it would in the circumstances have been not only a breach of the rules of navigation but entirely opposed to the imperative demands of good seamanship that the *Cataract* should have ported her helm and sounded a cross signal. One would suppose that nothing but increased confusion and probably disaster could have resulted from any such manoeuvre on her part. Therefore I think it is not only reasonably established by the evidence but entirely beyond question that the *Cataract* would not have been justified in the circumstances to attempt to avoid collision by passing on the port side of the *Ketchum.* Indeed the *Cataract* was expressly forbidden by rule 23 to confound the situation by a cross signal. The rule says in terms:

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Steam vessels are forbidden to use what has become technically known among pilots as "cross signals" that is, answering one whistle with two, and answering two whistles with one.

But, says the local judge, the *Cataract* knew that her course was dangerous and the *Ketchum's* course and conduct were perfectly apparent to the *Cataract;* the answer is that the chief element of danger in the course of the *Cataract* was that introduced by uncertainty as to what the *Ketchum* would do, and the *Cataract,* having declared her intention, could not without incurring greater risks resile from that so long as it was open to the *Ketchum* to acknowledge the *Cataract's* signal and cross in the manner indicated. It is not suggested of course that the master of the *Cataract,* up to the time when he gave his insisting signal, was aware of the impudent resolve of the *Ketchum,* which was admitted at the inquiry, to defy the crossing rule and to persist in opposing the election of the *Cataract.*

As to the second ground of fault which the local judge imputes to the *Cataract* it is apparent from a glance at the chart that the *Cataract,* having directed her course to port, that is to the north as far as navigable space permitted, had shortly after the time when she gave the danger signal, reached a point where, having regard to the trend of the bank, she must either port her helm in order to keep off or go directly ashore. The evidence about her porting on that occasion is given by her master; he says:

Q. Supposing you had not ported as you say you did—supposing you had not directed your course somewhat to starboard as you then did, is it not a fact the boats would have cleared?—A. No, sir.

Q. Why not?—A. Because I would have gone directly ashore and I would have been on when she hit. I would have only about a length to go.

Q. You would have only about a length to go from the time you ported—you would have had only a length to go? Then you were only 250 feet off the shore at that time?—A. Probably a little more or less.

Q. Between the time of porting your helm and the collision, had you changed your course a little bit?—A. A little bit.

Q. Some points?—A. I could not say. I had to port a little bit.

Q. You preferred to hit the *Ketchum* rather than the canal bank?—A. I thought he was going to clear. I was trying to clear him and keep my ship off the river bank.

Q. Then you were in this position—that you had fairly good hopes that by porting when you did, and keeping on full speed ahead you would pass port to port?—A. Oh, no.

Q. What did you?—A. I knew I could not pass port to port the way she was coming.

Q. Did you think he was going to pass you to starboard?—A. Yes, because he answered me the signals.

Q. And yet you ported?—A. I ported merely enough to keep steerage way and keep her off the river bank.

By the Court:

Q. If you had not ported, Captain, instead of you striking the *Ketchum* the *Ketchum* would have struck you?—A. Yes, sir.

Q. So you struck the *Ketchum?*—A. Yes, sir.

and also:

A. I ported my helm just probably ten or fifteen seconds before we hit. I was over that close to the bank I either had to port my helm or go on the canal bank.

The captain's testimony is corroborated by that of his second officer and other witnesses and no complaint is made by the witnesses from the *Ketchum* that her navigation was in anywise embarrassed by the fact that the *Cataract* ported immediately before the collision in order to keep off the land, or that the porting had any effect in causing the accident. It might indeed have been regarded as an improper manoeuvre if the *Cataract* had had sea room to hold her course, but in view of her near approach to the bank it was manifest to the *Ketchum* that good seamanship and regard for her own safety would require the *Cataract* to port her helm to the extent and as and when she did.

There were assessors at the trial, and, although they differed in some respects, they were of the same mind in one particular. The local judge says:

My assessors advise me that there was room enough for the *Cataract* to pass between the *Ketchum* and the shore, but say it would have been dangerous for the *Cataract* to attempt it as while she would not collide with the *Ketchum*, she might possibly run ashore after passing the *Ketchum*.

Now if she might run ashore after passing the *Ketchum* that risk would be avoidable by a port helm, and if the Cataract had not room to port, it was because of the improper position of the *Ketchum*. The *Cataract* was obviously in a difficulty, but there seems no reason to question the judgment of her master in taking the only course which offered to him a prospect of avoiding the land on the one hand and the *Ketchum* on the other.

If the *Ketchum* had intended to make way for the *Cataract* by reversing and waiting until she had passed clear, she should have done so in time to open a passage for the *Cataract* between the *Ketchum* and the north bank; but

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there is no satisfactory proof that the *Ketchum* had lost her headway when the collision occurred, and on the contrary the weight of evidence points to the opposite conclusion.

The preliminary acts of the colliding vessels were deposited after the taking of the testimony before the court of inquiry and they are in substantial agreement upon the material facts, although differing of course in imputations of fault. There is little conflict in the testimony, and, not only is it admitted by the witnesses from the *Ketchum* who described her movements that Mr. Gendron, about whose position on the ship there is some uncertainty, but who certainly was directing her navigation at the time when she came into relations with the *Cataract,* heard and understood the *Cataract's* first signal of two blasts, but also that he, knowing the rule, perversely refrained from answering the signal or from directing his course in accordance with it. He asserts, boldly enough, that he never had any intention to allow the *Cataract* to pass on his starboard side, although he knew he was breaking the rules, and it appears moreover by the testimony of the man at the wheel that when the *Cataract* blew her first two blasts Gendron said to him "do not answer now." Both sides agree that the section of the river between the canal entrance and Graveyard Point is extremely dangerous; there is a swift current on the north side and an upward eddy on the south, which make the passage difficult, especially for vessels coming down. The master of the *Cataract* says:

> It is one of the meanest places on the river especially for a boat that has not got very much power.

Gendron of the *Ketchum* says:

> It is an awful bad place, sometimes it is going down fine and you never know what is going to happen there.

If any fault be possibly imputable to the *Cataract* it is that notwithstanding the misconduct of the *Ketchum* she proceeded at full speed up to the moment of collision, but this is explained by the testimony of the master of the *Cataract* who says:

> This place is a very hard place to handle a steamboat and you have got to keep in the current, and a boat like the *Cataract,* it takes almost all the power she has got to keep from turning around on that place. If

I was to go out and pass him on the port side I would very likely put my boat on the shore.

Asked if he wishes to imply that the *Cataract* does not steer very well, he answers

No, but she has not got very much power.

This explanation of his speed is not seriously questioned, and I think it reasonable to conclude that the master, knowing that he was making a difficult passage, exercised good judgment in the selection of his course and the management of his ship. Indeed it appears that notwithstanding the faulty and confusing conduct of the *Ketchum* he would not improbably have made the passage in safety if the *Ketchum* in the end had not directed her course to starboard in opposition to her port signal.

The local judge invokes the familiar principle, of which the case which he cites, *Spaight* v. *Tedcastle* (1), is one of many examples, and of which the latest is *Anglo Newfoundland Development Co.* v. *Pacifico Steam Navigation Co.* (2), that a defendant's negligence may cease to operate as the efficient cause of an accident which would not have happened in the absence of it, if notwithstanding the defendant's negligence the accident be directly and proximately brought about by some supervening negligent act or omission of the plaintiff; but this principle, well recognized though it be, has no application to a case like this where the defendant's negligence operated from beginning to end, and step by step in natural and obvious sequence, to render escape from its consequences impossible or so hazardous as not to commend the attempt to reasonable judgment. Even if the master of the *Cataract* had made a mistake by porting his helm when faced with the alternatives of standing his ship and in that position receiving, as he anticipated, the impact of the *Ketchum* on his starboard quarter, or of the precarious attempt to pass between the *Ketchum* and the bank, he should not be held accountable for an error which it required time and opportunity, which were not at his disposal, to demonstrate. Illustrations of the indulgence or favourable consideration shown by the courts to navigators in dangerous extremeties or in confused and difficult situations abound, and may be seen in such cases

(1) 6 App. Cas. 226.

(2) [1924] A.C. 406.

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as *The Nor* (1); *The Bywell Castle* (2); *Stoomvaart Matschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.* (3); *The Emmy Haase* (4); *Mary Tug Co.* v. *British India Steam Navigation Co.* (5); *Kwang Tung* v. *Ngapoota* (6); *Hoek Van Holland Maatschappij* v. *Clyde Shipping Co.* (7). As to this aspect of the case the reasoning of Lord Mersey in *Canadian Pacific Railway Co.* v. *The Kronprinz Olav* (8), is applicable. His Lordship said:

> It is said on the part of the *Olav* that those in charge of the *Montcalm* ought to have recognized sooner than they did the danger created by the bad navigation of the *Olav* and by a timely reversal of the *Montcalm's* engines ought to have averted it. In considering this question it is necessary to bear in mind that the onus of providing the alleged negligence rests on the *Olav* and that it is an onus which can only be discharged by clear and plain evidence, (and having referred to the evidence, he continued): It seems to their Lordships impossible to say, in the face of this evidence, that the captain of the *Montcalm* was negligent in not realizing before he did that the risk of collision was imminent; and even if he can be said to have miscalculated the time by some few seconds the very gross negligence in the navigation of the *Olav* was well calculated to confuse him and to cause the error. He was, moreover, fully justified in expecting that the *Olav* would realize the dangerous position into which she had brought herself and would try to remedy it by herself-reversing.

For the reasons which I have stated I find no fault against the *Cataract,* and I find that the collision was due solely to the reckless and persistent breach by the *Ketchum* of the navigation rules and the requirements of good seamanship.

The appeal should therefore be allowed; the action should be maintained; the counter-claim should be dismissed, with costs in both courts, and the cause should be remitted to the local judge to determine the damages.

IDINGTON J.—The appellant owned a vessel named *The Cataract* which it employed for carrying wheat from Port Colborne to Montreal. The respondent ship was coming up, empty, from Montreal by the St. Lawrence river, and the *Cataract* was going down the same river, on the 8th of November, 1923. They collided at a point therein between the lower end of the Farran's Point canal, and a point called Graveyard Point. The appellant brought an action

(1) 2 Asp. M.C. (N.S.) 66.
(2) 4 P.D. 223.
(3) 5 App. Cas. 876 at p. 891.
(4) 9 P.D. 81.
(5) [1897] A.C. 357.
(6) [1897] A.C. 391.
(7) 5 Session Cases 15 Ser. 227 at p. 234.
(8) 14 D.L.R. 46, at p. 48.

in the Exchequer Court for the damages which the *Cataract* suffered by said collision; and the respondent counter-claimed for its damages.

The case was tried by Mr. Justice Maclennan, Local Judge in Admiralty in the Exchequer Court, Quebec Admiralty District. That learned judge dismissed the appellant's action and allowed the respondent's claim for damages, with a reference to the deputy registrar to assess the damages. Hence this appeal.

Having read the evidence specially cited by appellant and respondent respectively, and more, including that of the chief actors in what is involved herein, and considered therewith the decisions relied upon by the learned trial judge, I have come to the conclusion that the evidence does not bring the case within the principle proceeded upon in said decisions, and hence that this appeal should be allowed with costs, the appellant's claim for damages allowed but referred to the said deputy registrar to assess same, and the judgment in favour of respondent be reversed and set aside with costs.

The appellant's officers in charge of the *Cataract* were, by the course respondent's officers directed and pursued, in my reading of the evidence, placed in such a position up to the last moment before the collision that they could not safely pursue the course which the learned trial judge suggests might have been taken, and the collision avoided thereby.

The appellant's officers in charge of the *Cataract* may have erred in judgment but, speaking with every respect for the said learned judge, in my opinion they were not guilty of negligence, and not being to blame the appellant should have succeeded and the counter-claim been dismissed.

Appeal allowed with costs.

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

Solicitors for the respondent: *King & Smythe.*

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*Nov. 7.
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*Feb. 3.

THE ROYAL TRUST COMPANY (DEFENDANT) ..... APPELLANT;

AND

THE PROVINCIAL SECRETARY-TREASURER OF NEW BRUNSWICK (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Succession duty—Specialty debt—Creditor out of province—Locality of debt.

A mortgage debt due in New Brunswick at the time of the foreign creditor's death is property of the creditor's estate which may be liable to duty under the Succession Duty Act, 1915.

Where liability to pay such duty depends on the *situs* of the debt in case of a specialty debt the *situs* is the place where the specialty was found. *Commissioner of Stamps* v. *Hope* [1891] A.C. 476) appl.

Property of the creditor's estate consisting of mortgages is not liable to duty where the creditor was domiciled out of the province and had possession of the specialty at his death; Idington J. dissenting.

APPEAL from the judgment of the Appeal Division of of the Supreme Court of New Brunswick on a special case submitted for its opinion.

The material portions of the special case are set out in the dissenting opinion of Mr. Justice Idington published herewith. It sets out that Anna M. Ferguson died at her domicile, Chicago, U.S.A., in 1920, leaving as part of her estate mortgages on land in New Brunswick; that the Royal Trust Co. as administrator *cum testamento annexo* obtained probate in St. John, N.B.; and submits the question whether or not the estate should pay succession duties on this mortgage property. The Appeal Division answered in the affirmative and the Trust Co. appealed to this court.

Fred R. Taylor K.C. for the appellant. It is submitted that the Succession Duty Act, 1915, does not impose any tax but if it does it is a tax upon the succession or transmission and not on the property. *Wallace* v. *Attorney General* (1).

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 1 Ch. App. 1.

In any case these were specialty debts located in Chicago and so not taxable. *Commissioner of Stamps* v. *Hope* (1). This specialty rule is still law. *In re Mandslay, Sons & Field* (2); *New York Life Ins. Co.* v. *Public Trustee* (3).

Winslow K.C. and *E. Allison Mackay* for the respondent. The *corpus* of the property is taxed for succession duty. *Rex* v. *Lovitt* (4).

The specialty rule is not general and does not apply where something is to be done outside the jurisdiction in which the specialty is found to enforce it. Hanson on Death Duties (6 ed.) 109. *Receiver General* v. *Rosborough* (5).

The specialty rule applies only to probate and *Commissioner of Stamps* v. *Hope* (1) was a probate case. It was not applied in *Walsh* v. *The Queen* (6).

The judgment of the majority of the court (The Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.), was delivered by

DUFF J.—The deceased, Anna M. Ferguson, who, at her death, was domiciled in Chicago, left as part of her estate mortgages on real estate in New Brunswick. The instruments embodying the mortgage debts and the securities were in the usual New Brunswick form; that is to say, there was in each case a bond for the repayment of the loan and, in a separate deed, a mortgage securing the performance of the condition of the obligation. All these instruments were in Chicago at the death of the mortgagee. The appeal turns solely upon the question whether these assets which are alleged by the respondent to be subjects of taxation under the Succession Duty Act of 1915 had their *situs* at the time of the death of the testator in New Brunswick; whether, that is to say, they fall within the words of section 8 (1a):

> All property situate within the province belonging to a deceased person, whether such person was or was not domiciled therein.

On behalf of the appellant it is contended that these mortgage debts never had locality in New Brunswick but that

(1) [1891] A.C. 476.
(2) [1900] 1 Ch. 602.
(3) [1924] 1 Ch. 15.
(4) [1912] A.C. 212.
(5) 43 N.B. Rep. 258.
(6) [1894] A.C. 144.

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by reason of the presence of the instruments in Chicago at the time of the testator's death, they had locality there; while on behalf of the respondent the contention is that in each case the substance of the asset was the security which, it is alleged, as it has been held in the Supreme Court of New Brunswick, was property in New Brunswick and dutiable as such.

The asset in each case, from the economic or business point of view, is, of course, the security in its entirety; the personal obligation to pay money, plus the charge upon the mortgaged property by which the payment is guaranteed. But from the legal point of view, the personal obligation is for many purposes regarded as distinct from the charge, although the relation between them is such that the mortgagee cannot effectively transfer the personal debt while retaining ownership of the charge, or enforce payment of the debt without releasing the mortgaged property, or, by appropriate proceedings, converting it into money applicable in reduction of the debt. The mortgage does, unquestionably, create an interest in the mortgaged property in the jurisdiction where the property is situate, the security being, to quote the language of Lord Watson in *Henty* v. *The Queen* (1),

> according to the principles recognized by this board in *Walsh* v. *Reg* (2), * * * as much an asset in (New Brunswick) as the real estate there which it affects.

For the purpose of applying the rules of private international law as recognized under the law of England, such a security is an "immovable." *In re Hoyles* (3).

In theory there would appear to be several conceivable ways of viewing this question of *situs*. It is the contention of the appellant that the security is merely the accessory of the personal obligation, and that consequently the locality of the asset is determined by the locality of the latter. Then the view advanced on behalf of the respondent, as already mentioned—the view to which effect was given in the court below—is that the substance of the asset consists in the real security, and that consequently the locality of the asset is to be determined by the locality of the property charged with payment of the debt. Then there is the possible view that

(1) [1896] A.C. 567, at page 574. (2) [1894] A.C. 144.
(3) [1911] 1 Ch. 179.

the asset in its entirety has not exclusive locality, either in the *situs* of the debt or in the *situs* of the property, but that the right arising from the personal obligation and the rights constituting the real security are severally assets in their respective localities.

There would appear to be little doubt—the decisions in *Walsh* v. *Reg.* (1) and *Henty* v. *Reg.* (2) seem to be conclusive upon the point—that, irrespective of the constructive *situs* of the personal debt, the fiscal authority of a Canadian province must embrace the power to levy duties upon interests in real estate situate within the province (whatever the limitations or conditions by which such interests may be affected) upon the creation, transfer or transmission of them. Whether, under a given enactment, an interest such as that of a mortgagee in a mortgaged property has in fact been subjected to a particular tax upon such transfer or transmission in circumstances in which the mortgage debt, as a debt, has escaped must be a question of construction. It is not necessary to pursue this subject further, because the question submitted by the stated case appears to be the question whether or not the mortgage debts as such had their *situs* in New Brunswick. The question is in these terms:

> The question for the opinion of the court is whether the said specialty debts referred to in paragraph three herein are subject to the payment of the duties prescribed by the Succession Duty Act, 1915, and amending Acts. If the question submitted for the opinion of the court be answered in the affirmative, it is agreed that judgment may be entered for the plaintiff against the defendant for the amount of succession duty for which the estate is liable to the province of New Brunswick, together with costs taxed as between party and party. If answered in the negative, it is agreed that judgment may be entered for the defendant with costs as between party and party.

"Specialty debts," as used here, may not be entirely without ambiguity, but the question considered in the court below and the question presented by counsel on argument before this court was as to which of the rival contentions above indicated was to prevail as touching the seat of the mortgage debt. The litigation has proceeded upon the assumption that in each case the solution of this question is to be regulated by one or other of two circumstances the locality of the personal obligation as determined by the

(1) [1894] A.C. 144. (2) [1896] A.C. 567.

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situs of the instruments, or the locality of the mortgagee's interest in the New Brunswick land, as determined by the *situs* of the land itself. Nor would the case as framed make it possible to deal with the question submitted on the hypothesis that the asset was to be dutiable to the extent only of the value contributed by the real security independently of the personal responsibility of the mortgagor.

Such being the question to be decided, it seems impossible to escape the conclusion that the decision is ruled by the judgment of the Judicial Committee in *Commissioner of Stamps* v. *Hope* (1). The state of facts upon which the decision of their Lordships proceeded appears to present nothing upon which a substantial distinction between that case and this can be based. The debtors and the mortgaged property were both in New South Wales. The mortgage was given to secure the payment of promissory notes which, on the mortgagee's death, were in a bank in Victoria for collection. The question submitted by the special case, as appears from the report in (2), was whether the notes were liable to probate duty in New South Wales, probate duty being a duty leviable on all property, real as well as personal, in the colony. Their Lordships held that the promissory notes had become merged in the mortgage deed, and had acquired the character of a specialty debt which had its locality where the deed itself was, that is to say, in Victoria. Payment of the debt could not, of course, be enforced in New South Wales, either by judgment against the mortgagors personally or by proceedings to enforce the security, without obtaining probate in that colony; nor could the charge on the New South Wales lands be released otherwise than in conformity with the New South Wales law. As the mortgaged property appears to have been leasehold, it seems probable that for this purpose alone the issue of probate in New South Wales would have been necessary.

The principle of *Commissioner of Stamps* v. *Hope* (1) which had its origin in the traditional identification of a specialty contract with the paper in which it was embodied, is no doubt a principle which, in its application to cases

(1) [1891] A.C. 476.

(2) 12 N.S.W. L.R. 220, at pages 221-222.

such as this, is open to some comment. It seems singular that fiscal jurisdiction or the incidence of a taxing statute should be determined by the accident of the locality in which a particular paper happens to be on a given date; but a similar principle has been widely applied in the case of negotiable instruments; *Attorney General* v. *Bouwens* (1); *Winans* v. *Attorney General* (2); *State Tax on Foreign-held Bonds* (3); *Blackstone* v. *Miller* (4); *Buck* v. *Beach* (5).

And probably any system of rules for determining the constructive locality of intangible property must be more or less arbitrary.

The decision in *Commissioner of Stamps* v. *Hope* (6) has been recognized in England and in this country, and it is only necessary to refer to the judgment of their Lordships of the Judicial Committee in *Toronto General Trusts Corporation* v. *The King* delivered by Lord Cave and reported in (7). His Lordship said:

> A claim to succession duty having been made the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specalty debt is the place where the specialty is found at the time of the creditor's death: Wentworth on the Office of Executor, ed. 1720, p. 46; Bacon's Abridgement, tit. Executors and Admistrators, (E.), p. 462; *Gurney* v. *Rawlins* (8); *Commissioner of Stamps* v. *Hope* (6). This rule has been recognized in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well settled.

In that case their Lordships found it impossible to apply the rule, and consequently it was necessary to resort to other *indicia* for the purpose of determining the locality of the mortgage debts there in question.

The Supreme Court of New Brunswick, whose judgment was delivered by Hazen C.J., has taken the view that the circumstances of that case are not materially distinguishable from the facts now before us; but one cardinal fact, which materially affected the decision in that case, is not

(1) 4 M. & W. 171.
(2) [1910] A.C. 27.
(3) 15 Wall. 300.
(4) 188 U.S.R. 189.
(5) 206 U.S.R. 392.
(6) [1891] A.C. 476.
(7) [1919] A.C. 679 at pp. 683-4.
(8) [1836] 2 M. & W. 87.

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present here. The mortgage there had been executed in duplicate—one duplicate being in Alberta and the other in Ontario—the controversy being whether the asset had locality in Ontario or in Alberta. It was quite plain that the decision in *Hope's Case* (1) could not be successfully appealed to as establishing locality in Ontario while at the same time establishing the non-existence of locality in Alberta. At page 684, Lord Cave says:

> But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages created and evidenced by duplicate deeds, and that at the date of the testator's death one of the deeds was in the province of Ontario and the other in the province of Alberta. An attempt was made to shew that, having regard to the terms of the Land Titles Act, the duplicate of each mortgage held by the testator was the principal or dominant instrument, but in their Lordships' opinion no such ascendancy was made out, and the deed produced to and retained by the registrar under the provisions of the statute was not of less importance than the duplicate delivered to and retained by the mortgagee. In these circumstances, any argument which goes to shew that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions; and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case.

There are, no doubt, in my own judgment delivered in this court, observations which might be cited in support of the view which prevailed in the Supreme Court of New Brunswick, but any opinions expressed in this court are, of course, superseded by the judgment of their Lordships; and when that judgment is read as a whole, and especially in view of the passages quoted, it appears to be impossible to hold that the present case is in principle distinguishable from *Commissioner of Stamps* v. *Hope* (1).

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

IDINGTON J. (dissenting).—The late Anna M. Ferguson, when domiciled in Chicago, in Illinois, died there, on or about the sixth day of February, 1920, possessed of an estate in real and personal property worth $130,605.09,

(1) [1891] A.C. 476.

without making any reduction therefrom for debts due and expenses.

About $55,000 thereof consisted of four mortgages on real estate in New Brunswick.

The mortgagors, in the case of three of the said mortgages, resided in said province, and in the case of the fourth of said mortgages, the mortgagor was an incorporated company having its head office in the city of St. John, in said province.

The mortgages were all recorded in the office of the Registrar of Deeds for the county of the city and county of St. John.

The mortgage deeds and bonds evidencing the said several specialty debts at the said time of the death of said Anna M. Ferguson were in possession of the Chicago Title and Trust Company in the said city of Chicago, and outside the said province.

The question raised herein is as to the liability of the respondent in its representative character to pay succession duties upon or in respect of said mortgages, and was presented to the court below by way of a special case, of which the first three paragraphs are as follows:—

SPECIAL CASE

1. The Royal Trust Company is administrator *cum testamento annexo* of the estate in the province of New Brunswick of Anna M. Ferguson under Letters Testamentary issued out of the Probate Court of the city and county of Saint John, on the twenty-first day of April, A.D. 1921.

2. The said Anna M. Ferguson was in her lifetime and at the time of her death a resident of and domiciled in the city of Chicago, in the state of Illinois, one of the United States of America, and died in the said city of Chicago on or about the sixth day of February, A.D. 1920.

3. The said estate, if any, in the province of New Brunswick, of the said Anna M. Ferguson consisted solely of specialty debts being mortgages on real estate situate in the said province of New Brunswick as follows:

Then follows a statement of the said mortgages, and the following:—

The real estate which is the subject matter of the said mortgages is of value in excess of the amount of the said mortgages and interest.

The substance of the next three paragraphs is stated above, and paragraphs seven and eight are not material in my view of the case.

Paragraph 9 is as follows:—

9. Under the provisions of the Succession Duty Act of the province of New Brunswick, 1915, and amending Acts, the plaintiff claims that the

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said specialty debts are subject to the payment of Succession Duties at and after the rate prescribed by the said Succession Duty Act, 1915, as being property situate within the said province of New Brunswick within the meaning and intent of the said Succession Duty Act.

And paragraph 10 sets out subsection 1 of section 8 of the New Brunswick Succession Duty Act, 1915.

Then follows the question submitted:—

The question for the opinion of the court is whether the said specialty debts referred to in paragraph three herein are subject to the payment of the duties prescribed in the Succession Duty Act, 1915, and amending Acts. If the question submitted for the opinion of the court be answered in the affirmative, it is agreed that judgment may be entered for the plaintiff against the defendant for the amount of succession duty for which the estate is liable to the province of New Brunswick, together with costs taxed as between party and party. If answered in the negative, it is agreed that judgment may be entered for the defendant with costs as between party and party.

The case seems to have been submitted to the Appeal Division of the Supreme Court of New Brunswick.

Judgment was given after argument by Chief Justice Hazen dealing at length with the case and maintaining the claim of the plaintiff, now respondent herein. And from that judgment the appellant, The Royal Trust Company, in its said capacity has appealed here.

On the authorities alone, cited by the learned Chief Justice in the court below in support of the conclusion therein reached, I am clearly of the opinion that his judgment is right, but there are many other authorities also shewing that this appeal should fail.

There are a number of decisions of this court in accord with my view in which I have applied substantially the same test that I did in the case of *Lovitt* v. *The King* (1), quoted by respondent's counsel in his factum herein, as follows:—

Having regard to the terms of this statute which the executors solemnly undertook to obey upon obtaining the ancillary letters granted them by the probate court of New Brunswick, preceded by all that that grant implies it seems to me that there is an obligation resting upon them by force of the statute and the proceedings upon which the ancillary letters were got which can only be discharged by the payment of the duties claimed.

In that case my brother Duff and I were not in accord with the majority here but, as it turned out, the court above allowed the appeal there and practically maintained the position so taken.

(1) 43 Can. S.C.R. 106, at page 127.

I am quite confident that the appellant herein could not, without probate or ancillary letters of administration, bring any action on any of said mortgages to recover from any of said mortgagors the money due upon any of said mortgages in question.

I put a question to the counsel for the appellant early in his argument raising that test, but am yet without any explanation as to how he imagined his client could bring such an action, unless a copy of section 31 of 10 Geo. V, 1920, c. 6, known as the "Registry Act" sent to the registrar of this court for each of us, is so intended.

No memorandum in way of supplemental factum accompanied the copy of said section, and I am left to guess at the import or meaning of its being sent.

It simply provides for the registration of a will probated elsewhere, and, with other sections in said Act, may be very useful in protecting those concerned against loss by non-registration within specified terms provided for in said Act.

I can see nothing in that Act enabling the executor or administrator of a foreign will to sue or recover anything.

The test I present is a simple but very far reaching one. Its converse case was early presented in the case of *Lambe* v. *Manuel* (1).

Of course the legislature may claim *ultra vires,* and that exception to said test must, if it ever arises, be dealt with on its merits.

But here I see no such point and fail to see that its enactments, when the whole purview of them is considered, have failed (as counsel urged) to enact, as it claims now, though it may have approached the subject timidly, as suggested.

I am, for the foregoing reasons, of the opinion that this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Fred. R. Taylor.*
Solicitor for the respondent: *E. Allison MacKay.*

(1) [1903] A.C. 68.

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*Dec. 12.

FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... } APPELLANT;

AND

DUNCAN McPHERSON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Stay of proceedings—Jurisdiction—Security for costs only—Execution for debt and costs below.

The appellant company, having been held liable in the courts below for a sum approximately $7,000, appealed to this court giving security only for the sum of $500 for the costs of the appeal. The appeal to this court was dismissed with costs. The appellant then applied for a stay of proceedings in the action pending a projected appeal to the Judicial Committee of the Privy Council.

Held that the application as made could not be granted as, security for the debt and costs in the courts below not having been given, the control of the issue of execution for them rests wholly with the provincial courts; a judge of this court can only direct that further proceedings be stayed in this court until the appellant should have an opportunity of presenting a petition for leave to appeal to the Judicial Committee of the Privy Council.

MOTION by the appellant for stay of proceedings pending a projected appeal to the Judicial Committee of the Privy Council.

The facts are fully stated in the judgment of the Chief Justice on the application.

A. C. Hill for the motion.

Herridge contra.

THE CHIEF JUSTICE.—The unsuccessful appellant has applied for a stay of proceedings in this action pending a projected appeal to the Privy Council.

Held liable for a sum approximating $7,000, the appellant appealed to this court giving security, however, only in the sum of $500 for the costs of the appeal (Supreme Court Act, s. 75). The plaintiffs might, therefore, at any time have issued execution out of the provincial court for the judgment debt and costs. The certificate of the judgment of this court has not yet issued. After delivery of

*PRESENT:—The Chief Justice in Chambers.

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judgment here the defendant moved in the provincial court for a stay of execution pending a projected appeal to the Privy Council. That motion was rejected. Counsel for the plaintiffs opposed the present application on the ground that, security for the debt and costs below not having been given, the control of the issue of execution for them rests wholly with the provincial courts. Section 76 (*d*) of the Supreme Court Act enacts that

> if the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security to the satisfaction of the court appealed from, or a judge thereof, * * *

It would seem, therefore, that it was not the policy of Parliament that the Supreme Court of Canada, or a judge thereof, should control, or interfere with, the issue of execution on a judgment for the recovery of money when security for the payment thereof has not been given as indicated in s. 76 (*d*). One method, and one only, is sanctioned for obtaining a stay of execution in such a case at any stage of the proceedings in this court, and that is the giving of security to the satisfaction of the court appealed from, or a judge thereof. That the control of the issue of execution in such a case is fully vested in the court appealed from is further indicated by the provisions of s. 77. Other cases not within the proviso to s. 76 may fall within rule 136.

But I have jurisdiction to direct, as requested by the appellant, that further proceedings be stayed in this court until it shall have had an opportunity of presenting a petition for leave to appeal to the Judicial Committee of the Privy Council. Such an order may issue upon the appellant undertaking to present its petition for leave to appeal to the Judicial Committee at its first sittings after the first of January next.

The costs of the present application will be costs in the projected appeal, if leave be given, and, if leave be refused, must be paid by the appellant to the respondents.

Motion dismissed.

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*Dec. 12.
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*Feb. 3.

THE CITY OF KITCHENER (DEFENDANT) ..... } APPELLANT;

AND

THE ROBE AND CLOTHING COMPANY (PLAINTIFF) ..... } RESPONDENT;

AND

THE STANDARD PAVING COMPANY (THIRD PARTY) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Municipal corporation—Defective sewers—Alteration—Negligence of contractors—Obstructing natural drainage.

When, during a heavy rainstorm, the city sewers are incapable of carrying all the water that falls, and contractors employed to relay the pavement, in course of their work, obstructed the natural flow of the surface water and caused it to back and flood premises on the street, the corporation which must be deemed to have notice of the obstruction, is guilty of negligence in not having it removed and also responsible for the negligence of the contractors. *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (6 H. & N. 488) appl.

Judgment of the Appellate Division (55 Ont. L.R. 1) affirmed.

The contractors covenanted to indemnify the city against the consequences of any injury to property in the course of the work.

Held, reversing the judgment of the Appellate Division (55 Ont. L.R. 1), that as it was shown that the act of the contractors was the sole effective cause of the injury to said premises they were liable under said covenant notwithstanding the defective drainage system, and the negligence of the corporation. *City of Toronto* v. *Lambert* (54 Can. S.C.R. 200) and *Sutton* v. *Dundas* (17 Ont. L.R. 556) dist.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial as to the liability of the city to the plaintiff and reversing it as to the right of the city to claim indemnity from the third party dismissing such claim.

The two questions raised on this appeal are, whether or not the defendant is liable in damages for flooding of the plaintiff's premises during a heavy storm and whether or not, if liable, it had recourse over against the third party. Both depend on appreciation of the evidence on the record. The trial judge decided both questions in the affirmative.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 55 Ont. L.R. 1.

The Appellate Division reversed him as to the liability of the third party.

R. S. Robertson and *Bray* for the appellant. The rainfall in this case was one which could not be expected and the city is not liable. *Faulkner* v. *City of Ottawa* (1).

The city can recover from the third party unless it is shown that its negligence was an active and proximate cause of the injury and was distinct from that of the third party. *Sutton* v. *Town of Dundas* (2).

Gideon Grant and *Scellen* for the respondent Kitchener Robe Co. Act of God or *vis major* cannot be pleaded as a defence. *Nitro-Phosphate Co.* v. *London and St. Katharine Dock Co.* (3) at pages 517-8.

Hattin for third party.

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The plaintiffs are manufacturers of woollen goods, carrying on business at the S.W. corner of Foundry street and Hall's Lane in the city of Kitchener. They sue the city for damages sustained through the flooding of the cellar of their warehouse by surface water which, after crossing the sidewalk, forced its way through basement windows facing Foundry street, during a severe rainstorm on the evening of the 26th of July, 1921. In third party proceedings the city claims indemnity from the Standard Paving Company to whose wrongful act in obstructing the natural passageway for such surface water down Hall's Lane it ascribes the flooding.

The learned trial judge found the city liable for $2,069.87 damages and costs and held the third parties obliged to indemnify it and condemned them to pay the costs of the third party proceedings.

The Appellate Divisional Court upheld the judgment against the city but dismissed, with costs, its claim for indemnification (4).

The city now appeals against its condemnation and also, should its main appeal fail, against the discharge of the

(1) 41 Can. S.C.R. 190.
(2) 17 Ont. L.R. 556.
(3) 9 Ch. D. 503.
(4) [1923] 55 Ont. L.R. 1.

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third parties. If there be liability the amount of the recovery is not questioned either by the appellants or the third parties.

During heavy rainstorms the surface water of a considerable area which the storm drains could not carry converged from three directions, north, east and south, at the intersection of Foundry street and Hall's Lane. Owing to the paving of the city streets, and the recent construction of enlarged storm sewers under Foundry street, for which an inadequate outlet had been provided, thus causing a backing up of water through catch basins and manholes in the street, the rush of water towards the spot in question and the amount accumulated there during the storm of the 26th of July was increased. For this the defendant was responsible. But, on the whole evidence, it would seem to be highly probable that, but for the presence of the mound of earth thrown across the entrance to Hall's Lane by the third parties, notwithstanding the undoubted severity of the storm, the water which the storm sewers could not carry off would have flowed down that lane with such rapidity that flooding of the plaintiffs' cellar would not have occurred. That is what had happened for many years; and, as put by the learned trial judge,

> there was no evidence to convince me that with a clear opening down the lane even the extremely excessive flow might not have been taken care of sufficiently to have saved the plaintiffs' premises.

The learned judge adds:

> The mound must necessarily have obstructed the water until the sidewalk was flooded, and so soon as the flooding commenced the immediate cause of it must have been the mound. To what extent, had the mound not been there, the continued onrush of water might have been so fast that it would rise above the level of the curb and so overflow the sidewalk must be mere guesswork. * * * In my judgment the conclusion to be drawn from the established facts, as distinguished from those which consist of mere conjecture or are matters of calculation based upon conjectural premises is that the mound of earth and debris caused the flooding of the plaintiffs' premises. * * * The defendant corporation were fully aware of the fact that during some rainstorms the storm drains were not sufficient to carry off the water, and that Hall's Lane must necessarily be kept free from obstructions in order to carry off the surface water. The paving company's manager admitted that the danger of flooding at that corner was apparent. Under these circumstances it was, I think, the duty of the defendant corporation not to leave any obstruction in the lane which might block the flow of water and endanger the plaintiffs.

This concept of the facts is the fair result of the evidence. Notwithstanding Mr. Hattin's able attempt to demonstrate

by expert evidence based on the testimony as to water levels in Foundry Street during the storm that the flooding of the plaintiff's cellar would have occurred had there been no obstruction in Hall's Lane, with the learned trial judge we regard that conclusion as at the most conjectural. One obvious fallacy in the premises on which it is based is that the water levels in Foundry Street given in evidence, assuming their accuracy, were those which obtained with the obstruction of the mound in full operation. How much lower they would have been had the entrance to the lane been clear does not appear. We are, therefore, in accord with the view of Mr. Justice Riddell that " the sole tortious cause of the damage (suffered by the plaintiffs) was the barrier " placed across the entrance to the lane by the third parties and with that of the learned Chief Justice of the Common Pleas that " everything turned on that obstruction".

While the storm was no doubt unusually severe, the evidence in our opinion falls short of establishing that the rain-fall was so torrential and unprecedented that it can be said to have amounted to *actus Dei* or *force majeure*, *Greenock* v. *Caledonia Ry. Co.* (1). But, though it were of that character, the defendant would not thereby be excused if the true cause of the flooding complained of was the obstruction of the mouth of the lane and if responsibility for its presence attaches to it. *Nitro-Phosphate, etc., Co.* v. *London & St. Katharine Dock Co.* (2). There is no suggestion here that a case could be made for any apportionment of the damages.

While the paving of the city streets may have materially increased the accumulation of water at the intersection of Foundry Street and Hall's Lane, and the city's method of constructing storm sewers certainly cannot be commended from a common sense, and still less from an engineering, point of view, the conditions thus created were not the immediate and direct cause of the flooding. If they contributed to it, they were rather in the nature of a cause *sine qua non*. Indeed the circumstances in evidence make it probable that the obstruction across the entrance to the lane would have sufficed to cause the flooding even had the sewer outlet been adequate and that the only relevant effect

(1) [1917] A.C. 556. (2) [1878] 9 Ch. D. 503.

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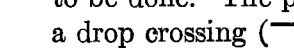
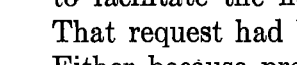
of its inadequacy was that the invasion of the plaintiffs' premises by the water may have occurred a few moments earlier than it otherwise would have happened. Nevertheless the creation of conditions so apt to cause a sudden accumulation of rainwater was an obvious menace which undoubtedly made it the duty of the civic officials to be more than ordinarily vigilant in regard to the means of carrying off the additional volume of surface water thus gathered. Failure to discharge that duty, if that be the proper inference from the evidence as a whole, and responsibility for the tortious act of its contractors, would seem to be the true bases of the defendant's liability.

Moreover, although the plaintiffs originally averred actionable negligence on the part of the city, both in its sewer construction and in regard to the obstruction of the lane, at the trial the former ground of claim was distinctly abandoned and the plaintiffs' case was rested solely on negligence both of commission and omission in regard to the mound of earth; and it was on that footing that the judgment against them proceeded. The third parties however, insisted on retaining any advantage to which they might be entitled from the proof of defective or improper sewer construction. By some of the members of the Appellate Division they were regarded as joint tortfeasors with the city and, as such, not liable to contribution; by others the indemnification provisions of the contract were held not to cover the case because the liability of the city rested on fault of its own officials.

In order to determine the governing legal principles it is necessary to have a correct appreciation of the facts in regard to the presence of the obstruction across the lane. The third parties were in the course of paving Foundry Street under a contract with the city. Enlarged sewers had already been constructed; the concrete foundation for the pavement had been laid; but the asphalt surfacing was still to be done. The plaintiffs had asked for what is known as a drop crossing () at Hall's Lane expressly to facilitate the flow of surface water into and down it. That request had been approved of by the city engineer. Either because proper instructions were not given or because, if given, they were overlooked, the contractors had put in a sloping crossing () somewhat similar

to what had formerly been there, the ends of which, when finished, would be level with the sidewalk and the centre slightly depressed. Noticing this mistake the plaintiffs' manager called the attention of the city engineer to it. He ordered the contractors to make the necessary change, which required the cutting out of the concrete foundation and some additional excavation. This the contractors proceeded to do some five days before the storm. They piled the broken concrete on Foundry Street, but the rest of the material they threw across the mouth of the lane, forming a bank, probably about a foot in height, which the learned trial judge finds

> was sufficient to obstruct the natural flow of surface water, even during a severe storm, down the lane.

The contractors' foreman says that he placed the pile of earth in the lane as a barrier to protect the concrete from traffic; that after long experience they had found such an obstruction more effective than the usual wooden barrier. The insistence of the plaintiffs on a drop crossing had brought to the immediate attention both of the city engineer and of the contractors the necessity of keeping Hall's Lane open to carry off the surface water in a heavy storm. Yet this dam of earth was placed across the mouth of the lane and kept there for five days and the foreman says similar barriers were placed at each street intersection. Notice to the city of the existence of the obstruction at the mouth of Hall's Lane seems, therefore, to be not merely a justifiable, but almost an inevitable inference.

Upon this state of facts it is impossible to suggest that the contractors' act in placing the pile of earth across the lane was mere casual or collateral negligence. To protect their fresh concrete from traffic entering Foundry street from the lane was a necessary incident of the work they had undertaken. The specifications expressly imposed that obligation and required that barriers should be put up and maintained. To provide such protection by means of a dam of earth thrown across the lane instead of the customary open barrier, which would not have interfered with the flow of water into the lane, was, under the circumstances, very gross negligence. Such a method of carrying out an integral part of the work contracted for was palpably wrong and involved the city in liability. *Hole* v. *Sittingbourne & Sheerness Ry. Co.* (1). Having undertaken the construc-

(1) [1861] 6 H. & N. 488.

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tion of the drop crossing at Hall's Lane in connection with the paving of Foundry street, it became incumbent upon the city so to dispose of the material necessarily excavated in the course of that work as not to cause injury to neighbouring property owners. For the performance of the work itself and the discharge of that incidental duty it was, no doubt, authorized to employ contractors. But their failure to fulfil their obligation to the city in regard to the safe disposal of excavated material left the latter responsible for the resultant injury. Its duty to the plaintiffs remained undischarged and the contractors' fault of omission was not mere casual or collateral negligence for which the city would not have been responsible. Upon that ground, therefore, the city is responsible for the damages thus caused. *Vancouver Power Company* v. *Hounsome* (1); *Dalton* v. *Angus* (2); *Hardaker* v. *Idle District Council* (3); *Holliday* v. *National Telephone Company* (4); *Robinson* v. *Beaconsfield Rural Council* (5), per Buckley L.J.; *Ballentine* v. *Ontario Pipe Line Co.* (6); *Penny* v. *Wimbledon Urban District Council* (7); *Kirk* v. *Toronto* (8). But, if that were not so, on the ground that it had failed to require the removal of such an obvious cause of known danger, of which it must be held to have had notice, liability also attaches to it. Therefore, because of negligence both of commission and omission the municipal corporation was rightly held liable and the judgment condemning it must be upheld.

By their contract with the city the third parties had agreed that

> The corporation will not in any manner be answerable for any injuries to any person or persons, either workmen or the public, or for the damage from any cause arising from the conduct or operations of the company or their workmen or any one employed by them, all of which injuries and damages to persons or property the company must guard against, and make good all damages, being strictly responsible for the same.

They had also covenanted to construct the works in accordance with and upon the terms of the specifications. Paragraph 7 of the grading specifications reads:—

(1) [1914] 49 Can. S.C.R. 430.
(2) [1881] 6 App. Cas. 740, 829.
(3) [1896] 1 Q.B. 335, 340.
(4) [1899] 2 Q.B. 392
(5) [1911] 2 Ch. 188, 198.
(6) [1908] 16 Ont. L.R. 654.
(7) [1898] 2 Q.B. 212.
(8) [1904] 8 Ont. L.R. 730.

All surplus material not required by the city must be disposed of by the contractor off the line of work, but in such a manner as not to cause a nuisance, injury or inconvenience to the city or to public or private parties; otherwise the contractor must indemnify the corporation against all claims in respect thereof.

The material placed in the lane was "surplus material not required by the city." In direct violation of the clause just quoted the contractors so placed it that it became the cause of injury to private parties. Why should they not indemnify the city for the present claim for such injury?

It is argued that the clause was not meant to apply to a case in which negligence of the city itself is found to have involved it in liability and such authorities as *City of Toronto* v. *Lambert* (1) and *Sutton* v. *The Town of Dundas* (2), are invoked by the third parties. In each of those cases an independent act of negligence of the party asserting the right to indemnity under a contractual provision, which may for the moment be taken to have been somewhat similar to clause 7 of the specifications above quoted, had been the immediate and effective cause of the injuries sustained; in neither of them had a wrongful act of the contractor who had undertaken the obligation to indemnify, in the carrying out of the work contracted for, been the primary and sole effective cause of the damage suffered. In the case at bar, on the contrary, the city's liability arises either because responsibility for the tortious act of its contractors is by law attached to it, or because it had failed to remove a known source of danger, which a tortious act of its contractors had created. Where, as here, a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests. As put by the late Mr. Justice Rose in *Carty* v. *City of London* (3):

I would be unable to find any case to apply the indemnity clause to if this be not one, and indemnity implies liability against which indemnity is sought.

(1) [1916] 54 Can. S.C.R. 200. (2) [1908] 17 Ont. L.R. 556.
(3) [1889] 18 O.R. 122, at page 131.

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See too *McIntyre* v. *Lindsay* (1), and *Gignec* v. *Toronto* (2). Had the evidence established that the faulty construction of the city sewer was a proximate cause of the flooding, the authorities relied upon by Mr. Hattin might have been in point and the application of the indemnity clause might have been excluded.

We are for these reasons of the opinion that the judgment of the learned trial judge holding the third parties liable to indemnify the respondent was right and should be restored. It is perhaps unnecessary to state that in affirming their liability we base our judgment solely upon the covenant for indemnification in their contract and not at all upon section 464 of the Municipal Act, or to add that the doctrine of the common law excluding contribution between joint tortfeasors does not apply to such a case as this.

The appeal of the City of Kitchener against the plaintiff will, therefore, be dismissed with costs. Its appeal against the Standard Paving Company will be allowed with costs here and in the Appellate Division and the judgment of the learned trial judge in the third party proceedings restored.

The defendant, however, is not entitled to recover from the third parties any costs which it may have to pay arising out of the appeals to the Appellate Division and to this court from the judgment in the main action.

IDINGTON J.—The respondent, the Robe & Clothing Co. Ltd., is a manufacturer of woollen goods carrying on business in the City of Kitchener in a factory fronting on one of the streets of said city, known as Foundry Street, and alongside it there has for many years been a lane fifteen feet in width running at right angles to said Foundry Street and known as Hall's Lane.

On the 26th of July, 1921, an unusually heavy rain storm occurred in said city which resulted in the water being more than the appellant's sewer pipes on Foundry Street could carry, and therefore the water on that street overflowed part thereof and ran down in the side ditches thereof to the said junction of Hall's Lane with Foundry Street and probably would have found an easy outlet at and over

(1) [1902] 4 Ont. L.R. 448. (2) [1906] 11 Ont. L.R. 611.

said lane (which had a fall of about four feet per hundred feet in length) as it usually did in cases of heavy rains, but for an obstruction put thereon by the respondent the Standard Paving, Limited, under circumstances which I am about to refer to.

The result was an overflow of water into the cellar of the said Robe & Clothing Company, which caused heavy damages to the goods of the said company.

Hence this action was brought against the said city to recover from it said damages.

The conflicting evidence given at the trial before Mr. Justice Orde, without a jury, was such as to lead to a change of opinion by those conducting the plaintiff's case at said trial, and to the diversity of judicial views we find expressed throughout the course of this case in the courts below.

The appellant, before pleading to the action so brought, served the said Paving Company with notice of bringing it in as a third party, bound by the terms of its contract with appellant to indemnify the latter against the results of the action.

To this it responded denying all liability.

An order was made by the local judge providing for such proceeding and its results as required by the practice in such cases in Ontario.

That resulted in all parties so concerned appearing at the trial and taking part therein before the learned trial judge.

The contention as between the defendant and the said third party was, of course, that the other fellow was entirely to blame.

And as between each of them and the plaintiff, now a respondent, the respective contention of each was, by the plaintiff up to a certain point that both the original defendant, now appellant, and the third party were to blame and, conversely, each of the latter tried to shew that the other was to blame.

According to the findings of fact by the learned trial judge his view of the law as applied thereto seemed to me absolutely correct.

Therefore I decided to read the entire evidence and see if that justified his findings of fact being departed from and I am pleased to find that he had paid close attention

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to the case throughout and took pains, by questioning many of the witnesses, to have many points in the evidence cleared up instead of being left in the confusing condition in which it had been presented and possibly would have been left out but for his doing so.

When one understands the actual facts and appreciates correctly their bearing the case is comparatively simple.

The junction of Hall's Lane with Foundry street is at the lowest point of said street, which is comparatively a short street crossing three blocks.

The more the streets are improved by paving or otherwise the more rapidly the rainfall moves, and what seems to have happened in the part of Kitchener, on Foundry street, by reason of the city's rapid growth, was that the pipes for carrying the water off had been found to be too small and along said street had been renewed and enlarged, but when it came to renewing and enlarging correspondingly the continuation thereof on and along said Hall's Lane, there was no need for haste in doing so inasmuch as the surplus water could find an easy outlet down that lane and be taken care of thereby without risk of injuring any one.

The title to that lane was in the respondent, the Robe & Clothing Company, Limited, and had been for many years past.

Evidently there was a movement on foot by the appellant city to change that situation of things, for we are told on argument, in addition to what appears in evidence, that the offer, contained in the letter from said owner to the city, to sell said lane to the city, had been accepted by resolution of the latter's council shortly before the accident in question herein, but it was some months later before the title was completed.

The pipes had been found to be quite capable of carrying all the water for years past, except on the occasion of unusually heavy rains, which might be three or four times a year, and on such occasions the surplus water ran down the said lane and, on the occasion of the storm in question, beyond a shadow of doubt in my mind (despite the theory of an engineer witness based on the evidence of two witnesses, who spoke of what they had seen when unconsciously magnifying the severity of the storm) would have

done the same but for the interference of the situation by the respondent, the Standard Paving, Limited.

The most convincing tests from actual facts, instead of many theories, is that given by Richardson, a witness living in another part of the city, who tells of a storm some seven or eight years before which brought the water from the streets in such a volume as to bring it into his cellar, but this storm did not. That storm did no injury to the premises now in question, though the buildings had been built before that time.

The Standard Paving, Limited, had entered into a contract with the appellant to do some paving for it, which included Foundry street, and when it came to Hall's Lane the manager of the Robe & Clothing Company, knowing the actual situation and the need of the entrance of surplus water into said lane being protected for the very purpose of meeting the requirements of the street drainage, explained this to those engaged in the work. Somebody forgot, or paid no heed, until a few days before the accident in question, and all concerned then met and agreed that the crossing from Foundry street (main part of the highway) over the sidewalk thereon into said lane, should be, when finished, so shaped as to provide for the anticipated possibilities of surplus water needing its outlet into the lane.

The men engaged in executing said work on behalf of the said Standard Paving, Limited, bungled it by throwing the refuse or debris of the old sidewalk, and earth and other materials under it, to make way for the new, on the lane, forming what proved to be a dam, when the storm came, and the old outlet for the surplus water being gone or impaired thereby, it ran into the cellar of the respondent, the Robe & Clothing Company, Limited, and did the damage for which the learned trial judge entered judgment against the appellant and gave it relief over against said respondent, the Standard Paving, Limited.

The latter had by its contract agreed with appellant to indemnify it against just such claims, in the following terms:—

> The corporation will not in any manner be answerable or accountable for any injuries to any person or persons, either workmen or the public, or for damage from any cause arising from the conduct or operations of the company or their workmen or any one employed by them,

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all of which injuries and damages to persons or property the company must guard against, and make good all damages, being strictly responsible for the same.

That seems comprehensive enough to cover all that is in question herein, and why the said company failed to respond thereto without litigation puzzles me.

Seemingly the storm was looked upon as such an Act of God as to excuse the fulfilment of the said contract of indemnity. And hence I fear the gross exaggeration of the storm.

No judicial opinion seems to have countenanced that view, but the Appellate Division for Ontario seems to have looked upon the appellant and the Standard Paving, Limited, as joint tortfeasors, and it varied the said judgment so as to deprive the appellant city of its remedy over against said third party, the Standard Paving, Limited. Hence this appeal here.

With great respect I cannot agree with the view taken, either as to the facts or the law, by those who, in said court, have written opinions tending to allow said appeal.

I have set forth as briefly as I can the relevant facts, and I submit that the learned trial judge was in much better position to hear and determine the facts than any one else judicially concerned in this case, and all the more so by reason of the somewhat confusing manner in which the evidence was presented and the tendency on the part of some of the witnesses apparently to magnify the storm.

The evidence of a witness who had an instrument for use in measuring rain-falls tells us it lasted for an hour and a half, and the total fall was a trifle over two inches which, if we apply common knowledge, is not so great as pretended.

Turning now to the law governing the case, the learned trial judge seems to have taken, as his chief guide, the judgment of Lindley L. J. in *Hardaker* v. *Idle District Council* (1).

In said judgment he quotes from the opinion of Lord Blackburn, in *Dalton* v. *Angus* (2), as follows:

> Ever since *Quarman* v. *Burnett* (3), it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence

(1) [1896] 1 Q.B. 335. (2) 6 App. Cas. 740, at 829.
(3) 6 M. & W. 499.

of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (1); *Pickard* v. *Smith* (2); *Tarry* v. *Ashton* (3).

These cases cited seem to support the proposition laid down in the foregoing quotation. And I submit that it is because of the relations between the appellant and the said contractor (The Standard Paving, Limited) by virtue of the contract between them and the duty resting upon the appellant to get said work done that appellant is at all liable herein, and not by reason of anything that the appellant itself did or did not do, that it should be held liable.

For if the learned trial judge is, as I hold he is, quite right in his findings of fact, there is, and can be, no ground for holding that the appellant is a joint tortfeasor.

The duty to protect the plaintiff herein rested in law upon the appellant, and the rule as to tortfeasor is not applicable to defeat the right of the appellant to look to and recover over as against the third party upon the latter's covenant for indemnity, which is perfectly legal.

On the facts as found nothing further need be said. But I would refer to the discussion of the principle involved as to the right to recover from him who indemnifies against his own acts, on pages 198 and 199 of Pollock on Torts, 12th ed., and cases there cited, and also the case of *Moxham* v. *Grant* (4), as a means of illustrating the modern and more reasonable doctrine than that so widely laid down in *Merryweather* v. *Nixon* (5).

In my opinion for the foregoing reasons this appeal should be allowed with costs here and in the appellate court below, and the judgment of the learned trial judge be restored.

Appeal defendant v. *plaintiff dismissed with costs.*
Appeal defendant v. *third party allowed with costs.*

Solicitors for the appellant: *Sims, Bray & McIntosh.*
Solicitors for the respondent: *Scellen & Weir.*
Solicitors for third party: *Clement, Hattin & Snider.*

(1) 6 H. & N. 488.
(2) 10 C.B. (N.S.) 470.
(3) 1 Q.B.D. 314.
(4) [1900] 1 Q.B. 88.
(5) [1799] 8 T.R. 186.

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*Nov. 18.
*Dec. 30.

LA COMPAGNIE DE JESUS (DEFENDANT) ..... APPELLANT;

AND

LA CITE DE MONTREAL (PLAINTIFF)...RESPONDENT.

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

Assessment and taxes—Municipal corporation—Exemption from taxes—Granted to "successors or ayants cause"—Sale—Right of buyer.

Section 4559 of the Town Corporations Act, R.S.Q. (1888) provided that "the council may, by a resolution, exempt from the payment of municipal taxes * * * any person who carries on any industry, or trade, or enterprise * * * ." In 1906, the town of Notre Dame des Neiges (annexed in 1910 to the city respondent) passed a resolution exempting one E. G. and his successors or "ayants cause" from payment of taxes for a period of fifteen years upon farms of a total area of 192 acres, inasmuch as E. G. undertook to subdivide the property into building lots and to build during the first year a certain number of houses. In 1908, E. G. sold his property to the Northmount Land Company to whom right to exemption was confirmed; and the latter sold in 1910 to the appellant part of the property, undiveded. The taxes for 1911, $1,000, were paid to the respondent; but the taxes for 1912 and 1913, $3,675, were unpaid. Proceedings were taken by the respondent for the sale of the property owned by the appellant. The latter pleaded that, under the terms of the resolution, it was entitled to the benefit of the exemption granted to its predecessor in title, as its successor or "ayant cause." At the time of the action the property bought by the appellant was still vacant.

Held that the appellant, not being presumed owing to its character and and aims to have purchased the tract of land for the purposes of engaging in speculative building, was not an *ayant-cause* of its vendor and therefore was not entitled to claim the exemption from taxes granted to the latter.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec, reversing the judgment of the Court of King's Bench sitting as the Court of Review and affirming the judgment of the trial judge, who had dismissed the opposition filed by the appellant.

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

Beaulieu K.C. and *St. Jacques K.C.* for the appellant.

Laurendeau K.C. and *St. Pierre K.C.* for the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—The statutory authority, by virtue of which the appellants claim the right to a commutation of taxes, which is asserted in this litigation, is to be found in section 4559 of the Revised Statutes of Quebec, 1888, and is in these words:

4559. The council may, by a resolution, exempt from the payment of municipal taxes, for a period not exceeding 20 years, any person who carries on any industry, or trade, or enterprise whatsoever, as well as the land used for such industry, trade or enterprise; or may agree with such person for a fixed sum of money payable annually for any period not exceeding 20 years, in commutation of all municipal taxes.

Such exemption or agreement does not extend to work upon watercourses, boundary ditches, fences, clearances or front roads connected with taxable property so exempted or commuted.

Purporting to exercise the authority created by this enactment, the town of Notre-Dame des Neiges passed the following resolution on the 9th February, 1906:

Attendu que monsieur Edouard Gohier, *agent d'immeubles*, a acquis et entend acquérir dans la ville de Notre-Dame des Neiges, les terrains suivants, savoir:

La ferme Swail, portant le numéro vingt-cinq (25) formant environ cent vingt-deux arpents, la ferme Lacomb, portant le numéro vingt-sept (27), et formant environ vingt-huit arpents, le terrain Leslie, portant les numéros quarante (40) quarante A, quarante B, (40A-40B) formant quarante-deux arpents environ, *et qu'il entend exploiter ces terrains en lots à bâtir et ouvrir des rues, y bâtir des maisons et faire la concession de ces terrains.*

Attendu que cette exploitation serait de nature à augmenter considérablement la valeur de la propriété foncière imposable de la ville de Notre-Dame des Neiges et donnerait, par conséquent, des revenus considérables à la dite municipalité;

Attendu que ces terrains ne paient actuellement pour toutes taxes municipales que les sommes respectives de $274.85;

Il est en conséquence résolu: sur proposition de monsieur l'échevin J. McKenna, seconde par monsieur l'échevin P. Sarrazin, que la demande de monsieur Edouard Gohier, telle qu'elle est faite, plus les amendements qui suivent, soit adoptée.

Proposé, en amendment à la motion de monsieur l'échevin J. McKenna, par monsieur Jos. Prévost, secondé par monsieur J. Lacombe, que le terme de 20 ans de la dite convention soit remplacé par celui de 15 ans à partir du 1er mai 1906.

Adopté à l'unanimité.

La corporation de la ville de Notre-Dame des Neiges, consent par ces présentes, de n'exiger que les sommes respectives de $274.85, pour taxes municipales, pour une période de vingt années, tous les terrains suivants, savoir:

La ferme Swail, portant le numéro vingt-cinq (25), formant environ cent vingt-deux arpents, la ferme Lacombe, portant le numéro vingt-

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sept (27), et formant environ vingt-huit arpents, le terrain Leslie, portant les numéros quarante, quarante A et quarante B, (40-40A, 40B), formant environ quarante-deux arpents, tant et aussi longtemps que les dits terrains seront la propriété du dit Edouard Gohier, ses successeurs ou ayants-cause; néanmoins, au fur et à mesure que le dit Edouard Gohier, ses successeurs ou ayants-cause auront vendu ou concédé un ou des lots bâtis ou non bâtis sur ces dits terrains, telle convention ne s'appliquera pas aux dits terrains ainsi vendus, lesquels seront évalués au rôle d'évaluation de la dite corporation suivant la loi, et seront sujets à être taxés de la manière ordinaire.

Le nombre des propriétés construites par la compagnie ne devra pas être moins de quarante maisons, pour la première année, et seront taxables après six mois, vendues ou non. Le prix ne sera pas moins de $2,000. Le solage devra être soit en béton ou en pierre. Si un des actionnaires bâtit pour lui-même, ce terrain sera taxable. Aucune partie de ce terrain ne devra être vendue pour cimetière.

La convention de taxes ci-dessus ne s'appliquera qu'à la partie non vendue et non concédée desdits terrains et demeurant et restant la propriété dudit Edouard Gohier, ses successeurs ou ayants-cause.

Cette convention de taxes ne s'étendra pas non plus pour tous lesdits terrains, aux travaux à faire aux cours d'eau, drainage ou canaux d'égouts, fossés de lignes, clôtures ou chemins de front dépendant des biens imposables ainsi exemptés.

La présente convention de taxes, sous les réserves ci-dessus, commencera à compter du premier jour de mai, mil neuf cent six, et pour quinze années à venir de la dite date.

The properties described in this resolution having been sold by Gohier to the Northmount Land Company, the town adopted, on the 13th April, 1908, this further resolution:

Attendu que le conseil municipal de la corporation de la ville de Notre-Dame des Neiges, à une de ses sessions tenue au dit lieu de la Côte des Neiges, le neuf février mil neuf cent six, a passé une résolution relativement à une fixation de taxes pour la compagnie The Northmount Land Company, en, par cette dernière se conformant à certaines conditions et notamment construisant quarante maisons de deux mille piastres chacune.

Attendu que la compagnie The Northmount Land Company a déjà accompli beaucoup plus qu'elle n'était obligée de faire et entr'autes a construit vingt-trois maisons de trois à sept mille piastres chacune;

En conséquence de ce que ci-dessus, qu'il soit résolu que la corporation de la ville de Notre-Dame des Neiges en considération de ce que déjà fait par la compagnie The Northmount Land Company, reconnaît que The Northmount Land Company a amplement rempli ses obligations pour la somme d'argent dépensée, et soit à l'avenir dispensée de l'obligation de parfaire quarante maisons et ait le maintien complet de ses privilèges et exemptions.

On the 18th October, 1910, the Northmount Land Company sold part of the cadastral numbers 25 and 27, consisting of about fifty acres, to the appellants, and it is in relation to the taxes assessable in respect of this property that the dispute has arisen

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In 1910, the town of Notre-Dame des Neiges was annexed to Montreal. The property in question appeared on the assessment roll in the name of the appellants, with a valuation of $100,000 in the year 1911, and of $175,000 in each of the years 1912 and 1913. The assessment ($1,000) for the year 1911 was paid by the appellants; those for the years 1912 and 1913 (amounting in the aggregate to $3,675) were not paid, and proceedings were accordingly taken for the sale of the property. The contention on behalf of the appellants is that, under the terms of the resolutions, they are entitled to the benefit of the commutation granted to their predecessor in title, Edouard Gohier, as his successor or *ayant-cause.*

It is unnecessary to consider whether the arrangement with Gohier was a commutation authorized by the enactment quoted above; although it may be observed that the decision of the Court of Review affirming the judgment of Lafontaine J. in *Corporation de Cartierville* v. *Compagnie des Boulevards* (1), would, if followed, exclude the appellants' claim. The interpretation of the agreement embodied in the first resolution upon which the appellants rest their claim is this; the conditions, they say, laid down by the resolution, having been performed, as is formally declared by the resolution of 1908, the right to the commutation of taxes agreed to became vested in the Northmount Land Company, the successors of Gohier, and this right, it is said, passed to the appellants as purchasers from the company. In reply to the argument based upon the clause of the resolution providing that the reduction of taxes is only to affect lands remaining in the hands of Gohier, his successors or *ayants-cause,* and consequently is not applicable to any portion of the lands sold or granted by Gohier or the Northmount Land Company, it is asserted that the effect of this clause is to exclude from the benefit of the agreement only such parts of the land as are granted as building lots, and that the clause does not contemplate such a transaction as that with the appellants, under which a considerable area was sold *en bloc.*

This argument seems to proceed upon an inadmissible view, both of the resolution and of the statute. The statute

(1) [1916] Q.R. 51 S.C. 170.

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sanctions agreements for exemption and for commutation of taxes with some person who " carries on " an " industry, trade or enterprise." Primarily, the privilege relates to taxation in respect of the " industry, trade or enterprise," and it is quite indisputable that the statute contemplates the continuation of the privilege only so long as the " industry, trade or enterprise," in respect of which it is granted, is carried on. The exemption or commutation may also extend to lands used for the " industry, trade or enterprise," but it is equally clear that the duration of this exemption is limited in the same way. The statute does not refer to successors, although it may be assumed, without expressing an opinion upon the point, that so long as the identity of the business which is the primary subject of the exemption or commutation is preserved, the benefit of the agreement with the municipality may pass to a successor or a transferee; but there is nothing in the language of the statute giving colour to the contention that lands affected by the privilege by reason of being used for the purposes of the business continue to enjoy it after they have been severed from the assets of the business and have passed into other hands than those of its owners.

The resolution, of course, must be read in light of the terms of the statutory authority upon which the municipality purported to act. Assuming that Gohier and the Northmount Land Company were carrying on an " industry, trade or enterprise " in the sense of the statute, and assuming, further, that this " industry, trade or enterprise " has not come to a termination, it is impossible to hold, on the evidence in the record, that the appellants have acquired and are prosecuting it. The Northmount Land Company apparently did not denude itself of the whole of the lands unsold when, in 1910, it made the transfer of the tract in question to the appellants. It was not disputed that the fifty acres acquired are still vacant, and it cannot be presumed that the appellants, having regard to their character and aims, purchased this tract of land for the purposes of engaging in speculative building, assuming them to have the juristic capacity to do so.

The appeal should be dismissed with costs.

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IDINGTON J.—This is an appeal from the Court of King's Bench of Quebec on the appeal side, allowing an appeal from the Court of Review and confirming the judgment of the Superior Court by which the opposition made by appellant to the seizure of certain of its properties for non-payment of municipal taxes, was dismissed.

There has been written by Mr. Justice Tellier a dissenting judgment in the said Court of Review; and others by Mr. Justice Dorion and Mr. Justice Hall in said Court of King's Bench, each dealing at length with the questions raised, so fully and effectively, that, as I agree in the main therewith, I see no useful purpose to be served by repeating herein the reasons thereby assigned in support of the claims of respondent.

I doubt much the original validity of the commutation relied upon by appellant; but apart altogether from that, agreeing as I do with the said reasons demonstrating that the appellant is not entitled to relief thereby, I am content with expressing said doubt.

The factum of respondent calls our attention to the decision of this court in the case of *Ville Saint-Michel* v. *Shannon Realties, Limited* (1), upheld later on appeal to the Judicial Committee of the Privy Council.

Had that decision been arrived at a couple of years earlier by said courts, I imagine it would have saved much judicial labour in the course of what this cause has come through, for appellant paid one year's taxes and failed apparently to take any steps, as it should have done if any ground therefor, in way of challenging the assessments it now complains of.

I am of the opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Jacques, Filion & Houle.*

Solicitors for the respondent: *Jarry, Damphousse, Butler & St.-Pierre.*

(1) [1922] 64 Can. S.C.R. 420; [1924] A.C. 185.

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*Nov. 20, 21.
*Dec. 30.

DOMINION TRANSPORT COMPANY (DEFENDANT) ..... APPELLANT;

AND

MARK FISHER, SONS & COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL PER SALTUM FROM THE SUPERIOR COURT, PROVINCE OF QUEBEC

Transport company—Goods delivered to carter wearing ordinary insignia of company's employees—Theft—Liability—Arts. 1053, 1054, 1674, 1675, 1730 C.C.

The respondent claims from the appellant, a cartage company employed by the Canadian Pacific Railway Company, the sum of $3,629.27, value of certain parcels of merchandises alleged to have been confided to a carter in charge of a wagon marked "C.P.R." in large letters and belonging to the appellant. The respondent telephoned to the appellant company requesting it to send a carter for the merchandises for shipment to the railway company; and later on, a pretended carter arrived stating he had come for the "C.P.R.," asked for and received delivery of the parcels. This carter, a former employee of the appellant, had borrowed the cap and apron of one Jutras, then a carter employed by the appellant, and prevailed on Jutras to allow him to use the appellant's wagon, stating that he required it to cart some trunks. The goods thus obtained were stolen by the pretended carter and his confederates also former employees of the appellant.

Held, Idington J. dissenting, that the appellant cannot be held responsible for the loss of the respondent's goods. Under the circumstances of this case the appellant cannot be held liable as a common carrier under articles 1674 and 1675 C.C.; it cannot be held liable as having held out the guilty carter as having authority to call for goods in its name, under article 1730 C.C.; and there is no delictual liability on the part of the appellant under article 1054 C.C.

APPEAL *per saltum* from the judgment of the Superior Court, province of Quebec, Surveyer J., maintaining the respondent's action.

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

Chipman K.C. and *Montgomery K.C.* for the appellant.

De Witt K.C. and *Harold* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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MIGNAULT J.—This is an appeal *per saltum* by consent of the parties from a judgment of the Superior Court in Montreal, Surveyer J.

A criminal conspiracy between former employees of the appellant company, hereinafter called the conspirators, to rob wholesale merchants in Montreal by pretending to be carters employed by the Canadian Pacific Railway Company, has given rise to this litigation, and the respondents claim from the appellant, a cartage company employed by the railway company, $3,629.27, the value of certain parcels of merchandise which they allege they confided, on November 5 and November 27, 1917, to a carter in charge of a wagon marked "C.P.R." in large letters and belonging to the appellant. They say that this carter wore the cap provided by appellant as well as the apron and other insignia usually worn by the employees of the appellant, and asked for and received delivery of these parcels. They had telephoned to the appellant requesting it to send a carter for this merchandise for shipment by the railway, and in due time the pretended carter arrived stating he had come for the "C.P.R." The goods thus obtained were stolen by this carter and his confederates and were never recovered. The alleged responsibility of the appellant is based on articles 1053 and 1054 of the civil code, or in the alternative on articles 1674 and 1675, or on article 1730 of the same code.

Similar actions claiming damages arising out of the same conspiracy were brought before the Quebec courts and were finally disposed of by the Court of King's Bench, appeal side. In this case however the amount involved allowed of an appeal to this court. The trial having taken place in 1920 before Surveyer J., the learned judge suspended judgment until May, 1924, apparently to await the decision in the other cases. The learned judge did not make any specific findings of fact on the somewhat contradictory evidence, being content to hold generally that the plaintiffs had proved the essential allegations of their declaration and that the plea had not been established. The judgment further stated that the question at issue had come up several times before the Court of King's Bench, that the majority of the judges of that court had maintained actions

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based on similar, although possibly not identical, sets of facts, and that it was advisable to secure the decision of the Supreme Court of Canada, inasmuch as the present case was the first which, in view of the amount claimed, was susceptible of appeal to this court.

It is necessary therefore to review the evidence adduced before the trial court, which will be done as briefly as possible.

In the fall of 1917, one Alfred Jutras was a carter employed by the appellant to deliver parcels from the railway to consignees in the outlying districts of Montreal. It was not a part of his ordinary duties to fetch parcels for shipment by the railway, but occasionally he might be requested by telephone to do so when he telephoned to the company for instructions. He furnished his own cap and apron and used a horse and wagon belonging to the appellant. The four conspirators were Percy, a brother-in-law of Jutras, Wistaff, Tremblay and Fournier, former employees of the appellant, all of whom were called at the trial. The *modus operandi* was to borrow Jutras' wagon as well as his cap and apron, and then one of the conspirators called at the place of business of a wholesale merchant asking whether he had any parcels for the "C.P.R." This scheme of robbery was successful for some time, but finally the conspirators as well as Jutras were arrested and found guilty by the criminal courts. Jutras, who appears to have been the tool of the others—a disputed point being whether he was aware of their criminal designs—was condemned to two months imprisonment, while the others received penitentiary terms. The part played by Jutras, however, must be determined on the evidence in this case, and a point which was considered of some importance in the other cases, but its relevancy must be carefully considered, is whether he was *particeps criminis*.

According to the testimony of Jutras, and also of Percy, Tremblay and Fournier, Jutras was merely asked to lend his wagon "pour un voyage," being told that the others wished to earn some money by carrying trunks. Jutras says that he received small sums of money for the use of his wagon, while Tremblay states that he was also given some shoes stolen from Slater's shoe store, and that he aided in opening the box containing the shoes. The tes-

timony of Wistaff would indicate that Jutras knew that his wagon was borrowed to steal goods from the respondents, but the evidence of the other conspirators does not bear this out. Unfortunately we have not a finding of the learned trial judge on the question whether Jutras was or was not aware of the criminal designs of these men, if this circumstance be really material as to the liability of the appellant. The preponderance of testimony, if these conspirators were all equally credible witnesses, does not appear to attach guilty knowledge to Jutras, although it would probably not be unreasonable to infer such knowledge from all the circumstances of the case. In the absence of any specific finding of fact it will be well to determine what responsibility the appellant incurred, if any, on either assumption.

We may now examine the different cases in which the Quebec courts have dealt with the question of the liability of the railway company or the cartage company by reason of this criminal conspiracy. Their decisions of course were based upon the facts established in evidence in each case, which, as Surveyer J. observes, may not have been identical with those with which we are here concerned.

The first case in order is that of *The Canadian Pacific Railway Co.* v. *Hodgson Sumner Company, Limited* (1), by Martin, Greenshields, Dorion, Allard and Tellier JJ., where the judgment of the Superior Court, Lafontaine J., was affirmed, Mr. Justice Allard dissenting.

In that case, the parties had made a joint admission of the pertinent facts which in its entirety is not cited in the report. Martin J., said at p. 172:

> I do not think the case comes within the principles expressed in article 1730 C.C. which is a plain principle of justice common to all systems of law. Appellant's liability if existing in this case must, I think, rest on delictual, not contractual grounds. Jutras betrayed the trust reposed in him. The same thing was, however, done on several occasions in the same manner by Jutras and he was convicted and sentenced for having been implicated in the whole series of frauds extending from September to December, 1917, as well as Tremblay, Fournier, Percy and others. Jutras did not go to the plaintiff company's premises but remained with whichever of the two, either Tremblay or Percy, who did not go to plaintiff's premises. Does not that mean that Jutras was a guilty participant, *particeps criminis,* in the theft?

(1) [1920] Q.R. 31 K.B. 170.

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Greenshields J., was also of opinion that Jutras was *particeps criminis* with Tremblay and Percy. On that assumption he said he had no doubt whatever that in law the appellant would be responsible to the respondent for the loss. He was not prepared to accept the finding of the trial judge placing the responsibility of the appellant on article 1730 C.C., but held the railway company liable on the sole ground of Jutras' guilty participation in the theft. Had he not arrived at this conclusion of fact, he would have been disposed to relieve the appellant from liability.

Dorion J. was of opinion that neither article 1053 C.C. nor article 1054 C.C. could be applied. He excluded the latter provision saying at p. 178:

> La faute présumée du choix de Jutras, comme employé de la Dominion Transport Co., n'est pour rien dans l'occasion, car Jutras n'a pas failli dans l'exercice de ses fonctions: la faute qu'il a commise en prêtant sa voiture en est indépendante. Ainsi, mon employé, à qui j'ai confié une hache pour travailler à mon service et qui s'en servirait pour commettre un meurtre, n'engagerait pas ma responsabilité; non plus, à plus forte raison, si le meurtre était commis par quelqu'un à qui il aurait prêté ma hache. Je ne serais pas plus responsable du prêt ou du louage de l'instrument que de la vente.
>
> Toute la question est de savoir si Jutras agissait dans l'exercice de ses fonctions en détournant de son usage l'instrument de travail qui lui avait été confié. Je laisse toujours de côté la circonstance de l'enseigne que portait la voiture, et je conclus que, si la voiture n'eût pas été marquée du nom de l'employeur, celui-ci n'aurait pas été responsable de la fraude commise.

The learned judge then considered the latter circumstance and arrived at the conclusion that the appellant was liable under the rule expressed in article 1730 C.C. as having given reasonable cause for the belief that the person who called for the goods was the mandatary of the appellant. Mr. Justice Tellier concurred in the reasons of Mr. Justice Dorion.

Mr. Justice Allard dissented, being of opinion, as to the alleged delictual liability, that Jutras, even if he were the employee of the appellant, the railway company, which he was not, being merely the servant of the cartage company, was not in the performance of the work for which he was employed when he loaned his wagon. He also considered that the delictual act was not the direct and immediate consequence of the loan of the wagon. He rejected the contention of the respondent that the appellant was bound as carrier under articles 1674 and 1675 C.C., because the person who had received the goods had no mandate to

receive them. As to the argument based on article 1730 C.C., he was of opinion that the appellant had not given reasonable cause for the belief that the person who obtained delivery of the parcels had authority to receive them. The circumstance that Jutras was the employee of the cartage company and not of the appellant and that the wagon was the property of the former was also relied on by the learned judge.

The conclusiveness of this decision, it may be remarked, is somewhat impaired by the fact that no single ground of liability was adopted by a majority of the learned judges.

The next cases in order are those of *Abraham et al.* v. *The Canadian Pacific Railway Company* and *The Redmond Company* v. *The Dominion Transport Company, Limited,* (1), the court being composed of Greenshields, Allard and Létourneau JJ. In the first case the trial judge (Lane J.) had dismissed the action; in the second one, Mr. Justice Duclos had maintained it. The Court of King's Bench confirmed the first judgment and reversed the second, Mr. Justice Greenshields dissenting. Here the wagon of the cartage company was not loaned by Jutras, but by another of its carters, one Martineau. It was held that Martineau had no knowledge of the purpose for which his wagon was loaned. These two cases are of less importance here, for we are concerned with the act of Jutras and not of Martineau. The report contains only the reasons of judgment of Lane J. in the Superior Court, but the appellant in the present case prints as an appendix to his factum the very full judgment of Létourneau J.

Then we are referred to the case of *The Canadian Pacific Railway Company* v. *The Canadian Converters Company, Limited* (2). Here the court (Allard, Rivard and Hall JJ., Mr. Justice Allard dissenting) dealt with the act of Jutras in loaning his wagon to the conspirators and sustained the judgment of the trial judge, Duclos J. Mr. Justice Hall was of opinion that Jutras was *particeps criminis*. He held that Jutras was acting in the execution of his duties, that if for some legitimate reason he had sent Tremblay or Percy to call for the goods, the receipt of the goods by the person to whom he loaned his wagon would have been a

(1) [1922] Q.R. 34 K.B. 417. (2) [1924] Q.R., 36 K.B. 385.

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receipt by himself according to the maxim *qui per alium facit, per seipsum facere videtur.* The learned judge was also disposed to concur in the reasons of Mr. Justice Dorion in *Canadian Pacific Ry. Co.* v. *Hodgson Sumner Co.* (1), not considering that they were inconsistent with what he had said. Mr. Justice Rivard accepted the reasons of Dorion & Tellier JJ., in the case just mentioned, while Mr. Justice Allard dissented on the same grounds as in the case above noted.

Finally, also in connection with Jutras' act, we have the judgment of the Court of King's Bench, in the case of *Gardner et al.* v. *Dominion Transport Co.* (2), Allard, Rivard and Hall JJ., reversing, Mr. Justice Allard dissenting, the judgment of the trial judge, Maclennan J. The following *considérant* of the judgment shews that the liability of the cartage company was placed squarely on article **1054 CC.:**

> Considering that the said Jutras, while in the performance of the work for which he was employed, participated in the fraudulent and criminal acts of the said Tremblay and his associates.

In all the cases where the act of Jutras in loaning his wagon was an element of the alleged liability of the defendant, Martin, Greenshields, Hall and Rivard JJ., the latter in the case of *Gardner* v. *Dominion Transport Company* (2), placed the liability of the defendant upon article 1054 C.C. Dorion, Tellier, and Rivard JJ., the latter in the case of *The Canadian Pacific Ry. Co.* v. *The Canadian Converters Co.* (3), rejected the contention of delictual liability, but applied to the case under consideration the rule of article 1730 C.C. Mr. Justice Allard dissented in all the cases where the defendant was declared liable. In the two cases of Abraham and of The Redmond Company, the former against the Canadian Pacific Ry. Co. and the latter against the Dominion Transport Co. (4), Allard and Létourneau JJ., rejected the plaintiff's action, and Mr. Justice Greenshields dissented. No judge of the Court of King's Bench relied on articles 1674 and 1675 C.C.

Reverting to the present appeal, before discussing the alleged delictual liability of the appellant, it will be well to examine whether on the evidence the appellant can be

(1) Q.R. 31 K.B. 170.
(2) [1924] Q.B. 36 K.B. 414.
(3) Q.R. 36 K.B. 385.
(4) Q.R. 34 K.B. 417.

held responsible for the loss of the respondent's goods as a common carrier under articles 1674 and 1675 C.C., or as having held out the guilty carter as having authority to call for goods in its name, art. 1730 C.C.

The contention based on articles 1674 and 1675 C.C. can be easily disposed of. The goods were never delivered to or received by the appellant or any of its servants. The man who obtained them was not in its employ nor did he have authority to sign bills of lading on behalf of the railway company. As we have seen, none of the judges in the previous cases have attached liability to the appellant on this ground.

And as to article 1730 C.C., the facts in evidence do not appear to support any claim against the appellant for having held out the man who called for the goods as having authority to receive them on its behalf. This article supposes that there was no mandate whatever, but that the plaintiff has been misled by appearances wilfully or carelessly allowed to exist by the defendant. Here, although Jutras' wagon bore the letters "C.P.R.," and although the man who called for the goods wore Jutras' cap and apron, it does not appear that the respondents were induced by this circumstance to part with their goods. Whether, if they had been so misled, liability of the appellants would have ensued it is unnecessary to determine. Moreover, the testimony of their employees shews that any carter merely opening their door and calling out: "Any goods for the C.P.R.," was allowed to take away parcels for shipment. Johnson, the respondents' shipper, says:—

> I have the knowledge that I packed, marked and made out the bill of lading and had the C.P.R. call, sometimes I called myself, and sometimes I had somebody else to call, but I gave orders to call, and after that the C.P.R. called, a man came to the door, called out "C.P.R.," and I had the bills signed and my assistant put the case on the elevator, the elevator man took them out and loaded them on the truck with the carter.

Elsewhere Johnson says that the respondents used to have a steady rig, but that was cut out in November, 1917, and afterwards

> we had to call up the C.P.R., then a man would come to the door and call out "C.P.R. cartage," then if we had the goods there he came in and signed the bills, and we handed out the goods.

The conspirators, former carters of the appellant, were no doubt aware of the rather incautious way in which goods were handed out for shipment, and they made their calls,

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not in answer to telephone messages, but on the chance that there would be parcels for shipment which would be handed over to them on their merely asking for parcels for the "C.P.R."

It is important to add that the respondents filed a statement of telephone calls received by the appellant from the respondents, and calls on November 5th and November 27th are entered therein. The following day in each case a regular teamster of the appellant called at the respondents' store in answer to these messages. Whether he obtained goods or not does not appear.

Leheron, the respondents' elevator man, states that the invariable custom is not to give out freight unless the rigs bear the letters "C.P.R." or "G.T.R." Wistaff, one of the conspirators, says that Jutras' wagon bore the letters "C.P.R." Whether the respondents' employees noticed these letters on the wagon, they do not say, but Wistaff's statement is that he signed the bill of lading outside, so they might have seen them. Wistaff signed the name "Lalonde" and Percy the name "Lajeunesse," which were fictitious names, and not those of any of the appellant's carters.

All things considered and the onus being on the respondents, it does not appear that the latter have made out a sufficient case to call for the application of article 1730 C.C. Certainly no acts or conduct of the appellant calculated to induce the belief that the man who asked for the goods was its employee have been shewn. The cap and apron were furnished by the carter and not by the company, and so were the carter's property, and they were used by the robbers, the latter say, in order that the appellant's foremen, who drove around town all day to watch the teamsters, might not think that the company's wagon was being driven by a stranger. No holding out by the appellant is established.

There remains only the question of delictual liability, and if the appellant is responsible for the loss of the goods it can only be under article 1054 C.C. No case has been made out under article 1053 C.C.

The scope of article 1054 C.C. has been fully discussed in recent decisions of this court and of the Judicial Committee. The rule it lays down is perfectly plain and the

question which arises in concrete cases is whether the facts in evidence call for its application, that is to say whether the servant was in the performance of work for which he was employed when he caused the damage.

The ordinary duties of Jutras were to deliver parcels from the railway, occasionally he might be sent to fetch them from the shippers. For that purpose, the appellant furnished him with a horse and wagon. Had he stolen a parcel entrusted to him for shipment, had he run down a pedestrian while delivering parcels, there is no doubt his employers would have been responsible, for the damage would have been caused in the performance of the work for which he was employed. But he had no authority to loan his wagon either for or without a consideration. He could use it only on his master's business, and if he loaned it for any other purpose, lawful or unlawful, he was acting on his own account and not on the account of his master. Had he used the wagon to commit a burglary or for a joy ride, his employer would have been no more answerable for the damage caused than was the owner of the automobile in *Curley* v. *Latreille* (1).

But it is said that Jutras was *particeps criminis* in the robbery committed by the conspirators. The only act of participation alleged is the loan of the appellant's wagon with Jutras' cap and apron, and if Jutras had no authority from the appellant to loan the wagon, the purpose for which he made the loan and his knowledge, innocent or guilty, of the object for which the wagon was borrowed cannot create a liability which article 1054 C.C. does not impose on the master. It is true that if the servant commits a crime in the performance of the work for which he is employed, the master is civilly responsible for the consequent damage. But it does not follow, because the servant committed a crime or was an accomplice in a crime committed by others, that the master is liable. The commission of the crime must be in the performance of the servant's work; if it is entirely outside the scope of the servant's duties, there is no room for liability. Similarly while the master is answerable for an abuse of a duty which he has confided to his employee, he is not responsible for

(1) [1919] 60 Can. S.C.R. 131.

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something done entirely outside of the duty, even if it could not have been done without the tool or other object which he entrusted to his servant. The example given by Mr. Justice Dorion in the passage quoted above clearly shows the fallacy of the respondents' contention.

Whether therefore Jutras was or was not *particeps criminis* in the unauthorized loan of his master's wagon, the answer is the same and the inevitable conclusion is that the appellant is not liable for the theft of the respondents' goods.

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

IDINGTON J. (dissenting).—The appellant carried on in Montreal the business of a carter, chiefly engaged as agent of the Canadian Pacific Railway Company in collecting goods from merchants and transporting them to the said railway company's freight sheds or cars for shipment over its line; and delivering goods, received by said railway at said freight sheds or cars which had brought them, to the parties entitled to receive them.

The respondents are merchants in Montreal and as such apparently extensive shippers of the goods they deal in over the said railway, and they had long been accustomed to entrust the carriage thereof to appellant—almost daily.

The appellant had usually from a hundred to a hundred and fifty men employed as drivers of its wagons carrying such freight, and of these, one Jutras had been one for a considerable length of time before the occurrences in question herein.

The system followed by appellant and its customers requiring its services was, that when they had any goods ready for shipment they would telephone the appellant's office and those in charge thereof would direct by phone or otherwise such of their carters as they chose to select to respond to such call by going to the place where such service was wanted with the wagon, and the carter was expected to wear a certain type of apron and cap and mittens, indicating the service on which he was engaged; and the wagon had painted thereon in large letters " C.P.R." on the side and front, indicating also its service, and the proprietor thereof.

The following admission was made by the appellant at the trial hereof:

The defendant admits that Alfred Jutras was a carter and in its employ on the 3rd, 5th, 6th and 27th of November, 1917, and that on those days he took out a rig belonging to the defendant company and was paid for his services for those four days.

There were other telephone messages from respondents, in said November besides those on the dates mentioned, requesting appellant's services, but these are given as the important dates in question herein.

The said Jutras was in fact one of a gang of thieves, which had been carrying on its work during some months, from some time in September or earlier, to some time in December, 1917. And on two occasions in said month of November (on one or other of said dates given in above quotation) they used the wagon of appellant, which was being driven by said Jutras, as admitted above, on said dates.

Jutras, it is sworn by one or more of the said gang giving evidence herein, accompanied others of the gang up to the vicinity of the respondents' place of business, on the occasion in question herein, and awaited their return with the wagon he had been driving, as admitted.

One of the gang (wearing Jutras' apron and other insignia, above referred to, which Jutras lent him for the occasion) on reaching said place of business, announced by calling out " C.P.R." to respondents' shipper, one Johnson, that he had come for their freight; satisfied Johnson that he was serving appellant in response to the phone message, and signed the bills of lading and other documents usually required for the shipment of their goods; and then Johnson called his assistant to put the goods, then packed and ready to be loaded, on the elevator.

Then one Leheron, the only man delivering any goods, testifies as follows:

Q. Mr. Leheron, in November, 1917, where were you employed?—A. At Mark Fisher's.

Q. Do you have anything to do with delivery of goods?—A. I deliver all the goods.

Q. You deliver all the goods?—A. All the goods by freight.

Q. Did you deliver a parcel of goods outward on the 6th of November, 1917?—A. Yes, I deliver every day.

Q. Did you deliver these goods?—A. I don't know what goods they are. I deliver the goods but I don't know what goods they are.

Q. Do you deliver all the goods that go out from Mark Fishers?—A. Yes.

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Q. Did you ever deliver goods to any one but a regular rig * * *? —A. No, sir, it is always the C.P.R., G.T.R., or Canadian Northern, all the rigs I put my goods in.

Q. Unless the rigs bear the letters C.P.R. or G.T.R. you do not give out the freight?—A. No, sir, that is my orders by Mark Fisher.

Q. That is your invariable custom?—A. Yes, sir.

Cross-examined by Mr. W. R. L. Shanks, of counsel for the defendant:—

Q. Do you know what goods you delivered? How do you know it was on the 6th of November, 1917?—A. I do not know what goods are delivered. I deliver the goods, I don't know what goods they are. I have not got anything to do with that.

Q. You are delivering goods every day practically?—A. Yes, sir.

Q. Do you know whether you delivered the goods referred to in this case?—A. There is nobody else but me does it.

Q. Do you know whether you delivered them on the 5th or the 6th November?—A. That I could not tell you. It is such a long time ago.

Q. You take a receipt of some kind?—A. No, sir, I never take a receipt.

Q. Who takes the receipt?—A. The shipper.

Instead of taking the goods to the freight shed the man who got delivery, being a brother-in-law of Jutras, took them to a receiver of stolen goods. I may say he falsely signed thus for the goods under the assumed name of H. Lajeunesse.

This like performance with the same wagon and apron and cap and mittens, was gone through with Jutras' concurrence on the 27th of November, 1917, but with another man driving the wagon; going into the respondents' office, and doing the signing under the assumed name of Lalonde and then, when delivery got in same way as before, taking the goods to the receiver of stolen goods.

The present action is brought to recover from the appellant the value of the goods thus improperly taken by the connivance of its employee, Jutras, from the respondents.

The learned trial judge after reciting the essential part of the pleadings of the parties hereto, considering that the plaintiff had proved the essential allegations of its declaration and that defendant (now appellant) had not established its plea, directed judgment to be entered for the amount claimed.

From this judgment, which follows the judgment of the Court of King's Bench, on the appeal side, in a number of cases arising out of a wave of crime, as it were, the appellant, by consent of the parties hereto, has appealed per saltum to this court.

I am quite convinced (after reading the entire evidence in the case, and much of it more than once, and considering same as carefully as I can), that Jutras was an active party to the thefts in question of the respondents' goods whilst admittedly in the employment of the appellant, and hence appellant is liable therefor to the respondents.

I cannot accept the evidence of the said Jutras who tells such an improbable story, in face of the facts testified to by a number of witnesses some of whom, of course, one must look upon with some suspicion by reason of their past records.

I can see no interest they have in lying in regard to much of their evidence, which I accept especially as the circumstances in many ways seem to corroborate their respective stories.

Jutras pretends that he only got paid for the use of appellant's wagon which he, as its driver, was paid by appellant for driving on said dates.

He seems quite unconscious that in taking pay therefor he was doing what no honest man could be guilty of. He took much more than that out of the proceeds of other thefts of a like kind, if others are to be believed.

The pretence he and his brother-in-law set up of the wagon being lent for a trip for some valises, is rather extraordinary in face of what we are told as to a dozen or more occasions for which it was used for the like purpose as on the occasion herein in question.

Moreover there is a rather curious phase of the case put forward by the appellant as to the record of the telephone calls from the respondents relative to the occasion in question. The appellant's own record tends to shew that on the 5th of November a call was made by the respondents at 9.15, as testified by respondents' evidence also, and that was responded to by sending one McKinnon on the 6th of November at 3 p.m., and that the call of the 27th of November at 3 p.m., was responded to by sending one, Corlett, at 7 a.m. of the 28th.

We have no evidence of either McKinnon or Corlett. I am curious to know why so. If they really went I should have been pleased to have it verified and the result appear in evidence, had I been trying the case.

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Then I submit that appellant's factum seems to skip all reference to Leheron's evidence and then argues as if no one at respondents' place of business had seen this wagon in question on the occasion on which it was there.

Leheron shews he was the man alone who delivered goods, and never delivered any without seeing the mark of identification thereon, of the system it belonged to, for such were his instructions from Mark Fisher. Evidently that was the check the respondents relied on.

And it seems to me that some of the thieves well knew that, and hence their anxiety to get Jutras' wagon and other insignia, already referred to.

Moreover why stress Johnson's failure to see the wagon in face of such a system?

Indeed I infer, from Johnson's story about telling his assistant, after getting the signature to the documents, to place the packages of goods on the elevator, that his office was either a floor above or below the exit for their delivery, and hence he could not well be expected to look out for the wagon marks.

As I have stated my conclusion as to the facts, I do not see the need for going into an elaborate discussion of the law, for there are several different articles respondents can rely upon.

Surely no one will pretend that if Jutras had answered one of these calls in person and with appellant's wagon marked "C.P.R." on front and side, as already indicated, and bearing other insignia required by appellant (and he Jutras determined to steal the goods) that appellant could escape liability for the theft, if so committed. And I fail to see that the consequences could be any different and appellant's liability any less when he was on active duty and supplied others accused with the means of deceiving, and thereby gets the goods and is a party to the whole scheme of theft.

I have read most of the other cases of the same kind referred to, which had arisen out of the same wave of crime, as it were, and I agree with the majority in the appellate court below. With due respect I cannot agree with the reasoning and conclusion reached by Mr. Justice Létourneau. Of course I do not mean that his entire reasoning is erroneous, much of it would apply to many cases likely to happen but not to this rather gross case.

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I would therefore be in favour of dismissing this appeal with costs, and support the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *DeWitt, Howard & Harold.*

THE HURLBUT COMPANY (PLAINTIFF) . . APPELLANT;

AND

THE HURLBURT SHOE COMPANY (DEFENDANT) . . . . . RESPONDENT.

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*Dec. 15.

1925

*Feb. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Secondary meaning—Evidence—Use of owner's name—Person of same name in same business—Passing of—Intent.

A manufacturer registered a trade-mark consisting of his own name and was stamped upon the goods he sold.

Held, Idington J. dissenting, that in order to prove that the trade-mark had acquired a secondary meaning denoting that the goods on which it was stamped were those of its proprietor who has an exclusive right to the use of that particular name it must be shown that knowledge of such meaning was universal throughout the area in which the business was carried on. *S. Chivers & Son* v. *S. Chivers & Co.* (17 Cut. P.C. 420) fol.

Though a tradesman cannot be prevented from honestly using his name in connection with the sale of his goods he has no right to use it with the intent of passing off his goods as those of another person of the same name or, without such intent, of so using it and wilfully persisting in such use that it will have that effect.

Held, affirming the judgment of the Exchequer Court ([1923] Ex. C.R. 136) Idington J. dissenting, that in this case neither such intent nor such effect was proved.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the appellant's application to have the respondent's trade-mark expunged from the registry.

The Hurlbut Co. had registered a trade-mark consisting of the word "Hurlbut" with the family crest and another of the name "Hurlbut" alone. These marks were stamped on shoes made and sold by the company. The Hurlburt

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1923] Ex. C.R. 136.

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Co. also registered a trade-mark, namely, the word "Hurlburt" with a device of bow and arrow. This company sold a special kind of shoe with its trade-mark stamped on it and the Hurlbut Co. brought action to have it expunged from the registry and for an injunction. The Exchequer Court refused the application but ordered a variation of respondent's mark by striking out the word "Hurlburt" and substituting "Hurlburt Shoe Company."

Fetherstonhaugh K.C. and *Fox* for the appellant. An essential part of our trade-mark is infringed which is an infringement of the whole. See *Partlo* v. *Todd* (1); *Seixo* v. *Provezende* (2), at page 196.

As to the amount of similarity necessary to constitute infringement see *Davis* v. *Reed* (3); *Leather Cloth Co.* v. *American Leather Cloth Co.* (4); *Cash Ltd.* v. *Cash* (5); *Brooks & Co.* v. *Norfolk Cycle Co.* (6); *Landreth* v. *Landreth* (7);, and *Slater* v. *Ryan* (8), were also referred to.

Arthur A. Macdonald for the respondent, referred to *Teofani* v. *Teofani* (9), and *Guimaraens* v. *Fonseca* (10).

The judgment of the majority of the court (The Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—The critical question in this appeal is whether the respondents are, by the use of the name "Hurlburt" in connection with the goods they sell, representing that these goods are the goods of the appellants. The law is quite clear that no man can acquire a monopoly of his own surname in such a way as to prevent another person of the same name honestly using that name in connection with his goods or his business, but that is subject to the important qualification that no man is entitled by the use of his own name or in any other way to pass off his goods as the goods of another, and if he is using his own name with that purpose, or even, without the conscious intention of doing so, with the effect of doing so, and if, when he becomes aware of the fact that such is the effect of his

(1) 12 O.R. 171; 17 Can. S.C.R. 196.
(2) 1 Ch. App. 192.
(3) 17 Gr. 69.
(4) 11 H.L. Cas. 523 at p. 539.
(5) 18 Times L.R. 299.
(6) 22 Fed. R. 41.
(7) 16 Cut. P.C. 523.
(8) 17 Man. R. 89.
(9) 30 Cut. P.C. 446.
(10) 38 Cut. P.C. 388.

conduct, he persists in that conduct without taking reasonable care to qualify the representation implied in his conduct in such a way as to avoid deceiving persons who otherwise would be deceived by it, he cannot be said to be using his own name in good faith for his own legitimate business purposes. This general statement of the law is supported by a multitude of authorities, to some of which particular reference must be made later.

The appellant company is an incorporated company; the respondents are a partnership, the partners being Frank H. Hurlburt and his wife.

The appellant company has been manufacturing shoes at Preston, Ont., since 1902, and since that time the name of the principal proprietor, Hurlbut, has been associated with the shoes produced by them, and the appellants' allegation is that the name "Hurlbut" and the phrase "Hurlbut Shoe" have acquired a secondary meaning, which is that they denote a shoe made by them and by them alone. It appears that from 1907 to 1909 there is some reason to believe that the practice was discontinued. From 1909 down to the commencement of the action there is evidence that the name was used in increasing degree as a trade-mark or part of a trade-mark for their product. In 1913 a trade-mark was registered, consisting of the name Hurlbut with the family crest below, and particularly with regard to one class of goods, cushion sole shoes, it seems reasonably clear that this trade-mark has been stamped upon the inside of the sole almost invariably since it was registered. In 1920 another trade-mark was registered, consisting only of the name HURLBUT in block letters.

The respondents have a shoe shop in Barrie which they acquired from the Carey Shoe Company some six years before the commencement of the action, the respondent F. H. Hurlburt having acted as manager of the Carey Shoe Company for several years prior to that. Before that again he had been engaged either as clerk or manager or proprietor in buying and selling merchandise in general stores in Thornbury and Meaford, in which he says the sale of boots and shoes always constituted a very important part of the business. In 1919, he says, it occurred to him that a certain shoe known as Dr. Wirth's Cushion Sole Shoe, made by Ames, Holden & Co., which he had been selling,

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having become very expensive, it would be desirable to attempt to get a cheaper shoe of the same general description, and he conceived the idea of a shoe which he thought would meet the requirements he had in mind, and he then proceeded to register a trade-mark on behalf of the respondent firm, consisting of his own name with a device of a musket and a bow and arrow beneath it. Having obtained his trade-mark he entered into an arrangement with a manufacturing concern in Galt by which they were to manufacture shoes according to his specification and sell them under his trade-mark, the manufacturer allowing him a specified royalty. The appellants having complained of this and an action having been brought, the action was settled upon terms which included the abandonment of this arrangement, but which need not otherwise concern us, and thereafter Hurlburt had shoes made for him according to his specification by the Weston Manufacturing Co. That company having taken out a patent upon Hurlburt's process with improvements, the respondents sell the shoes made by it according to this specification, stamped with their trade-mark, and advertise them as Hurlburt's Cushion Sole Shoe.

Before the commencement of the present action the respondents offered to amend their "commercial literature," as they called it, by stating in explicit terms that they had no connection with the Hurlbuts of Preston, and by adding to the mark stamped upon their shoes and containers any short phrase which might reasonably be suggested by the appellants to make it quite clear that their goods were not the appellants' goods. The appellants rejected the respondents' offers, demanding that they should eliminate from their advertisements and from the mark used in connection with their goods all mention of the name Hurlburt. This attitude was persisted in, both at the trial and before this court.

It may be said at once that the evidence adduced by the appellants falls far short of establishing their allegation that their name has acquired a secondary signification in the only relevant sense. It is indisputable and it is, in fact, undisputed, that the appellants have a considerable trade, and that their goods are favourably known to their customers, but the evidence is wholly inadequate to shew that the words "Hurlbut's Shoe" or the name "Hurlbut" has

passed into common use as denoting the shoes made by the appellants and by them only. What the appellants must prove is shewn by the following passage from the judgment of Farwell J. in *S. Chivers & Sons* v. *S. Chivers & Co.* (1), at page 429:

I have heard an argument from Mr. Hughes which seems to me to have, if it were sound, a very far-reaching effect; but I do not accept it. It is not enough, in my opinion, for a man to say that he has been the only manufacturer of his name of a particular article, and that his customers, therefore, necessarily only know that article, and that no one else of that name having ever traded in that article there can be no other name under which that article can be sold except his own, and, therefore, he has a right to the sole use of that particular name. It appears to me that the issue thrown upon the plaintiff in a case of this sort is to prove that the world has come to know that particular article associated with his name as meaning his manufacture, and that only. When I say "the world" I am using another phrase similar to that used by Lord Shand, I do not, of course, mean every human being in the kingdom, but I mean all persons whom it in any way concerns. A man's own customers know his own jelly and do not know other people's because they have never troubled themselves to ascertain whether there were such other persons at all. But in order to give the name "Chivers Jelly" that secondary signification which the plaintiffs desire to attach to it, and not to make it mean a jelly made by a person of the name of Chivers, they must, in my judgment, show first of all that that user has been locally universal, at any rate in the sense that it extends in any locality over the area in which the defendant has traded. If it were necessary for the decision of this case I should hold myself that the universality must be co-extensive, at any rate, with England and Wales. I leave out Scotland because there is a different system of jurisprudence there, and it might not be necessary to shew that it extended to Scotland; but I think you must at least shew that the universality was such that it extended to England and Wales, for this reason: it would be intolerable, to my mind, to allow a man by simply trading in the eastern counties, say, to acquire for himself a monopoly in his own name. The gist of it as decided in *Reddaway* v. *Banham* (2). is that you take out of the dictionary of the English language, for the purpose of a particular trade, a word which bears a primary signification, and you attach to that word in the dictionary a secondary signification. To say that can be done at all is, I agree with Lord Shand, a very great step. But when you have once the finding of a jury, as you have in *Reddaway's Case* (2), that it had in fact been done with those words, it seems to me the law follows as a matter of course. The real difficulty is the finding of fact. Speaking for myself, I should never find the fact to be that the word had obtained that secondary signification unless it was proved to my satisfaction that the use had been locally universal in the sense I have attached to it—universal in point of space. I think Lord Halsbury also would certainly not have decided *Reddaway's Case* (2) as he did otherwise than on the facts found, because he expressly guards himself by saying it is a question of fact. If it is found as a fact that the words "camel-hair belting" have ceased to mean belting made of camel's hair, and have come to mean for all persons whom it concerns

(1) [1900] 17 Cut. P.C. 420. (2) [1896] A.C. 199.

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to know it—all persons in the trade and all persons buying camel-hair belting—the belting made by Reddaway, and not belting made of camel-hair, the law follows as a matter of course.

The appellants, to repeat what has already been said, have quite failed to establish the existence of any such usage as that pointed to in these observations in relation to the words in which they claim to have a monopoly.

In great part the evidence adduced by the appellants in support of this allegation is inadmissible as being merely hearsay, and as to the residue it is, for the most part, too vague to be of any real value. There is little or no admissible evidence definitely pointing to an identification of the name "Hurlbut" or the phrase "Hurlbut's Shoe" with the appellants as makers. The absence of such evidence is in itself significant. If there were any substance in the allegation that the alleged signification had attached as a secondary meaning to these words, if the words had gained currency in the sense alleged, there should have been no difficulty whatever in establishing the fact by abundant evidence.

This, however, is only one branch of the appellants' case. Another contention is put forward, and that is that the respondents deliberately laid their plans with the object of capturing the appellants' trade or, at all events, of establishing a trade for themselves, by adopting as a trade-mark something that would convey to the public the impression that their goods were the appellants' goods. It is, perhaps, convenient, before discussing the facts, to state explicitly the law bearing upon the issue arising out of this allegation. The law appears, if one may respectfully say so, to be stated with accuracy in some passages in judgments delivered in the Court of Appeal, which had best be quoted verbatim. The first passage is from the judgment of Lindley M. R., in *Jamieson & Co.* v. *Jamieson* (1), at page 181:

> We are asked to restrain a man from carrying on business in his own name simply. That is really what it comes to. I do not say that cannot be done. It can be done, and there are cases in which it has been done. I can refer to one—the *Holloway Pill Case*, with which lawyers are familiar, which is reported in (1), in which the court did restrain a man of the name of Henry Holloway from selling pills with "H. Holloway" on them at the instance of the original Holloway, who started the sale of "Holloway's Pills." There are, perhaps, one or two cases of that kind.

(1) 15 Cut. P.C. 169. (2) 13 Beav. 209.

There is that one certainly. There are other cases where a man, having a name which is useful in the trade, has been laid hold of by somebody who wants to carry on that business, and make use of his name, although he has nothing whatever to do with it, the object being to avail themselves of that name in order to unfairly obtain the benefit of the trade of somebody else of the same name. Now when we are asked to restrain a man who is carrying on business in his own name, we must take very great care what we are about. The principle applicable to the case, I take it, is this: The court ought not to restrain a man from carrying on business in his own name simply because there are people who are doing the same and who will be injured by what he is doing. It would be intolerable if the court were to interfere, and to prevent people from carrying on business in their own names in rivalry to others of the same name. There must be something far more than that, viz., that the person who is carrying on business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else. We must not lose sight for a moment of the real question which we have to try—the question of fact. The most recent case on that point is the "Yorkshire Relish" case, which came before the House of Lords, where Lord Halsbury read with approval that passage which Mr. Daldy has read from Lord Justice Turner's judgment in *Burgess* v. *Burgess* (1). He says: "The proposition of law is one which I think has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: "No man can have any right to represent his goods as the goods of another person. In an application of this kind, it must be made out that the defendant is selling his own goods as the goods of "another." That is what we must look to; and what we have to satisfy ourselves upon is—that the defendant has been selling his goods as the goods of the plaintiff.

Then in *Teofani & Co., Ltd.* v. *A. Teofani* (2), at p. 456, Cozens-Hardy M.R., referred to the judgment of Turner L.J., in *Burgess* v. *Burgess* (1). He said:

Lord Justice Turner put the case with his usual extreme accuracy. I will read what he said: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not." I do not think there is any case in which any doubt is expressed that this is the true principle of law. It is said in the present case that there is no evidence that the defendant has sold his goods or has threatened or intended to sell his goods in such a manner as to represent them as the plaintiff's goods.

And at page 458, Kennedy L. J., says:

As I understand the law, there is nothing to prevent a person who is setting up in a trade in which there are already others of the same name from using his own name, but alike from the legal and from the moral point of view a person is forbidden to use his own name in connection

(1) 3 DeG. M. & G. 896. (2) [1913] 30 Cut. P.C. 446.

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with the goods in that business in such a way as to represent that the goods are the goods of somebody else of that same name. If he does that he is doing that which is wrong and which the courts, as it seems to me, have consistently through a long list of cases refused to allow him to do. He must carry on the business under his own name honestly, and he does not carry on the business in his own name honestly if he so uses his name in connection with the business or goods—in this case it is the goods—as to lead those who deal with him in that business as purchasers to believe that they are goods which are the goods of another trader of the same name.

And again at page 459, there is this paragraph in the judgment of Swinfen Eady L. J.:

> The law is that no man may pass off his goods as and for the goods of another; and that proposition of law may be amplified, and be perfectly accurate, if it is put in this way, that a man may not, by the use of his own name or otherwise pass off his goods as and for the goods of another.

These passages exhibit an uninterrupted current of authority, beginning with the judgment of Turner L. J., in *Burgess' Case* (1), continuing through *Reddaway* v. *Banham* (2) in 1896, down to *Teofani's Case* (3) in 1913, in the same sence.

If the appellants had succeeded in establishing their allegation that the respondents have deliberately adopted a trade-mark with the object of representing to the public that the goods sold by them are goods produced by the appellants, which have acquired some reputation, then two results might follow; first, that design in itself, the respondents being persons of considerable experience in the trade of boots and shoe, would be some evidence to shew that in some degree, at all events, the name Hurlbut had become associated in the minds of people buying shoes with shoes of the appellants' manufacture; and, secondly, it would be some evidence to shew that the respondents were using their own name, not only in such a manner as to advance their own trade in a legitimate way, but in such a manner also as to represent that their goods were the appellants' goods.

The appellants place a great deal of emphasis, naturally and properly, upon a letter written by the respondent F. H. Hurlburt on September 12, 1919, in which the respondent makes proposals to a dealer in boots and shoes, and, in doing so, refers to the appellants' product in a way

(1) 3 DeG. M. & G. 396. (2) [1896] A.C. 199.
(3) 30 Cut. P.C. 446.

calculated to excite suspicion, to say the least, that he was contemplating pursuing that course of conduct which the appellants charge he has been pursuing. That letter, taken in conjunction with the circumstance that the respondent F. H. Hurlburt had acted for the appellants in selling their shoes in Barrie, had it stood alone would have required some better explanation than any which has been forthcoming. But the respondent F. H. Hurlburt was not in cross-examination pressed for an explanation of that letter, and when his conduct is looked at as a whole it seems very difficult indeed to say that the learned trial judge was wrong in acquitting the respondent of any deliberate design to steal the appellants' reputation and trade. There appears to be ground for the statement—Mr. Weston, of the Weston Shoe Manufacturing Company, gives explicit evidence on the point—that the cushion sole shoe designed by the respondent, or the shoe which developed ultimately from his design, is one which is free from the fault usually ascribed to shoes of that description, namely, the tendency of the cushion sole to become lumpy. As already mentioned, the respondent's design or process as improved by Mr. Weston has been patented, and Mr. Weston says that he manufactures and sell these shoes in large quantities, and that there is a large market for them. The respondent's shoe, he says, is of the same design as those which he sells to his other customers, but is made of the highest grade of material. There is, moreover, practical unanimity in the testimony upon the point that, as one witness put it, "anybody who knows anything about a shoe" would at once distinguish the respondents' make from that of the appellants. Then there is the conduct of the respondents already mentioned, on the eve of the litigation.

The respondents' course in offering to amend their advertisements and circulars and to modify their trade-mark for the purpose of distinguishing themselves from the appellants in almost any reasonable way short of abandoning the use of their own name does seem to lend a real corroboration to the contention that their design has been to manufacture a superior class of goods, to sell them under their own name, and to get a reputation and a trade in that way.

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At first sight the dealings with the Galt Manufacturing Company seemed to tell heavily against the respondents. The evidence of Mr. Weston, however, appears to put a different colour upon this transaction. It seems reasonable to think, in view of that evidence, that the respondent F. H. Hurlburt had conceived what he honestly believed to be a design according to which an exceptionally good cushion sole shoe could be made at a moderate price, and it is not incredible that he should have supposed, as he says he did, that the trade-mark gave him some sort of exclusive right in respect of which he was entitled to charge a royalty; and again it is a little difficult, in view of the circumstances, to accede to the contention that the trial judge's acquittal of the respondent on the charge of dishonesty should be reversed.

At all events, the appellants have quite failed to establish any case entitling them to inhibit the use by the respondents of their own name, nor have they made out a case which would justify the imposition upon the respondents of any undertaking broader than the undertaking they offered before the commencement of the action. It is important to notice that apparently the respondents sell largely, if not exclusively, to the retail trade, and so far as the trade is concerned, as has already been said, there is no sort of duplicity whatever. Any possible risk of confusion in the minds of the ultimate customer would be entirely obviated by the measures suggested by the respondents.

Therefore, upon the respondents undertaking to state in their advertisements and circulars that they have no connection with the appellants and to amend their trade-mark by attaching to it the name of the respondent, Frank Hurlburt, the appeal will be dismissed with costs.

IDINGTON J. (dissenting).—The appellant is a joint stock company organized under the laws of the Dominion and doing business in the Town of Preston in the County of Waterloo.

The respondent is a partnership carrying on business in the Town of Barrie in the County of Simcoe.

The former carries on the business of a manufacturer and dealer in foot-wear in a somewhat large and extensive way throughout the Dominion and, in connection therewith,

adopted and put into use, on or about the year 1902, a trade-mark consisting of the word "HURLBUT" used in connection with the manufacture and sale of foot-wear from thenceforward for many years, and at least until the 4th of August, 1913, when it registered its trade-mark by using the Hurlbut Arms, and below that the word "HURLBUT," and surrounding it with the words "Genuine-Welt-Patented."

It was sworn to at the trial that this surplusage was adopted because of mistaken legal advice that the name "HURLBUT" alone could not be registered, but this was corrected later and the name "HURLBUT" was registered as appellant's trade-mark on the 11th November, 1921.

The respondent meantime had registered, on the 5th of September, 1919, as its trade-mark, to be applied to the sale of foot-wear, a representation of a musket and of a bow and arrow, surmounted by the name "HURLBURT'S," and underneath that, the word "SHOE".

The appellant brought this action on the 22nd of February, 1922, setting forth the foregoing facts and then alleging the following charges:

8. The said defendant, knowing that the plaintiff had established a reputation in the business relating to the manufacture and sale of shoes and knowing that the word "HURLBUT" had acquired a distinctive trade-mark meaning, has for some time heretofore placed upon the market articles of footwear bearing the name "HURLBURT," with the object of deceiving the public and of unfairly competing with your petitioner and trading upon its name and the reputation it has established.

9. By reason of such actions of the defendant, the plaintiff has suffered great loss and damage.

10. As a matter of fact the plaintiff was the first to make use of the word "HURLBUT" to be applied to the manufacture and sale of foot-wear.

11. That there is a possibility of confusion between the said trade-mark registered by the said THE HURLBURT SHOE COMPANY, and the plaintiff's trade-mark "HURLBUT." The plaintiff is aggrieved by the registration of the said trade-mark by the defendant and claims that the said registration was made without sufficient cause.

That was followed by the following prayer for relief:

(*a*) That an order may be made asking that the "HURLBURT" contained in the said trade-mark registered in folio 25,255 of Register 106, of the Register of Trade-Marks, be expunged.

(*b*) An injunction restraining THE HURLBURT SHOE COMPANY its servants or agents from infringing the plaintiff's said trade-mark and from using the word "HURLBURT" in connection with the sale of foot-wear.

(*c*) Damages.

(*d*) Costs.

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(e) Such further and other relief as the nature of the case may require and to the court shall seem just.

The case came on for trial before Mr. Justice Audette of the Exchequer Court who held as follows:

Therefore the case is complicated by this very fact that the most conspicuous part of each trade-mark—that part which appeals to the eye —is the name of the respective parties.

It cannot be denied that any person has the undoubted right to use his own name for the purpose of his trade and that no one bearing a similar name has a right to arrogate to himself the exclusive use of the same.

However, that rule must be qualified under numerous judicial decisions to the effect that where such person makes use of his own name for the purpose of fraud and satisfactory evidence of fraudulent intention has been produced, such unfair conduct will be restrained even though the free use of the man's own name may be thereby hindered. *Holloway* v. *Holloway* (1); *Burgess* v. *Burgess* (2); Sebastian, Law of Trade-Marks, (5th ed.) 39, 40; Smart, Law of Trade-Marks, 112; 27 Hals. 749; Kerly, 4th ed. 593; *Saunders* v. *Sun Life Ass'ce Co.* (3); *Brinsmead* v. *Brinsmead* (4), (and dismissed) action with costs, and furthermore ordering to vary the registration of the defendant's specific trade-mark No. 106, Folio 25,055, of the 5th September, 1919, by striking out therefrom the word "Hurlburt's" and substituting therefor the words "The Hurlburt Shoe Company."

With great respect I cannot agree with either the conclusions of fact or of law reached by the learned trial judge.

There seems to me, in the history of the respondent's dealings in relation to what is charged against him, much clearer evidence of fraud than in many cases where such conduct as his, in trying to get an advantage over another who has used his own name, as a trade-mark, or an essential feature thereof, for a long period of time and that to the knowledge of the respective defendants, in such cases, has been held so fraudulent, or savouring of fraud, that relief has been granted such as appellant seeks herein.

Take the case of *J. H. Brooks & Co.* v. *The Norfolk Cycle Company and John Brookes* (5); or the case of *Valentine Meat Juice Company* v. *Valentine Extract Company* (6), or the case of *Teofani & Co.* v. *A. Teofani* (7); or the case of *John Palmer Co.* v. *Palmer-McLellan Shoe Pack Co.* (8), each shewing a distinctly different angle, in the facts to be looked at, of what was held to be a fraudulent course of dealing which entitled the plaintiff to relief, and in these

(1) 13 Beav. 209.
(2) 3 DeG. M. & G. 896.
(3) [1894] 1 Ch. 537.
(4) 30 Cut. P.C. 493.
(5) 16 Cut. P.C. 523.
(6) 17 Cut. P.C. 673.
(7) 30 Cut. P.C. 446.
(8) 37 D.L.R. 201.

four which I cite the respective personal names were involved as herein, or more directly so.

These cases I have picked out of many because I wanted to present a variety, and also such cases as had involved a use of the trade-mark in question by the originator of it, or successor, for a quarter of a century or less, before seeking successfully relief against him infringing it.

That of the appellant herein going back to and including 1902, or part of it, being only a period of twenty years, it occurred to me that possibly that might not be supported as long enough to give that secondary meaning to a person's name to which we find importance so often attached in many decisions but, I submit, long enough to acquire, under the circumstances, a secondary meaning.

I selected those approximately the same or less; for we so often find the Bass name, and the like, vastly longer in one than any I am now referring to.

But is proof of a fraudulent design necessary? From *Millington* v. *Fox* (1) down, there are cases such as *Reddaway* v. *Bentham Hemp-Spinning Co.* (2); *Johnston* v. *Archibald Orr Ewing* (3), and *Powell* v. *Birmingham Vinegar Co.* (4), and *J. & J. Cash* v. *Cash* (5), in which it was pointed out that proof of fraudulent intent was not necessary to entitle plaintiff to relief, but proof that it might reasonably be made the foundation of fraud upon the public, and hence an injury to the plaintiff which would entitle him to relief.

The said case of *Cash* v. *Cash* (5) turned upon the question of the use of the personal name of the defendant, and, apart from its probably misleading the public, presented no element of fraud.

There is far more evidence of fraud in this case than in that of *Warner* v. *Warner* (6), cited by appellant, which also points strongly in same direction.

The respondent's dealings with the Galt Shoe Company, and the imitation by it of making a shoe alike to the appellant's make of what the appellant had introduced to the market and called "The Cushioned Sole Shoe for Child-

(1) 3 Mylne & Craig 338.
(2) [1892] 2 Q.B. 639.
(3) 7 App. Cas. 219
(4) 13 Cut. P.C. 235; [1894] A.C. 8.
(5) 18 Times L.R. 299; 18 Cut. P.C. 213; 19 Cut. P.C. 181.
(6) 5 Times L.R. 359.

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ren," which the appellant had used long before the respondent, and in the use of the skeleton foot design (which was designed and adopted by the appellant) the respondent has committed that class of fraud which Lord Justice Cotton, in the case of *Turton* v. *Turton* (1), referred to as "garnishing the use of his name" by imitating the get-up of appellant's goods.

The case of *Burgess* v. *Burgess* (2), and cases cited therein, may also profitably be considered.

Many cases which also may well be considered are cited in the head-notes of the reprint of this case, on page 351 of vol. 43 of said reprint.

The appellant's factum contains a wealth of references which if followed out might suggest writing a treatise on the questions involved herein, but I do not intend to do so for the disposal of this case.

I am tempted, however, to adopt its quotation from the judgment of Lord Justice James in the case of *Levy* v. *Walker* (3), which is as follows:

> It should never be forgotten in these cases, that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on, is a right in the nature of a trade-mark, that is to say, a man has a right to say: "You must not use a name whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me." That is the principle, and the sole principle on which this court interferes;

and that from the judgment of Lord Alverstone M.R., in the *Valentine Case* (4) at page 680, as follows:

> A strenuous effort was made by Mr. Upjohn in his very able argument to draw a distinction in cases in which the word which has been used was the name of the defendant, that is the name of the person who was carrying on the business which is complained of. In my opinion there is no difference in principle. You still have to apply the test which the Lord Chancellor laid down in the passage I have read, namely, whether or not the goods of the defendant have been represented as the goods of somebody else. Of course it is more difficult to deal with cases where the name is the name of the person, or the name of both the persons, as distinguished from a fancy name which has been created for the purpose of the particular goods; but I can see no difference in principle between the two cases.

(1) 42 Ch. D. 128.
(2) 3 DeG. M. & G. 896.
(3) [1879] 10 Ch. D. 436, at pp. 447 and 448.
(4) 17 Cut. P.R. 673.

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as guiding principles in the relevant law needed to be applied in this case.

I would adopt each of these expressions as applicable herein.

For the foregoing reasons I would allow this appeal with costs here and below and give the relief prayed for by way of injunction to be framed (if the majority of this court agree in the result I have arrived at), in settling the minutes of the formal judgment, if the parties cannot agree thereon so as to amply protect the appellant.

Appeal dismissed with costs.

Solicitors for the appellant: *Fetherstonhaugh & Co.*

Solicitors for the respondent: *Denton, Macdonald & Denton.*

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*Feb. 3-6.
*Feb. 26.

THE GOVERNMENTS OF ALBERTA, SASKATCHEWAN AND MANITOBA ..... APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Statute—Construction—Subsidy—Railway tolls—Agreement by railway company—Board of Railway Commissioners—Powers—Revision of tolls—Effect on agreement—60-61 V., c. 5—Railway Act, 1903, 3 Edw., VII, c. 58.

By an Act passed in 1897 Parliament, *inter alia*, granted a subsidy to the C.P.R. Co. for building the Crow's Nest Line provided the company entered into an agreement for substantial reductions in the rates for carrying certain classes of freight over the railway between designated points and feeders and that no higher rates should thereafter be charged. The items of such reductions were set out in the Act and the company executed an agreement embodying these conditions. The reduced rates have since remained in force except as suspended by temporary measures during the war and after the war by power temporarily given to the Board of Railway Commissioners to revise railway tariffs notwithstanding any such statutes or agreements. When this temporary power ceased to exist the question of the reduced rates came before the board which made an order disallowing tariffs filed under the Act and agreement of 1897 claiming the right to do so under the general authority over railway tariffs given it by the Railway Act.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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Held, that the said statute and agreement made in 1897 are binding on the board which has, therefore, no power to change the rates thereby fixed.

Held also, Idington J. dissenting, that the rates so fixed apply only to carriage of freight between said points and feeders as they existed in 1897. Against such restricted application the anti-discrimination provisions of the Railway Act cannot be invoked.

The Act of 1897 is a "Special Act" as that expression is defined in the Railway Act.

If said Act authorizes the agreement and prescribes its terms the obligations under said agreement are statutory and not merely contractual, just as if the agreement were confirmed by, and made part of, the Act.

APPEAL from an order of the Board of Railway Commissioners disallowing a tariff of freight rates filed by the respondent in conformity with the provisions of the Crow's Nest Pass Act and agreement.

The two questions submitted by the board in granting leave to appeal were: 1. Are the said Act and agreement binding on the board? 2. If not, are the rates established thereby confined in their applications to the traffic between points on the railway designated therein as they existed when the Act was passed or are they applicable to extensions thereof now existing?

Symington K.C. appeared for the appellant.

Sydney Wood K.C. for the cities of Edmonton and Saskatoon.

W. T. Henderson K.C. for the city of Brantford.

G. G. McGeer K.C. for British Columbia.

R. E. Finn K.C. for Nova Scotia and New Brunswick.

Tilley K.C. and *E. P. Flintoft* appeared for the respondent.

Lafleur K.C. for the Canadian Railway Association.

A. Fraser K.C. for the Canadian National Railways.

The judgment of the majority (The Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—By the contract for the construction of the Crow's Nest Pass Railway, made in 1897, the Canadian Pacific Railway Company covenanted and agreed with Her Majesty, represented by the Minister of Railways and Canals, *inter alia*,

(*d*) That a reduction shall be made in the general rates and tolls of the company as now charged, or as contained in its present freight tariff, whichever rates are the lowest, for carloads or otherwise, upon the classes

of merchandise hereinafter mentioned, westbound, from and including Fort William and all points east of Fort William on the company's railway, to all points west of Fort William on the company's main line, or on any line of railway throughout Canada owned or leased by or operated on account of the company, whether the shipment is by all rail line or by lake and rail, such reduction to be to the extent of the following percentages respectively, namely:

Upon all green and fresh fruits, 33⅓ per cent;
Coal oil, 20 per cent;
Cordage and binder twine, 10 per cent;
Agricultural implements of all kinds, set up or in parts, 10 per cent;
Iron, including bar, band, Canada plates, galvanized, sheet, pipe, pipe-fittings, nails, spikes, and horseshoes, 10 per cent;
All kinds of wire, 10 per cent;
Window glass, 10 per cent;
Paper for building and roofing purposes, 10 per cent;
Roofing felt, box and packing, 10 per cent;
Paints of all kinds and oils, 10 per cent;
Live stock, 10 per cent;
Wooden ware, 10 per cent;
Household furniture, 10 per cent;

And that no higher rates than such reduced rates or tolls shall be hereafter charged by the company upon any such merchandise carried by the company between the points aforesaid; such reduction to take effect on or before the first of January, one thousand eight hundred and ninety-eight;

(*e*) That there shall be a reduction in the company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur, and all points east, of three cents per one hundred pounds, to take effect in the following manner: One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid.

The execution of the agreement containing these and other essential provisions by the company in terms prescribed therein was by the statute 60-61 Vict., c. 5, made the condition of an undertaking to grant a subsidy; and by s. 2 of the statute it was enacted:—

2. The company shall be bound to carry out in all respects the said agreement, and may do whatever is necessary for that purpose.

Tariffs in conformity with these rates were filed and maintained without serious complaint until 1917, when, owing to enormous increases in operating expenses occasioned by conditions arising out of the war, very substantial advances in railway freight rates were found to be inevitable. These were provided for chiefly by orders in

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council passed under *The War Measures Act* during 1917 and 1918, which disregarded all restrictions upon rates imposed by such special Acts and agreements as those with which we are now concerned. When the Railway Act was consolidated in 1919, these emergency orders in council were about to expire. Apparently it was felt that costs of operation were still too great to permit of a return to normal conditions. To provide for the interval until such a return might prove feasible, the following provision was then introduced into the Railway Act as s.s. 5 of s. 325:—

5. Notwithstanding the provisions of section three the powers given to the board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company;

Provided that this subsection shall remain in force only during the period of three years from and after the date of the passing of this Act.

A further substantial increase in rates was made by the Board of Railway Commissioners in 1920 under the authority of this subsection; and a revision of rates in many important particulars was effected in 1922 after an exhaustive inquiry made by the Board with the purpose of acquiring the information necessary to enable it to fix fair and reasonable freight rates.

The temporary character of s.s. 5 of s. 325 is patent. When it was about to expire, Parliament extended its operation by c. 41 of the statutes of 1922, which reads as follows:—

1. Subsection five of section three hundred and twenty-five of *The Railway Act, 1919,* shall, notwithstanding the proviso thereof, remain in effect until the sixth day of July, 1923, and may be continued in force for a further period of one year by order of the Governor in Council published in the *Canada Gazette;* Provided that notwithstanding anything herein or in said subsection five contained, rates on grain and flour shall, on and from the sixth day of July, 1922, be governed by the provisions of the agreement made pursuant to chapter 5 of the statutes of Canada, 1897.

Continuance for the further period of one year by order in council ensued. Further extension by legislation was sought, but ineffectually, and the operation of s.s. 5 of s. 325 came to an end on the 6th of July, 1924.

In anticipation of this occurrence, the railway companies, apparently under the conviction that the rates fixed by clauses (*d*) and (*e*) of the Crow's Nest Pass agreement would become again operative, had filed tariffs in conformity therewith effective on the 7th of July—the Canadian Pacific Railway presumably in fulfilment of its obligation, statutory or contractual, and the Canadian National Railway under the practical compulsion of meeting Canadian Pacific rates at competing points. The tariffs so filed by the Canadian Pacific Railway Company applied only to points which had been upon its system in 1897. Complaints of discrimination and unfair treatment from many points to which the system had been subsequently extended immediately began to pour into the Board's offices. The position taken by the complainants was that the Crow's Nest rates should be extended to all points within the designated areas touched by the Canadian Pacific Railway system as it now exists either because the agreement of 1897 should itself be interpreted as so providing, or because the anti-discrimination sections of the Railway Act require the board so to apply them. Hearing of these complaints took place in September. The railway companies then took the stand that the Crow's Nest Rates were no longer binding upon the Board because so to regard them would be inconsistent with the scheme of rate control inaugurated by *The Railway Act, 1903,* and with the powers by that Act and *The Railway Act, 1919,* committed to the board. For the Canadian National Railway it was further pointed out that the maintenance of the Crow's Nest rates indirectly, but most effectively, subjected that railway, although it was not a party to the agreement and was not intended to be bound or affected by it, to unfair and unjustifiable rates since it must either accept the Canadian Pacific Railway's reduced rates to and from points where it competes with that railway or entirely forgo traffic of all classes to which they apply.

On the 14th of October a majority of the Board (McKeown C.C., Nantel D.C.C., Boyce C., and Lawrence C.) McLean A.C.C., and Oliver C., dissenting, held that the rates stipulated in the Crow's Nest Pass Act and agreement were not binding upon the Board. In their

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opinion the Crow's Nest Pass Act was not a "Special Act" within ss. 2 (28) and 3 of *The Railway Act, 1919;* if it were such a "Special Act" it did not relate to the same subject-matter as the general Railway Act; its application was excluded because the sections in *The Railway Act, 1919,* respecting tolls (314 et seq.) have "otherwise provided" within the meaning of s. 3 of that statute; the Crow's Nest rates should be regarded as fixed by agreement and not by statute; and that agreement does not bind the Board, *Regina Rates Case, Canadian Pacific Ry. Co.* v. *Regina Board of Trade* (1), and must not be allowed indirectly to control rates on competitive lines of a railway not a party to it. The order of the board accordingly disallowed, and directed the withdrawal within fifteen days of, the tariffs re-establishing Crow's Nest Pass rates.

Holding these views the majority of the Board found it unnecessary to deal with the contention of the present appellants and other complainants that the operation of the Crow's Nest Pass rates should be extended to all points now on the Canadian Pacific Railway Company's system and also to all points on the Canadian National Railway which might, under the clauses of the Railway Act which provided against discrimination between different localities, be deemed entitled to the benefit of them. Mr. Assistant Chief Commissioner McLean in his dissenting opinion also refrained from passing upon this contention of the appellants, contenting himself with expressing in clear and forceful terms his reasons for dissenting from the board's decision upholding the contention of the railway companies. Mr. Commissioner Oliver, however, expressed with much vigour his views that:—

(1) The Crow's Nest Act applies to all lines and connections of the Canadian Pacific Railway in Canada, and, therefore, the rates as defined by that Act should be applied forthwith throughout the Canadian Pacific system.

(2) In pursuance of the powers vested in this board to prevent discrimination in railway rates and services, the rates defined by the Crow's Nest Act should be applied to the Canadian National system and to all other railway lines in Canada.

Exercising the power conferred by s.s. 3 of s. 52 of *The Railway Act, 1919,* the Board of Railway Commissioners by order of the 10th of December, 1924, granted leave to

(1) 45 Can. S.C.R. 321.

the governments of the provinces of Alberta, Saskatchewan and Manitoba to appeal to this court from its order of the 14th of October. By order in council, dated the 25th of December, 1924 (P.C. No. 2220), the operation of the board's order of the 14th of October was suspended until the decision of the appeal.

Section 52 (3) requires parties seeking leave to appeal to state the grounds on which it is proposed to appeal, and, as is customary, the Board in its order granting leave formulated the "questions of law and jurisdiction" to be presented for the consideration of the court. They are as follows:—

1. Whether, as a matter of law, the board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize railway rates upon the railway of the Canadian Pacific Railway Company in excess of the maximum rates referred to in the Crow's Nest Pass Act, being chapter 5, 60-61 Victoria, Statutes of Canada, and in the agreement therein referred to, upon the commodities therein mentioned.

2. If the court shall be of opinion that the Crow's Nest Pass Act or agreement is binding upon the Board of Railway Commissioners for Canada, then, according to the construction of the Crow's Nest Pass Act, section 1, clause (*d*), and the agreement made thereunder,

(*c*) Are the rates therein provided applicable to traffic westbound from Fort William and from all points east of Fort William now on the Canadian Pacific Railway company's railway; or, are such rates confined to westbound traffic originating at Fort William and at such points east of Fort William as were, at the date of the passing of the Act and (or) the making of the agreement, on the company's line of railway?

(*b*) Are such rates applicable to traffic originating at points east of Fort William which were, at the date of the passing of the Act and (or) of the making of the agreement, on any line of railway owned or leased or operated on account of the Canadian Pacific Railway Company?

(*c*) Are the rates therein provided applicable to traffic destined to points west of Fort William which are now on the Canadian Pacific Company's railway, or on any line of railway owned or leased or operated on account of the Canadian Pacific Railway Company? or

(*d*) Are such rates confined to traffic destined to points west of Fort William which were, at the date of the passing of the Act or the making of the agreement, on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

3. Whether, as a matter of law, the Board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize rates upon the Canadian Pacific Railway on grain and flour from all points on the main line, branches, or connections of the company west

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of Fort William, to Fort William and Port Arthur, and all points east, beyond the maximum rates specified in the Crow's Nest Pass Act and Agreement, and referred to in chapter 41, Statutes of Canada (1922).

In substance two questions are submitted:—

1. Is the board entitled to authorize rates upon the Canadian Pacific Railway Company in excess of those provided for in the Crows Nest Pass subsidy Act and agreement?

2. If not, is the application of the rates so provided for confined to traffic in the specified commodities between points on the Canadian Pacific Railway Company's lines as they existed at the date of the said Act and agreement to the exclusion of traffic originating at or destined for points to which that company's lines have been subsequently extended?

When the Canadian Pacific Railway Company was incorporated and its charter granted, in 1881, *The Consolidated Railway Act,* 1879 (c. 9) was in force. By that Act, subject to provisions against discrimination, the power to fix tolls was vested in the railway company or its directors (s. 17). While such tolls were subject to approval by the Governor in Council, Parliament was empowered to reduce them only with the consent of the company and subject to the restriction that when so reduced they should produce not less than 15 per cent per annum profit on the capital actually expended in the construction of the railway (s. 17, s.s. 11). It would seem not unlikely that the exercise of the right of revision by the Governor in Council was by implication subject to a corresponding restriction. In so far as applicable and not inconsistent therewith *The Consolidated Railway Act, 1879,* was incorporated with the Canadian Pacific Railway Company's charter by the statute 44 Vict., c. 1. The stipulation in s. 20 of that charter that the right of Parliament under the general Railway Act to reduce the company's tolls should be "extended" so that the profits of the company might be restricted to 10 per cent on the capital actually expended on the construction of the railway, with a corresponding limitation of the controlling power of the Governor in Council, was, perhaps, regarded as a concession in the public interest. But, however that may have been, the honour of the Parliament of Canada was thus pledged to non-interference with the tolls of the Canadian Pacific Rail-

way Company so long as the net profit on capital actually expended by it for construction should not exceed 10 per cent.

When the Railway Act was revised in 1888 (c. 29), while s.s. 11 of s. 17 of *The Railway Act, 1879,* purporting to restrict the right of Parliament to reduce tolls disappeared, rights conferred by special Acts, such as that of the Canadian Pacific Railway in regard to freedom within specified limits from control of its tolls, were preserved. (ss. 3 to 6).

This was the situation when the Crow's Nest Pass railway project came before Parliament in 1897 and it was asked to provide a subsidy for the construction of that railway by the Canadian Pacific Railway Company. Apparently the Government of the day thought the occasion opportune to secure, in the public interest, greater control over Canadian Pacific Railway tolls than Parliament had stipulated in 1881. It accordingly enacted the statute 60-61 Victoria, c. 5, whereby it appropriated a subsidy for the construction of the projected railway provided the Canadian Pacific Railway Company should enter into an agreement containing, *inter alia,* the covenants as to rates above quoted, around which the present controversy centres. The statute sets out *in extenso* nine undertakings—(*a*)-(*i*)—to be given by the company, and they were embodied *verbatim* in the agreement executed between Her Majesty, represented by the Minister of Railways and Canals, and the Canadian Pacific Railway Company, on the 6th of September, 1897.

Clauses (*a*) and (*b*) are covenants for the construction and operation of the Crow's Nest Pass Railway.

By clause (*c*) all local tolls on the new railway itself and certain connecting lines and other lines in southern British Columbia and all tolls on traffic on the entire Canadian Pacific Railway system originating from or destined for any point on the new railway or on such connecting lines and lines in British Columbia were made subject to revision and control by the Governor in Council, or by a railway commission when established.

By clauses (*d*) and (*e*), above quoted, maximum rates for certain commodities moving in stated directions and between designated points are provided and it is coven-

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anted that no higher rate shall be charged for such traffic after the dates specified. There is no reservation of any power of revision or control in regard to these maxima.

By clause (*f*) the granting of running powers is reserved to the Railway Committee of the Privy Council.

By clause (*g*) the new line and the specified connecting lines in British Columbia and the line between Dunmore and Lethbridge are made subject without restriction to the operation of the general Railway Act.

By clause (*h*) the disposition of any provincial land subsidy is made subject to regulation by the Governor in Council.

By clause (*i*) the company is required to surrender to the Dominion Government 50 per cent of any coal-bearing lands it may obtain from the Government of British Columbia to be dealt with on conditions to be prescribed by the Governor in Council.

It is noteworthy that in all these clauses, except (*d*) and (*e*), there is a reservation of control by the executive Government of Canada or by a body nominated by Parliament to exercise it. The contrast between clause (*c*) and clauses (*d*) and (*e*) is most striking and significant. All three deal with traffic rates; in clause (*c*) complete control and power of revision is stipulated for; in (*d*) and (*e*) there is an absolute and final fixing of certain maximum rates. It should also be remembered that, as indicated in clause (*c*), Parliament had before it the probability of the establishment of a railway commission. Nevertheless—as we must assume deliberately—it abstained from reserving to that body, or to its then existing predecessor, any control over the maximum rates fixed by clauses (*d*) and (*e*). The main question now before us is whether Parliament by its subsequent general railway legislation, including the creation of the Board of Railway Commissioners and the vesting in it of very broad powers of supervision and control over tolls and rates, as was undoubtedly competent to it—and to it alone—has relieved the Canadian Pacific Railway Company from the operation of clauses (*d*) and (*e*) of the Crow's Nest Pass Agreement, abrogating the maxima they prescribed so far as required to give to its delegate, the Board, unrestricted control of rates in respect to the traffic covered by them.

On behalf of the respondent railway companies it was strongly urged at bar that the stipulations as to rates in clauses (*d*) and (*e*) are merely covenants in an agreement and, as such, not binding on the Board of Railway Commissioners. But the terms on which Parliament was prepared to grant the subsidy for the Crow's Nest Pass Railway involved an interference with a privilege in regard to tolls conceded to the Canadian Pacific Railway Company in 1881, which, while not legally binding on Parliament, it no doubt deemed itself in honour obliged to respect. Hence, in all probability, the form adopted of offering the subsidy conditionally upon the railway company agreeing to a modification of that privilege—not, however, in terms to be agreed upon, but in definite and precise terms formulated by Parliament itself in the statute providing for the subsidy. Parliament in effect said: If you, the Canadian Pacific Railway Company, will assent to the proposed modification of a provision of your statutory contract of 1881 and will forgo *pro tanto* the control of rates which it gives you, we will grant you a subsidy on accepting which you will become bound to carry out the terms on which it is granted. That was, in substance and effect, granting a subsidy and imposing by statute the terms on which it was granted. In so far as the arrangement was contractual, while the contract is formally made with Her Majesty in Her executive capacity, it was in reality made with Parliament itself. It alone could grant the subsidy. It represented the people of Canada. Parliament speaks by statute. By statute it authorized the contract. It cannot make the slightest difference whether the statute, passed before the contract was in fact executed, authorized it, prescribed its very terms and declared that when made it should be binding; or, the contract having been already formally executed, the statute ratified and confirmed it and declared its terms binding as if enacted as part of the statute itself. A refinement which, while admitting that the terms would in the latter case be of statutory obligation, would treat them in the former as merely contractual in their nature and effect, does not commend itself either as sound in law or as consistent with common sense.

But, it is said, although the Crow's Nest Pass rates should be regarded as imposed by statute, and as such binding in

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1897, and subject to be interfered with only by Parliament, they lost that status under *The Railway Act, 1903*, and then became subject to the control of the Board of Railway Commissioners by that Act created. That, it is argued, was the effect of the scheme of rate control there adopted and of the wide powers for carrying it out conferred on the new Board.

On the other hand, it is asserted for the appellants that, as provisions of a special Act relating to the subject-matter of tolls, the stipulations in question came within ss. 3 and 5 of *The Railway Act, 1903*, and accordingly overrode its provisions so far as was necessary to give effect to them. Clause (*w*) of s. 2, s. 3 and the concluding clause of s. 5 of *The Railway Act, 1903*, are as follows:—

2. (*w*) The expression "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such a railway, and includes all such Acts; and where such authority is derived from letters patent granted under any Act, such letters patent shall be deemed to form part of such Act.

3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative authority of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the Special Act, subject as herein provided.

5. * * * unless otherwise expressly provided in this Act, where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall be taken to override the provisions of this Act in so far as is necessary to give effect to such Special Act.

Almost every word of these several provisions was the subject of exhaustive argument and criticism before us, which it is quite impossible to review without writing at inordinate length.

The Crow's Nest Pass Act is unquestionably "enacted with special reference to the Canadian Pacific Railway" and, therefore, comes within clause (*w*) of s. 2 and is a "Special Act" within the meaning of that term as used in ss. 3 and 5. The suggestion that to bring it within the definition it must also be an Act conferring "authority to construct or operate a railway" involves an unjustifiable substitution of "and" for "or." That the conclusion of the majority of the board that the Crow's Nest Pass rates were not imposed by a "Special Act" rests largely upon such a change in the text being made is apparent from the treatment accorded the corresponding section of *The Rail-*

way Act, 1888, s. 2 (*t*) by the learned Commissioner who wrote the principal judgment delivered by the board (1), and whose conclusions as to the legal aspect of the case the learned Chief Commissioner unreservedly adopts, with the concurrence of MM. Commissioners Nantel and Lawrence.

Apart entirely from the ordinary rule of construction "*generalia specialibus non derogant*" and the provisions of section 3, in the application of which that principle must govern, we have the explicit saving language of s. 5:—"unless otherwise expressly provided in this Act," etc.

We regard it as incontrovertible that the subject-matter of clauses (*d*) and (*e*) of section 1 of the Crow's Nest Pass Act and the subject-matter of the sections of *The Railway Act, 1903,* which confer jurisdiction on the Board in regard to tolls, are the same in the sense required by section 5. The former deals with tolls on the Canadian Pacific Railway alone, as is to be expected in a special Act; the latter with tolls on Dominion railways generally, which, of course, include the Canadian Pacific Railway.

Counsel for the railway companies pressed the contention that the provisions of s.s. 4 of s. 251 of *The Railway Act, 1903,* forbidding the taking of tolls by any railway company "except under the provisions of *this* Act" and other similar provisions—especially when contrasted with other sections in which we find such language as "subject to the provisions in this and the Special Act contained" (s. 111)—clearly evince an intention to exclude the application of any provision of any special Act inconsistent with giving to them the widest and most comprehensive operation and effect. But, at the most, they amount to a "providing otherwise" by implication, whereas section 5 declares that the provisions of the special Act must prevail "unless otherwise *expressly* provided in this Act." When Parliament intended to exclude the application of the special Act in favour of the general Act of 1903, it said so in unmistakable terms, as, for instance, in section 52 and in subsection 8 of section 175. There is certainly nothing in *The Railway Act, 1903,* which *expressly* provides that the rate stipulations of the Crow's Nest Pass Act shall not override, but, on the contrary, shall be subject to

(1) Judgments, etc., Board of Railway Commissioners for Canada, vol XIV, at p. 164.

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the several provisions conferring control of rates on the Board of Railway Commissioners. The same observations apply to arguments founded on the inconsistency of the Crow's Nest Pass rate provisions with the scheme of *The Railway Act, 1903,* to prevent inequalities and discrimination, and on the fact that to maintain those rates involves subjecting other railway companies not parties to the Crow's Nest Pass agreement to corresponding rate restrictions at competitive points. Nothing short of an express provision abrogating or overriding clauses (*d*) and (*e*) of section 1 of the Crow's Nest Pass Act would justify subordinating them to any general provisions of *The Railway Act, 1903.* Parliament has explicitly so enacted.

Since, then, we have in the Crow's Nest Railway Act of 1897 a statute which was enacted with special reference to the Canadian Pacific Railway and which relates to the same subject-matter as the toll sections of *The Railway Act, 1903,* and the latter Act does not expressly otherwise provide, it follows that anything in the provisions of *The Railway Act, 1903,* which is inconsistent with those of such special Act is thereby overridden so far as may be necessary to give effect to the special Act.

That this is not merely the intention expressed in sections 3 and 5 of *The Railway Act, 1903,* but that it was the actual purpose of Parliament becomes practically certain when we take into consideration two pieces of legislation in *pari materia* referred to by counsel for the appellants and the subsequent legislation of 1919 and 1922 temporarily suspending all statutory restrictions on the rate-controlling powers of the board.

In 1903, the very year in which it constituted the Railway Board and passed the general Railway Act defining its powers, Parliament enacted another railway subsidy Act (c. 7) which contains this provision:

> 6. The rates and tolls to be charged for the transfer and carriage of freight and passengers upon the lines of railway so aided and upon all lines owned by the Canadian Northern Railway Company shall be under the control of the Governor-in-Council, or of such authority, commission or tribunal as is designated or constituted under any Act of the Parliament of Canada for the regulation or control of the business of railways; provided that the rates or tolls to be charged shall not in any case be higher than the rates or tolls which may be fixed in the contract to be made between the Government of Canada and the Canadian Northern Railway Company under this Act.

Yet we are asked to hold that at the same session the proviso to this section, so obviously designed to prevent the Board, then about to be born, authorizing rates in excess of maxima to be fixed by contract between the Government and the Railway Company, was rendered nugatory by the very generality of the control over rates vested in the new board by *The Railway Act, 1903*.

Again in 1908, by section 6 of chapter 11—another railway subsidy Act—passed five years after the Railway Act, 1903, had come into force, Parliament enacted that:

> The rates and tolls charged by the company upon any of its lines shall not in any case be higher than the rates and tolls fixed in the contract to be made between the Government of Canada and the Railway Company under this Act;

another piece of inconsistent legislation if it was meant that the Board should possess the overriding powers for which the respondent now contends.

Could more convincing evidence be found that, notwithstanding the wide character of the control over rates vested in the Board of Railway Commissioners, its powers were not meant to extend to the authorization of tolls in excess of maxima which Parliament had seen, or should see, fit to fix by special Acts—that, as stated in section 5 of *The Railway Act, 1903*, such provisions of special Acts were meant to override the general provisions of the Railway Act, unless otherwise *expressly* provided?

A series of opinions expressed by successive chairmen of the Board—Hon. A. C. Killam, Sir Henry Drayton and Hon. F. B. Carvell—recognizing the Crows Nest Pass rates as binding, followed by action based thereon, is likewise not devoid of weight and significance.

The legislation of 1919 (c. 68, s. 325 (5)) and that of 1922 (c. 41) form important incidents in the history of railway rate legislation in Canada. These enactments seem to indicate with very great probability that in the view of Parliament the provisions of special Acts fixing maximum rates had not been superseded by the rate control powers conferred on the Board of Railway Commissioners—a circumstance which, notwithstanding the tenor of section 21 of the Interpretation Act, may not be wholly disregarded. When all the circumstances are taken into account the case in favour of the appellants' contention that, upon the sus-

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pension effected by s.s. 5 of s. 325 of *The Railway Act, 1919,* expiring in July, 1924, the rates clauses of the Crow's Nest Pass Special Act immediately revived and were in their pristine force and vigour binding on the Board of Railway Commissioners, with the result that it was without jurisdiction to pronounce its order of the 14th of October, seems to us to be incontrovertibly established.

Before leaving this branch of the case, lest it be thought it had been overlooked, s. 3 of *The Railway Act, 1919,* should be noticed. In the revision of 1906 sections 3 and 5 of *The Railway Act, 1903,* were recast and combined. In their new form they became section 3 of *The Railway Act* (c. 37, R.S.C. 1906). The phrase "unless otherwise expressly provided" was retained intact and applied only to the provision of section 5 of the Act of 1903 carried into section 3 of the Revised Statute. In 1919 the word "expressly" is dropped and the phrase "except as in this Act otherwise provided," with which it opens, is made applicable to the entire section, including the clause (*a*) taken from section 3 of the Act of 1903, replacing as to it the words "subject as herein provided" found in the Act of 1903 and the words "subject to the provisions thereof" (i.e. of this Act) found in section 3 of c. 37 of the Revised Statutes, 1906. While it may be that in the change made in 1919 clarity and certainty are to some extent sacrificed to a desire for brevity it would, we think, be extravagant to attribute to Parliament, merely because of the omission under such circumstances of the word "expressly," the intention of thereby effectuating such an important and far-reaching change in its legislative policy as would be involved in clothing the Board of Railway Commissioners with jurisdiction to disregard and override maximum rates prescribed by special Acts such as those of 1897, 1903, and 1908, to which attention has been drawn.

In holding the statutory maximum rates fixed by clauses (*d*) and (*e*) of the Crow's Nest Pass Agreement to be binding on the Board of Railway Commissioners we do not, as the learned Chief Commissioner apprehended, view the agreement as

> forever disabling the parties thereto from reconsidering their situation * * * or readjusting their relations.

On the contrary Parliament, which was in reality one of the contracting parties stipulating the terms on which it would grant the subsidy, may to-morrow reconsider and readjust those terms and relieve the other contracting party from the obligations it incurred; and it is not to be supposed that Parliament would hesitate to exercise its powers for the correction or amendment of legislation which is found to operate prejudicially to the public interest. But Parliament alone can do this. Having made the obligations statutory, it must change or amend them by statute.

We now pass to the consideration of the second question: Do the Crow's Nest Pass rates apply exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897? The terms in which the rate reduction clauses (*d*) and (*e*) were couched seem to afford a conclusive answer in the affirmative. Both clauses provide for a reduction in then existing rates and tolls—clause (*d*) by deducting certain specified percentages from rates and tolls in respect to the carriage of certain commodities as now charged or as contained in the present freight tariff of the company, whichever rates are the lowest; clause (*e*) by deducting from the present rates on eastbound grain and flour 3 cents per one hundred pounds. It is obvious that the rates and tolls to be reduced whether those actually charged, or those contained in the freight tariff, were rates and tolls between points actually on the Canadian Pacific Railway as then existing. There were—there could be—no rates or tolls in existence to or from points not then on the system; and there could be no reductions in non-existing rates and tolls. Counsel for the appellants, therefore, very properly conceded that if question no. 2 were confined strictly to a construction of the Crow's Nest Pass Act and agreement he could not hope to succeed on this branch of the case. He requested, however, to be allowed to treat the question as if the Board had also asked the court to answer its several sub-interrogatories, (*a*), (*b*), (*c*) and (*d*), having regard to the anti-discrimination sections of the Railway Act. Counsel for the railway companies acquiescing, the court acceded to this suggestion believing it to be in the public interest that the whole question as intended to be submitted and discussed should be dealt with.

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It should also, perhaps, be observed that no disposition of this question having been made by the order appealed from, it may be doubtful whether it is strictly a proper subject-matter of appeal under s. 52 (3). But it was before the board on the applications of the appellants; it must necessarily be dealt with in view of the conclusion at which we have arrived as to question no. 1; and, if not properly submitted as a subject of appeal under section 52 (3), it was quite open to the board to submit it in the form of a stated case under section 43. We, therefore, think it should be answered regardless of the form in which it has been presented to us.

For the reasons fully stated in disposing of the first question we are of the opinion, after giving full consideration to the anti-discrimination sections of the Railway Act, that the provisions of the special Act and agreement must prevail and that effect must be given to the plain and unmistakable terms in which clauses (*d*) and (*e*) are couched notwithstanding any discrimination, inequality or unfairness that may ensue. It is quite within the power of Parliament to provide that on certain lines of railway rates and charges in respect of certain traffic shall not exceed stated amounts regardless of any discriminatory effect which the making of such rates and charges may produce. Such provisions are made in the Crow's Nest Pass Act of 1897 and in the two Acts of 1903 and 1908 above quoted. When such maxima are fixed by special Acts they must be regarded as exceptions intentionally made by Parliament from the application of its general policy against discrimination. Section 5 of *The Railway Act, 1903*, and section 3 of *The Railway Act, 1919*, apply quite as fully and quite as effectively to the anti-discrimination sections of those respective statutes as they do to the equally general provisions ordaining the control and supervision of tariffs by the Board of Railway Commissioners.

The alleged fact that, if applied to the limited extent for which clauses (*d*) and (*e*) distinctly provide, the maintenance of the Crow's Nest Pass rates will produce discrimination and inequality which would ordinarily be in clear violation of the anti-discrimination sections of the Railway Act would not justify an exclusion of their application such as the appellants press for. Discriminations so authorized

by Parliament itself cannot be regarded as unjust or prohibited.

We, therefore, think it clear that the application of the Crow's Nest Pass rates is confined to traffic between points which were on the Canadian Pacific Railway in 1897.

We answer the series of questions submitted as follows:

Question No. 1: No.

Question No. 2:

(*a*) Part one: No,
Part two: Yes;

(*b*) In order that the traffic provided for by clause (*d*) should fall under that clause it must originate at Fort William or some point east thereof which at the date of the agreement was "on the company's railway";

(*c*) In order that the rates prescribed in clause (*d*) should apply the destination of traffic otherwise within that clause must be a point which was, at the date of the agreement, "on the company's main line or on (some) line of railway throughout Canada owned or leased by or operated on account of the company";

(*d*) Yes.

Question No. 3: No.

There remains to be noted a point raised by counsel for the provinces of Nova Scotia and New Brunswick, namely that the Canadian Pacific Railway Company had in the tariffs disallowed by the order of the 14th of October fixed Megantic, in the Province of Quebec, as the most easterly point to which it applied the Crows Nest rates, whereas, it is contended, those rates should be extended to the port of St. John in the Province of New Brunswick, the eastern-most point on the Canadian Pacific Railway as it existed in 1897. Of this matter it need only be said that it does not fall within the scope of the questions of law and jurisdiction submitted, and, as indicated in the opinion of the learned Chief Commissioner, it would appear to be one of "the other and manifold subjects remaining for consideration after the settlement of the main question" and "undetermined by the present decision of the board."

It is not before the court on the present appeal.

In appeals from the Board of Railway Commissioners the functions of the Supreme Court are very circumscribed. When it has declared and certified the law as it finds it and has accordingly allowed or disallowed the appeal for which leave is given, *Can. Pac. Ry. Co.* v. *City of Toronto* (1),

(1) [1911] A.C. 461, 471-2.

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those functions are exhausted. However grave, however disastrous the consequences, the court is powerless to afford a remedy. The Board of Railway Commissioners in its turn can only apply and administer the law as it exists. If, under the existing law, unreasonable rates must be imposed or unfair discrimination sanctioned, with the resulting chaos and other ill effects so graphically portrayed in the opinion of Mr. Commissioner Boyce, the remedy lies with the High Court of Parliament. By amending the existing law it may either itself do, or may empower and require its delegate, the Board, to do as full and complete justice as circumstances admit. Fortunately Parliament is presently in session. Whatever remedy, if any, it may in its discretion consider necessary or desirable can be speedily afforded.

The appeal will be allowed to the extent indicated, but, in view of the divided success, without costs.

IDINGTON J.—This is an appeal from an order of the Board of Railway Commissioners for Canada in regard to railway rates in respect of which said board submits as questions of law for the opinion of this court a number of questions of which the first reads as follows:—

1. Whether, as a matter of law, the board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize railway rates upon the railway of the Canadian Pacific Railway Company in excess of the maximum rates referred to in the Crows Nest Pass Act, being chapter 5, 60-61 Victoria, Statutes of Canada, and in the agreement therein referred to, upon the commodities therein mentioned.

I regret to find that there has been created such a concurrent jurisprudence since the constitution of the said board in 1903 under and by virtue of The Railway Act, 1903, of decisions by said board and the courts before which the same question has come and, lastly, the high court of Parliament itself by the respective enactments of 1919 and 1922, recognizing the provisions of the Crow's Nest Pass Act as predominant over the powers conferred on the board by virtue of said Railway Act of 1903, that such jurisprudence cannot now be properly overruled in answering said question.

There is much in the principles had in view in the creation of the board, and especially in relation to the powers given it over tolls or rates and in the determination thereof, to provide against improper or unjust determinations therein which I am, with due respect, afraid was not duly fore-

seen, or properly appreciated at the times or occasions on which the decisions constituting the jurisprudence I have referred to was being built up, as it were.

It is however, fundamental with us that when our jurisprudence has become thus settled it must remain so until Parliament sees fit to rectify the evils arising thereout.

I am, therefore, constrained to answer or agree in answering the said question in the negative.

I may be permitted to remark, however, that the appointment of a Railway Commission was distinctly anticipated by said Crow's Nest Pass Act, as appears by subsection (*c*) of section 1 thereof, and inferentially would have full power of revision of any toll and thus be enabled to avoid any unjust discrimination.

The clear implication rests in the provisions of the Railway Act of 1903, which provided for the constitution of the board that all unjust discriminations in fixing rates should be eliminated by the board as may happen to appear no matter from what cause.

The observance of the Act in question would not necessarily impose unjust discrimination under then existing conditions. But in the then rapidly developing condition of things in Canada, no one could foresee when, or in what direction, the observance of the agreement of 1897 might or might not produce unjust discrimination.

I most respectfully submit that when that did develop, the board had the power, in my opinion, to duly consider the said Act and eliminate so much thereof, or the whole if need be, in order to remove all fair and reasonable grounds of complaint.

That point of view was unfortunately not taken and we cannot remedy it.

If appeal had been presented here when the board first felt unjust discrimination had developed and such a question as said no. 1, been submitted, I, for one, should, if feeling as at present advised, have answered "Yes" instead of "No."

The Act merely authorized an agreement such as concluded.

We are asked in no. 2 the following questions:—

2. If the court shall be of opinion that the Crow's Nest Pass Act or Agreement is binding upon the Board of Railway Commissioners for

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Canada, then, according to the construction of the Crows Nest Pass Act, section 1, clause (*d*) and the agreement made thereunder,

(*a*) Are the rates therein provided applicable to traffic westbound from Fort William and from all points east of Fort William now on the Canadian Pacific Railway Company's railway; or, are such rates confined to westbound traffic originating at Fort William and at such points east of Fort William as were at the date of the passing of the Act and (or) the making of the agreement, on the company's line of railway?

(*d*) Are such rates applicable to traffic originating at points east of Fort William which were, at the date of the passing of the Act and (or) of the making of the agreement, on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

(*c*) Are the rates therein provided applicable to traffic destined to points west of Fort William which are now on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

(*d*) Are such rates confined to traffic destined to points west of Fort William which were, at the date of the passing of the Act or the making of the agreement, on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

I unfortunately cannot agree with the opinion of the majority of the court that it is quite clear that the said Act only applied to the then existing lines of the Canadian Pacific Railway. We are not told what lines of said railway were then existent, or immediately to come into existence, or what other lines in western provinces such as the Canadian National Railway, and whether any of that line running near or through the Canadian Pacific Railway district and possibly might be indirectly involved by the express language of the Act.

We are told by the case admitted to us that the Canadian Pacific Railway has since the agreement in question doubled its then mileage.

Although the express language used as to part of the lines in question may bear a then present tense, yet we should never forget that in order to escape unjust discrimination so far not only as its own used lines came into existence but also that of others, many of them might in actual fact come under the operation of the Crow's Nest Pass agreement and said Act.

Therefore thus indirectly the absolute maintenance of the Crow's Nest tariff may draw with it the tariff to be fixed for such other lines.

Again we have in the agreement the 9th paragraph thereof, which reads as follows:—

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9. So soon as the said railway is opened for traffic to Kootenay Lake, the local rates and tolls on the railway and on any other railway used in connection therewith and now or hereafter owned or leased by or operated on account of the company south of the company's main line in British Columbia, as well as the rates and tolls between any point on any such line or lines of railway and any point on the main line of the company throughout Canada or any other railway owned or leased by or operated on account of the company, including its line of steamers in British Columbia, shall be first approved by the Governor in Council or by a Railway Commission, if and when such commission is established by law, and shall at all times thereafter and from time to time be subject to revision and control in the manner aforesaid.

This puts the question in a light that leaves no doubt as to rates on the future parts of the road, as well as the present, being brought under the power of the board, and when the specific items of freight tolls mentioned in the 10th paragraph are compared with others a question may arise as to unjust discrimination from another angle of view.

It is beyond doubt, I imagine, that there always exists a discrimination of rates relative to different classes of goods but is this now Crows Nest tariff not likely, if left, to be made a standard in fixing rates for goods of some general nature in relation to other freight rates?

And the rates specifically fixed by the agreement came into force on 1st January, 1898, not the previous September as set forth in the judgment of the majority.

In short I cannot see how the entire range of the effect of the Crow's Nest Tariff can, on the skeleton presented to us, be definitely determined.

LA CITE DE VERDUN (DEFENDANT).....APPELLANT;

AND

S. E. YEOMAN (PLAINTIFF).....RESPONDENT.

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*Nov. 25, 26.

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*Feb. 3.

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

Negligence—Municipal law—Pumping station—Electric wires—Children playing on roof—Accident—Liability—Need of notice or fence.

The respondent in his quality as tutor to his minor son aged about eight years sued the appellant city for $20,000 damages for injuries sustained by his son. The city is situated on the river side, near Montreal; and in order to prevent flooding, a dyke with a roadway on the top was constructed and is maintained by the city. A

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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pumping house not abutting upon any street or highway was erected behind a part of the dyke in order to prevent sewage from backing up in times of heavy rain. This pumping station was worked by electric power conveyed through the delivery system of the city. At a corner of the pump house was a small building known as the valve house having a flat roof somewhat lower than the top of the dyke and situated at a distance of about three feet six inches from it. Children were in the habit of playing about the dyke and in the vicinity of the pump house; and it was possible for them, descending the dyke in disregard of a by-law of the appellant posted at different places, to mount the roof of the valve house, jump on the sloping roof of the pump house and climb on hands and knees to its top, whence they would slide down. The evidence shows that the children engaged in this sport only when the pump house was not occupied and when policemen were not in sight. It was not proved that the city appellant knew, by its officials or otherwise, that children were in the habit of going upon the roof of either house, although it would appear that children were using the roof in the manner described upon favourable occasions. The respondent's son, on the day of the accident, had climbed to the top of the pump house roof and was sitting on the ridge awaiting his turn to slide, when he lost his balance, rolled down the slope opposite the side facing the valve house and the dyke and was arrested in his fall by one of the groups of electric wires at the eaves of the pumping station, whence he was rescued by a neighbour after sustaining the injuries in respect of which the action is brought. The jury found that the accident was "due to the common fault" of appellant and respondent; and that the fault of the appellant consisted "in not having danger notices about the neighbourhood of the pumping station and some fences to prevent boys getting on the roof." Judgment by the trial judge for $10,000 was affirmed by the Court of King's Bench.

Held, that the case presented no evidence for the jury; that the boy was a trespasser upon the roof and that trespassers have no right to complain of the condition of the premises as they find them; that the electric wires which were the immediate cause of the boy's injury, although an incident of the case, were not an element in the cause of action, because they did not tempt or attract the boy, were not in the nature of a trap, and had nothing whatever to do with bringing the boy upon them, and that the case was therefore distinguishable from the Turntable Cases which have been considered both in Quebec and in England and the United States.

Held also that the law does not impose a duty upon proprietors to fence their buildings to exclude mischievous boys any more than it does with respect to natural objects such as growing trees which are no better known nor more familiar.

Per Idington J. dissenting. The evidence adduced before the jury was such that the trial judge could not properly withdraw the case from the jury and therefore their verdict should stand.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge with a jury and maintaining the respondent's action for $10,000 damages.

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

Laurendeau K.C. and *F. Fauteux* for the appellant.

Lafleur K.C. and *Claxton* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The plaintiff (respondent) in his quality as tutor to his minor son, Walter Sydney Yeoman, recovered judgment against the defendant (appellant) in the Superior Court for $10,000 damages for injuries sustained by his son who fell from the roof of the city pumping station at Verdun upon electric wires which were used for the working of the pumps and was thereby badly burned and disabled. Upon appeal the Court of King's Bench confirmed the judgment, and the city now appeals to this court. The proof is not contradictory and there is no substantial dispute about the facts of the case. The accident occurred on 3rd July, 1922, when the respondent's son Walter, who sustained the injuries, was of the age of about 8½ years. The city of Verdun is situated on the river side where the land is flat and low lying; and, in order to prevent flooding in times of heavy rain or freshet, a dyke was constructed and is maintained by the city along the north bank of the river. The dyke is of considerable dimensions, having a roadway on the top which is used as a promenade, and is broad enough also for the passage of motor vehicles and carriages. The north side of the dyke is a grassy slope, and at intervals steps are set into this for purposes of access to the promenade, and there is a city by-law, notices of which are posted along the slopes of the dyke at different places and near the pump house, whereby

it is forbidden for any person to cross the embankment known as the dyke or levee at points other than where steps have been provided.

These notices are for the protection of the dyke and of the grass growing on the slopes. A sewer discharges opposite to the pump house. The pumping station stands behind the dyke and is worked by electric power conveyed through the delivery system of the city. Ordinarily the water in the river is low enough for the sewer to discharge by gravity, and this condition prevails at the usual rainfall,

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but in times of heavy rain it is necessary to work the pumps in order to prevent the sewage from backing up and causing an overflow. Mr. Wishart, the secretary-treasurer of the city, testifies that

> the pumping station is never finally shut up. It is visited continually by the men in the winter time, from the month of December to the month of April we keep four men day and night in the pumping station, and in the summer time the men only go down there when we have a heavy rainfall.

The pump house does not abut upon any street or highway; it is reached by a foot path from Pacific Avenue, one of the city streets. The electric wires are introduced into the building on the north side at the eaves in groups of three, horizontally, and at a height above the ground of 14 feet. The pump house is rectangular but not square, the sides facing the north and south being the longer. The roof, which is of galvanized iron unpainted, is described as a hip-roof, having four slopes and is thus constructed somewhat like a pyramid; but, owing to the fact that two of the opposite sides are longer than the other two, the four sides do not meet at a point, and there is a ridge of some length at the apex of the roof running east and west. The perpendicular height from the peak to the eaves is 15 feet 6 inches, and the direct slope of the roof is described as of about 45 degrees. At the southeast corner of the pump house between it and the dyke is a small building known as the valve house. This building has a flat roof which is somewhat lower than the top of the dyke, and is distant from the north slope of the dyke at the nearest point about three feet six inches. Children were in the habit of playing about the dyke and in the vicinity of the pump house, and it was possible for them, in disregard of the by-law, descending the dyke, to mount the flat roof of the valve house. They were seen there on several occasions by city policemen who warned them and sent them away. It appears, however, that some of the larger and more adventurous of the boys who were accustomed to play about the place, had discovered that they could by running along on top of the valve house towards the pumping station, from which it was separated only by a narrow passage, jump onto the sloping roof of the pump house, and run up this roof for a distance on foot until their speed was overcome by the ascent, and then, by grasping the projection formed

by the intersection of the south and east planes of the roof, clamber on hands and knees to the top, whence they would slide down, and, by the assistance of a guy-wire which was fastened to the top of the pump house, swing themselves back at the end of the slide on to the flat roof of the valve house. The boys engaged in this sport only when the pump house was not occupied, and when policemen were not in sight. Several policemen who patrolled the neighbourhood, and an employee of the city who had been engaged in the working and repair of the pumping station for twenty years, were called; they testify that they had never seen or heard of any boys being upon the roof of the pump house, although two of the policemen had seen children on the valve house and had sent them away. No report had been made to the secretary-treasurer of the city, and he had no knowledge that boys had been upon the roof of either house; he describes with emphasis his astonishment that an accident could have happened there. There is thus no evidence that the city authorities knew that boys were sliding, or had at any time been on the roof of the pump house, or of any danger connected with it, or of any complaint or accident which might have brought home to them the fact of the sliding, or the existence of any danger. It would appear, nevertheless, that during the season of 1922, and for the two previous seasons, boys had used the roof of the pump house in the manner described upon favourable occasions. The respondent's son, Walter, whose parents had moved into the locality only in the spring of 1922, was one of the boys who engaged in the sliding, and on the day of the accident he had climbed to the top of the pump house roof, and was sitting on the ridge with a companion awaiting his turn to slide, when unfortunately he lost his balance, rolled down the slope on the north side, and was arrested in his fall by one of the groups of electric wires at the eaves of the station, whence he was rescued by a neighbour after sustaining the injuries in respect of which the action is brought. The trial took place on 15th and 16th February, 1923; the boy was examined as a witness and gave his testimony very intelligently; he had been two years at school; he was nine years old on 8th December, 1922; he says that he had played on the pump house station roof pretty often; he describes

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how, after school, the boys used to climb there; he says that there was never anybody about to chase them away; he says that he never told his father or mother about his sliding, because he was afraid he would be punished for it, and he gives the following evidence:—

By the court:

Q. Did you know what you were doing was wrong?—A. Yes—well no, I didn't think there was any danger.

By defendant's counsel:

Q. We don't ask you that, Walter. We ask you if you thought it was wrong to slide on that roof?—A. No, I asked the other boys when I first went there if the man allowed them to slide on the roof, and they said they did not know, but they always slid on the roof.

Q. Why would your mother give you a hiding for doing that? You were afraid though that you would get a hiding if you told your mother you would go there?—A. Because some days I would come with my stocking rubbed and she would say where did I get my stocking rubbed and I would tell her I was down at the boats.

Q. But you had been on the roof?—A. Yes, I had rubbed them sometimes.

Q. Did you ever hear your mother say that children had been sliding there, and that she had turned them off?—A. No, I never heard her say that.

By a juror: Could I inquire if it is known that boys slid down this roof in winter time?

The court: You might ask him.

By a juror:

Q. Walter, do you know of any of your friends that ever slid down over that same roof in the winter time?—A. No.

By defendant's counsel:

Q. That is because the men are working in winter?—A. The men are working in winter.

Q. And the boys don't slide when they know there are men inside?—A. No, they don't slide.

By a juror:

Q. I am not sure whether you quite understand me. I want to know if your friends are aware of them sliding down there in the winter time?—A. Well, all the boys that ever slid down there with me around there, they said they did not slide in the winter time, because the men were working in there.

Q. And would not allow them?—A. Would not allow them.

Several of the boy's companions with whom he had been in the habit of sliding were called; the ages of the boys who testified were respectively at the time of the trial, 9, 12, 13 and 15 years, the respondent's son being the youngest of these. James Mills, 7 years of age, was called to prove the sliding; he had been at the place in company with the other boys, but he did not slide. They concur in the statement that they were never chased away from the building,

but that they did not slide when the men were working there. One boy says he did not know whether the men were inside or not; that he never saw a policeman about there, and that he did not know it was forbidden to slide. It was admitted that a number of the other boys would, if called, have given substantially the same testimony as the boys who had testified.

The case was tried with a jury and the learned trial judge submitted questions upon which the jury found in effect that the accident was not

due solely to the fault, carelessness or negligence of the defendant and its employees;

that the accident was not

due solely to the fault, carelessness or negligence of the child or of his father;

that the accident was

due to the common fault, carelessness or negligence both of the defendant and its employees on the one hand, and of the father or his minor son on the other;

that the fault, carelessness or negligence of the defendant and its employees consisted

in not having danger notices about the neighbourhood of the pumping station, and some fences to prevent boys getting on to the roof;

they found moreover that the father was not guilty of any negligence; and, in answer to the question

in what the fault, carelessness or negligence of the child consisted

the jury answered

he had no business to have been on the roof at all, and must have known it was wrong, as he did not want his parents to know he had been there.

The jury assessed the damages at $20,000, deducting $10,000 by reason of the boy's fault, and the learned judge denied a motion on the part of the city for dismissal of the action notwithstanding the verdict, and entered judgment for the respondent for $10,000 damages as found.

The findings of the jury were returned in the light of the observations made by the learned trial judge during his charge, and it may be well to reproduce the material passages. Upon the suggestion that the boy was at fault in going on the roof, he said:

Now you will have to decide, first of all, whether that boy was in fault or not in sliding down that roof. It was not his roof. He evidently knew there was something wrong about it, like all these boys, because you will have noticed that the occasions they took for sliding on that roof were when there were no policemen about. They evidently were of all ages, and most of them at all events would know that that action was not a correct action.

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As to the lack of notices or fencing:

Now, there is no doubt whatever that the defendant put no kind of a notice to anybody not to go upon those premises, that there was no notice like "private Property," "No trespassing here." There was no fence between the dyke and the top of that shed. There was nothing to prevent anybody who was inclined to get on to the roof from doing so. At the back of the roof were electric wires, high voltage electric wires. Except for somebody doing what has happened in this particular instance they apparently would have been as safe as anything could be, because they were fourteen feet above the ground. There was no possible chance of anybody touching them, and in the position in which they were in seems to me they were quite secure. But you will have to make up your minds—I don't see for myself that the presence of those electric wires were any danger in themselves, because it is perfectly clear that if a person grasps two of those wires at the same time that he runs a very good chance of being instantly killed.

With regard to the obligations of the city the jury were told that:

The city should have known that this roof was being used as a playground. There is no doubt about it, and the boys say they did use it as a playground. No single witness has been brought here connected in any way with the city who ever saw that roof used as a playground. The nearest approach is the statement of two constables. The last one examined in rebuttal, and another one examined in defence, who say that they had seen children on the little valve house and that they had ordered them away, and one of them never reported that to his superior officer. Of course, if he did not report it the city council could not very well take any steps, so that something could be done to alter things. The secretary-treasurer, who in all municipalities probably knows a good deal more about the affairs of the council, always on the job, the secretary-treasurer told us that he had not the faintest suspicion that that roof was being used as a playground, as a slide by these children, until after the accident. We do know that a serious accident happened, and it is for you to say whether the city should have been able to foresee that such an accident could be possible, by children getting on the roof, and if they did foresee that such an accident was possible if they should not have taken some steps to make it impossible for children to get on to that roof. What strikes me in connection with that roof is not only the danger of the electric wires, which seems one of the smallest dangers to me, but it would be the danger to children falling from the roof down some fourteen feet below. This boy might just as well have broken his neck instead of having burned his arm off if he had slid off that roof. Well now, seeing the position that that roof was in, in regard to that dyke, seeing the comparatively easy access there was to it, seeing the fact that the children used to frequent that dyke, it is for you gentlemen to say whether or not the city was negligent in not fencing that house off in some way.

There was no possible danger that could take place, to my mind, with those electric wires in any other way provided access to that roof was rendered impossible from the dyke side. If some fence had been used, had been put up there, which children could not scale, and possibly barb wire in some way or other, because it would take a good deal to keep characters of the stamp of these boys from getting on the roof, if there was any possibility to do it it would take a great deal of ingenuity, to plan a barricade that would keep them out, I should fancy: but there, it is for

you gentlemen to decide whether such a barricade of some kind or another should have been put up.

Finally upon the suggestion of counsel that the judge should instruct the jury to consider the capacity of the boy to discern between right and wrong, and as to whether he was capable of fault, the judge, having stated his impression that this was a pretty bright lad, told the jury that if they thought he was old enough to know what he was doing to be wrong, if he was old enough and intelligent enough to be conscious of the danger of going on the roof, then they would be in a position to find that it was careless and imprudent on his part, and that there was fault in going on the roof.

The evidence points only to the conclusion that the boys were trespassers upon the building. Although the learned trial judge said in his charge that the city should have known that the sliding was going on, it is noteworthy that when the building was occupied the boys did not slide; when the policemen were in sight the roof was deserted; the building was on the water side and the only witnesses who testify to seeing the boys on the roof, except the boys themselves, are five residents of Pacific Avenue, a street which terminates on the flats in the immediate vicinity of the pump house. One of these was the mother of the injured boy. There is no suggestion of a report by any of these to the city authorities; it was known that the city did not allow children to play on the flat roof of the valve house, that when they had been seen there by the police they had been sent away. Constable McCaskill testifies that he had seen children on the roof of the valve house two or three times and he adds:

> Of course when you are in uniform, when the youngsters see us around there they will certainly get off and get away home. I had occasion to bring one down to his mother and I warned her about the danger the child was in in falling off the roof perhaps.

Trespassers have no right to complain of the condition of the premises as they find them. The law is stated by Sourdat, 6th ed. vol. I, 661, as follows:

> Nul ne doit s'introduire sur l'héritage d'autrui sans son consentement. En le faisant, on s'expose à toutes les conséquences des accidents qu'on peut y rencontrer. Ainsi je pénètre dans une propriété close, même sans intention malveillante, peut-être seulement pour éviter un circuit de la route qui m'obligeait à tourner autour des murs, tandis que je puis traverser en ligne droite. Le propriétaire chasse ou s'exerce au tir. Un

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coup de feu, parti de l'épaisseur du bois, m'atteint et me blesse. La faute est tout entière de mon côté. On ne pouvait point soupçonner ma présence en cet endroit.

La jurisprudence autorise même l'emploi de moyens de défense, tels que chiens de garde, pièges, appareils explosibles, pour protéger les habitations et leurs dépendances contre les incursions des animaux, ou des personnes qui tenteraient de s'y introduire indûment.

Upon appeal the Court of King's Bench considered that there was evidence for the jury, and that the findings and judgment at the trial ought not to be disturbed, but Dorion J. dissented upon the ground that the city did not know and was not bound to know of the use which the boys were making of the roof, and that it could not have been reasonably anticipated that an accident of the kind might occur; he maintains that the jury have attributed fault to the city where there was none.

One cannot approach the consideration of this case without realizing the aptitude and truth of an observation of Lord Justice Farwell in *Latham* v. *R. Johnson & Nephew, Ltd.* (1), a case which proceeded upon the assumption that the infant plaintiff was a licensee, where he said:—

> It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country. We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment; sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles.

The case is perfectly distinguishable from the class of cases of which the Turntable Cases, which have been considered both in Quebec, in England and in the United States, are types, where proprietors have been held responsible for injuries caused to young children incapable of negligence, who were permitted to be upon the premises, by machines placed within their reach and capable of being operated by them in a manner to cause them injury, and in which it has been held that a duty rests upon the proprietor to protect the child against artificial contrivances which embody a peril unknown to him and unexpected. *Canadian Pacific Ry. Co.* v. *Coley* (2); *Cooke* v. *Midland Great Western Railway of Ireland* (3); *Railroad Co.* v.

(1) [1913] 1 K.B. 398, at p. 407. (2) [1907] Q.R. 16 K.B. 404.
(3) [1909] A.C. 229.

Stout (1); also *United Zinc & Chemical Co.* v. *Britt* (2); *New York, New Haven & Hartford Rd. Co.* v. *Fruchter* (3). We are concerned here not with a vehicle, nor with any sort of machine with which it is in itself dangerous for children to meddle, but with an ordinary and usual object in a city, a building with a pitched roof, the use and purpose of which is well known to every school boy, and with the misuse of it for a dangerous sport by school boys who it is impossible to suppose had not a perfect realization of what they were doing and of the dangers incident to their sport.

The case should be cleared of the confusion which is imported by reason of the electric wires; these enter the building at the eaves on the north side, fourteen feet from the ground, where they could not be reached without the use of a ladder, or by the extraordinary method by which this unfortunate boy came there, climbing the roof on the opposite side and descending upon them; the wires were not and are not alleged to have been in anywise an object of attraction or curiosity; they possessed no lure; they did not tempt or fascinate; they had none of the properties belonging to a trap, and they had nothing whatever to do with bringing the boy upon them; as said by Dorion J., this came about in consequence

d'un accident résultant d'un autre accident,

and such an occurrence, the possibility of which is demonstrated by the event, was a contingency too remote to be reasonably anticipated, *Horsburgh* v. *Sheach* (4). The boy Yeoman immediately before his fall was sitting on the ridge of the roof to which he had climbed in company with another boy who sat beside him. If at the same time the latter had also lost his balance and, escaping the wires, had fallen to the ground and sustained injuries by his fall, I can see no reason to suppose that he would not have every right of recovery which Yeoman has; or if the respondent's son had fallen to the ground and broken his arms without touching the wires, is it possible that he would be any the less entitled to compensation? I should think not. These wires are an incident of the case, not an essential; they con-

(1) [1873] 17 Wallace Sup. Ct. U.S. 657.
(2) [1922] 258 U.S.R. 268.
(3) [1923] 260 U.S.R. 141.
(4) [1900] 3 Ses. Cas. 268, at p. 270.

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tribute perhaps to the damages, but they are not an element in the cause of action. The boys were able by the exercise of considerable agility and some ingenuity to climb the roof of the pump house, and thence to slide off on to the flat roof of the valve house by means of the guy-wire, which, in a manner that is not clearly explained by the evidence, was used to direct the course of the sliding and the offtake from the sloping roof to the flat underlying one. These were uses for which it is needless to say the roof was not designed or intended and nobody knew this better than the boys themselves. Indeed it would appear that the case was of the class which was excluded by Lord Atkinson in *Corporation of the City of Glasgow* v. *Taylor* (1), which is cited to elucidate, where he said:—

> There is in my view, no resemblance between this case and those cases where mischievous boys sustain injury by interfering with or misusing natural objects, such as trees in public parks up which they may be tempted to climb, or water, ornamental or other, into which they may accidentally fall or be tempted deliberately to enter. The appearance of such objects as these is well known and unmistakable. There is nothing deceptive or misleading about them. They cannot well be mistaken for things other than, or different from, what they really are.

In the same case, p. 60, Lord Shaw of Dunfermline says in his speech:

> In grounds open to the public as of right, the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious.

It is maintained that evidence is presented here for the consideration of the jury and that effect should be given to their finding. It is true that the question whether or not the defendant was negligent is for the jury, but behind that is the question of law for the court as to whether the negligence alleged constitutes a ground of legal liability. The allegation of fault in the plaintiff's declaration is as follows:—

> Defendant is in fault and responsible for the damages suffered by the said Walter Sydney Yeoman because it did not take precautions to prevent the said Walter Sydney Yeoman and other children from playing on the roof and in the neighbourhood of the pump house which was dangerous, and to protect people, and particularly the said Walter Sydney Yeoman, from the danger of being injured by coming into contact with the electric wires running into the pump house.

The faults found against the defendant are the absence of danger signals about the neighbourhood of the pumping

(1) [1922] 1 A.C. 44, at p. 52.

station, and of fencing to prevent boys getting on to the roof. The Lord Chancellor (Cairns) had occasion to consider in the well known case of *Metropolitan Railway Co.* v. *Jackson* (1), the distinction between the functions of the court and of the jury, and, having explained the respective duties which fall to be discharged by the judge and by the jurors, he concludes with the statement that:

> It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the judge must say whether negligence can be legitimately inferred, and the jury whether it ought to be inferred.

The rule is the same in the province of Quebec; it is provided by Article 469 of the Code of Civil Procedure that

> whenever the judge is of opinion that the plaintiff has given no evidence upon which a jury could find a verdict he may dismiss the action.

If therefore the learned trial judge had adopted my view of the case he would have found no evidence from which negligence on the part of the defendant could have been properly inferred, and he would have dismissed the action; and, if the judge should have done this, the plaintiff's case is not established or improved by the verdict, for it does not rest upon a legal foundation. *Canadian Pacific Railway* v. *Fréchette* (2).

Moreover, as to the faults found against the city, they are not faults. The danger of falling off the roof, to which the boy voluntarily exposed himself, and from which he suffered, was one which was apparent, and which is common to all buildings. As to the wires, there was no risk from them that could be seen, or reasonably foreseen. There was no place from which the boy could legitimately view the wires except from the ground, and there he was in no danger from them. I do not interpret the jury's finding as meaning that the notices should have suggested that there were electric wires on the north side of the building which would increase or aggravate the danger to people falling from the top of the roof, when of course nothing was further from the thought of the proprietor, nor less within the region of anticipation or conjecture, than that any climbing of the roof should be permitted or take place. As to the fencing, it is, as the learned judge told the jury, a difficult project to build a fence high enough and tight

(1) [1877] 3 A.C. 193, at p. 200. (2) [1915] A.C. 871.

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enough to exclude mischievous boys of the capacity and ingenuity manifested by the evidence in the case, and in my judgment the law does not impose that duty upon proprietors any more as to their buildings than as to natural objects, which are no better known nor more familiar; the case of negligence would have been the same if in the place of the pump house a tree had been growing where the building was, and the boy, indulging his desire to climb, had fallen from the branches and injured himself. The alleged liability is founded upon article 1053 of the Civil Code which declares that

> every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill.

Liability in cases of this sort is founded upon fault, but no precedent has been cited, and I have not been able to find one, either in the jurisprudence of the province or in the decisions in England or in the United States, where fault or liability has been judicially found upon facts such as those presented in this unfortunate case.

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

IDINGTON J. (dissenting).—The respondent in his quality as tutor brought this action for damages suffered by his minor son resulting from an accident which took place on the 3rd of July, 1922, at the Verdun pumping station whereby the boy lost one arm and the use of the other.

The case was tried by Mr. Justice Lane, with the assistance of a special jury who brought in a verdict of $20,000, founded on their answers to questions submitted to said jury, presumably with the assent of the respective counsel for either side.

By reason of the jury finding that the boy was guilty of contributory negligence and that the verdict should be reduced to half said amount, the judgment is only for $10,000.

The judge and jury, by consent of counsel, visited the scene of the accident and thus had exceptional means of appreciating correctly the evidence adduced on either side.

The learned trial judge's charge to the jury was eminently fair and no exception has been taken thereto.

The questions submitted brought out all that could have been reasonably desired in such a case, and were so fully explained in the charge of the learned judge to the jury that there can, I submit, be no mistake in their answers as covering the whole ground involved.

The counsel for appellant made a motion, after the jury retired, for a judgment *non obstante veridicto* and, from what transpired in regard thereto, it is quite clear that the learned trial judge, who was in a better position than we are to appreciate the correctness of the jury's findings and the proper result flowing therefrom, fully approved of the verdict and entered judgment according therewith.

The defendant appealed therefrom to the Court of King's Bench and, after hearing said appeal and fully considering same, the learned Chief Justice Lafontaine, Mr. Justice Guérin and Mr. Justice Howard, each wrote at length their respective reasons for dismissing said appeal and Mr. Justice Tellier concurred with Mr. Justice Howard's views.

To my mind they covered between them the entire ground most effectively; and I so entirely agree with their reasoning (save that of the learned Chief Justice in some remarks of minor importance as to the responsibility of the boy's mother, with which I cannot agree in view of the jury's entire exoneration of the respondent), that I can see no useful purpose to be served by repeating their reasons here.

Mr. Justice Dorion briefly dissented.

I may observe in parting with this case that there assuredly was such substantial evidence for the consideration of the jury that, in my humble opinion, no one would be justified in withdrawing this case from their consideration.

And, lest it be suggested that the rule in that regard differs in Quebec from that applied here and in England, I submit the following quotation from the judgment of the Judicial Committee of the Privy Council in the case of *McArthur* v. *Dominion Cartridge Company* (1):—

> In Quebec, when an unsuccessful party after verdict moves for judgment or a new trial, the function of the court under the Code of Civil Procedure is the same as the function of a court of appeal in this country

(1) [1905[A.C. 72, at p. 75.

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in similar circumstances. It is not the province of the court to retry the question. The court is not a court of review for that purpose. The verdict must stand if it is one which the jury, as reasonable men, having regard to the evidence before them might have found, even though a different result might have been more satisfactory in the opinion of the trial judge and of the court of appeal.

For the foregoing reasons I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fauteux & Fauteux.*
Solicitors for the respondent: *Claxton & Claxton.*

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*Dec. 1.

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*Feb. 3.

LA COMPAGNIE D'AQUEDUC DU LAC ST-JEAN (PLAINTIFF) ..... APPELLANT;

AND

JOSEPH FORTIN (DEFENDANT) ..... RESPONDENT.

LA COMPAGNIE D'AQUEDUC DU LAC ST-JEAN (PLAINTIFF) ..... APPELLANT;

AND

ALFRED MARTIN (DEFENDANT) ..... RESPONDENT.

Contract—Aqueduct—Payment in advance—Agreement to furnish water to a farm in perpetuity—Sale of land—Right of buyer as the ayant-cause of the vendor—Arts. 494, 1030, 1499 C.C.

One Guay in common with several other landowners entered into an agreement with an aqueduct company whereby the latter, in consideration of the payment of a lump sum by each of the landowners, undertook to furnish water to their farms in perpetuity. Subsequently Guay sold his farm to Fortin without any express assignment of the right to the water of the aqueduct. The aqueduct company having demanded from Fortin payment of the amount fixed by its tariff for the supply of water:

Held, that this stipulation having been made by Guay for the use of his farm and having created a right accessory thereto Fortin, as *ayant cause à titre particulier* of Guay, could set up this agreement as a defence to the company's action.

Judgment of the Court of King's Bench (Q.R. 38 K.B. 75) affirmed.

APPEAL from the decision of the Court of King's Bench, appeal side province of Quebec (1) affirming the judgment of the Superior Court and dismissing the appellant's action.

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*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Q.R. 38 K.B. 75.

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Mignault J.

The material facts of the case are fully stated in the judgment now reported.

Belcourt K.C. and *T. L. Bergeron* for the appellant.

A. Boulianne for the for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—Ces deux causes nous arrivent en vertu d'une permission spéciale d'appel que l'appelante a obtenue de la cour du Banc du Roi. Il s'agit, dans chacune d'elles, du droit de l'appelante de se faire payer par l'intimé, pour le service de l'aqueduc, le montant porté en son tarif ordinaire, et cela nonobstant un contrat fixant d'avance la somme que certains contribuables verseraient pour ce service. Ce contrat est intervenu dans les cas qui nous occupent entre les auteurs de l'appelante et l'auteur de l'intimé, et l'appelante prétend que l'intimé ne peut l'invoquer. Comme la question à décider ne se présente pas de la même manière dans chaque espèce, il sera préférable de les envisager séparément.

Première espèce. Les faits qui ont donné lieu à ce procès peuvent se raconter assez brièvement.

En 1912, Xavier Martin et Alfred Martin, l'intimé, étaient copropriétaires par indivis de deux terres dans le canton Caron qu'ils avaient achetées le 10 avril 1909, d'un nommé Napoléon Gagné.

Le 12 avril 1912, les nommés Alphonse Aubin et Georges Perron se mirent en société pour le terme de 99 ans, sous la raison sociale de "Aubin & Perron", pour la construction et l'exploitation d'un aqueduc dans les paroisses de St-Jérôme, Hébertville et Ste-Croix du Lac à la Croix. L'acte de société déclarait que le capital de cette société serait formé des sommes perçues des divers cultivateurs ou autres personnes qui, pour avoir l'eau à perpétuité, donneraient une somme variant avec la grandeur de leur terre, la base étant de $350 par lot de cent acres. Ce capital devait aussi comprendre les sommes perçues pour loyer de robinets et le montant que les associés devaient fournir par parts égales pour terminer la construction de l'aqueduc, si les fonds ci-dessus mentionnés n'étaient pas suffisants.

Après la formation de leur société, Aubin & Perron cherchèrent à se procurer le capital requis en obtenant des cul-

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Mignault J.

tivateurs une contribution en argent en considération du service de l'aqueduc projeté. A ces fins, le 26 mai 1912, ils signèrent avec quarante-cinq cultivateurs de St-Jérôme, d'Hébertville et de Ste-Croix un contrat devant notaire contenant les conventions suivantes, pour ne citer que celles qui importent à la décision de la cause. Aubin et Perron s'engagèrent à construire un aqueduc jusqu'à la limite des propriétés des parties de seconde part (les cultivateurs), à leur fournir l'eau à perpétuité et à entretenir l'aqueduc en bon état de réparations moyennant le paiement de $250 pour un demi-lot, de $300 pour trois quarts de lot, de $350 pour un lot de 100 à 135 acres, de $400 pour un lot et demi et deux lots avec une seule bâtisse, et de $500 pour deux lots bâtis et plus. Les cultivateurs s'engagèrent à verser cette somme et, à l'expiration de vingt-cinq années, à payer annuellement deux pour cent sur le montant de leur contribution. Il y avait défense pour les cultivateurs de dépenser l'eau inutilement ou de permettre de prendre l'eau à ceux qui n'y avaient pas droit. Parmi les parties de seconde part, Xavier Martin entreprit de payer la somme de $350, qu'il a effectivement versée, et de payer les deux pour cent après les vingt-cinq ans. Aubin et Perron déclarèrent hypothéquer l'aqueduc jusqu'à concurrence de $20,000 en faveur des parties de seconde part pour leur garantir le bon fonctionnement de l'aqueduc. Il n'est pas nécessaire, pour les fins de cette cause, de se prononcer sur la valeur de cette hypothèque portant sur un aqueduc projeté, qui, au demeurant, n'est pas décrit au désir de la loi.

Les sommes ainsi promises par les parties de seconde part se montent à $15,850, et nous verrons dans la cause de *La Compagnie d'Aqueduc du Lac St-Jean* v. *Fortin* qu'il y a eu d'autres contributaires.

Le 4 août 1916, Alfred Martin, l'intimé, achetait de Xavier Martin la part de ce dernier dans les deux terres qu'ils avaient acquises de Napoléon Gagné. Dans l'acte de vente il était déclaré que le vendeur transportait à l'acquéreur toutes ses parts dans la compagnie d'aqueduc Aubin & Perron.

Le 17 mars 1917, Georges Perron vendait à Euclide Perron tous ses droits dans la société Aubin & Perron.

Le 15 septembre 1917, la société Aubin & Perron vendait à l'appelante tous ses biens meubles et immeubles, et notamment l'aqueduc en question et ses accessoires, comprenant ses privilèges, droits et permis, pouvoirs hydrauliques, installations, concessions, systèmes d'aqueduc, servitudes actives, revenus, exploitations, choses et contrats dépendant de l'aqueduc appartenant à la dite venderesse dans le canton Caron, comté du Lac St-Jean, en rapport avec le dit aqueduc.

Le 14 mai 1923, l'appelant a intenté cette action contre l'intimé lui réclamant la somme de $358.45 pour service de l'aqueduc depuis le 31 août 1916. L'intimé en défense a invoqué le contrat signé par Xavier Martin, son copropriétaire.

Dans sa déposition, l'intimé déclare qu'il exploitait les deux terres en société avec Xavier Martin, qu'il avait fourni l'argent pour la part d'aqueduc acquise par ce dernier, qu'il était absent de la maison quand on a fait signer Xavier Martin, sans cela il aurait signé lui-même, et que la signature de celui-ci devait compter pour les deux.

Etant donné que l'appelante a acquis avec l'aqueduc les choses et contrats dépendant de l'aqueduc * * * en rapport avec le dit aqueduc,

ce qui mettait l'appelante à la place d'Aubin & Perron quant à ces contrats, et que Xavier Martin a transporté à l'intimé toutes ses parts dans la compagnie d'aqueduc Aubin & Perron, nous sommes d'avis que l'appelante a succédé aux obligations assumées par Aubin & Perron à l'égard de Xavier Martin, et que l'intimé a acquis les droits de ce dernier et peut exiger de l'appelante le service d'eau conformément aux stipulations du contrat du 26 mai 1912. Il y a de part et d'autre un lien contractuel, et il n'est pas nécessaire de se demander quelle est la nature du droit que le contrat a créé.

A l'audition, M. Belcourt, conseil de l'appelante, a prétendu que Xavier Martin aurait dû payer une plus forte somme que $350, les deux terres dont il était copropriétaire ayant une superficie supérieure à de 100 à 135 acres.

Ce moyen, soulevé pour la première fois à l'audition, ne peut être accueilli, et il ne peut être accordé à l'appelante, sur l'action telle que prise, un supplément d'indemnité. L'appelante demande que l'intimé soit condamné à lui payer le service d'eau d'après un tarif qu'elle a adopté; et l'intimé lui oppose le contrat du 26 mai 1912. Ce serait

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changer la nature de l'action que l'appelante a intentée que de lui permettre maintenant de faire valoir l'insuffisance de la contribution primitive de Xavier Martin. S'il y a eu erreur quant au montant de cette contribution, l'appelante n'est peut-être pas sans recours, nous ne nous prononçons pas sur ce point, mais elle devra exercer ce recours, s'il y a lieu, par une autre action.

L'appelant a aussi prétendu qu'il s'agit dans l'espèce d'un droit d'usage et partant incessible aux termes de l'art. 494 C.C. Nous croyons cette prétention absolument inadmissible.

L'appel est visiblement mal fondé et doit être rejeté avec dépens.

Deuxième espèce. Le cas de Joseph Fortin n'est pas d'une solution aussi facile.

En 1912, Joseph Guay était propriétaire de la terre au sujet de laquelle l'appelante réclame $449.20 de Fortin pour service de l'aqueduc depuis le 31 août 1914, conformément au tarif qu'elle a adopté pour ses abonnés. Le 25 août 1912, Joseph Guay et une vingtaine d'autres cultivateurs ont signé avec Aubin & Perron un contrat devant notaire par lequel, en considération du paiement de $175 par Joseph Guay, et d'autres sommes plus ou moins fortes par les autres signataires, le total étant de $3,790, Aubin & Perron se sont engagés à leur fournir et livrer l'eau à perpétuité. L'eau doit être conduite jusqu'aux propriétés des cultivateurs au moyen d'un maître tuyau et les raccordements jusqu'à ce tuyau sont aux frais des cultivateurs. Le contrat ne contient pas la clause de deux pour cent, au bout de vingt-cinq ans, comme dans le contrat analysé dans la cause d'Alfred Martin. L'acte, du reste, est moins complet que celui produit dans l'autre cause. On n'y trouve pas l'échelle des prix que les intéressés devaient payer, lesquels, dans le cas de Xavier Martin et consorts, étaient calculés d'après l'étendue de leurs terres. Il appert suffisamment cependant que la part contributive de chaque intéressé était réglée par la grandeur de son terrain. Cela devient évident quand on consulte la clause de l'acte de société d'Aubin & Perron où il est dit que la contribution des cultivateurs variera avec la grandeur de leurs terres. Et c'est du reste ce que reconnaît expressément, dans sa déposition,

Alphonse Aubin, gérant de l'appelante et membre de la société Aubin & Perron. Il était lui-même partie à l'acte du 25 août 1912, et il dit que la différence des prix dans cet acte était basée sur la grandeur des terres.

Le 28 août 1914, Joseph Guay vendit à Joseph Fortin, l'intimé, la terre au sujet de laquelle il avait fait le contrat du 25 août 1912, avec tous les animaux, voitures et instruments d'agriculture se trouvant sur la terre vendue, sauf certaines réserves qui sont sans intérêt dans cette cause. Par le même acte, Guay a vendu d'autres immeubles au père de l'intimé, le nommé Mars Fortin, et il y a une stipulation d'usufruit en faveur de Mars Fortin de la terre vendue à l'intimé. Il appert cependant, à la défense de l'intimé, que c'est lui qui se sert de l'eau et c'est de lui que l'appelante en réclame le paiement. La stipulation d'usufruit ne paraît donc pas affecter les droits des parties au procès.

Dans l'acte de vente de Guay à Fortin il n'y a pas, comme dans l'autre cause, cession expresse des droits résultant du contrat entre les cultivateurs et la société Aubin & Perron. Alphonse Aubin admet dans sa déposition que si Joseph Guay était demeuré propriétaire de sa terre, il ne lui aurait rien réclamé pour le service d'eau. Il dit que la compagnie reste engagée envers Joseph Guay, mais sa prétention est que Joseph Fortin ne peut réclamer le bénéfice de cette stipulation faite par son auteur, Joseph Guay.

Nous avons décidé dans l'autre cause que l'appelante a succédé aux obligations assumées par Aubin & Perron à l'égard des cultivateurs. Il reste à déterminer si le bénéfice de la stipulation faite par Joseph Guay peut être réclamé par son ayant cause à titre particulier, l'intimé, à qui ce bénéfice n'a pas été expressément cédé.

Il est clair que Joseph Guay a fait cette stipulation comme propriétaire de sa terre et au profit de celle-ci, puisque cette terre et les bâtiments y érigés devaient bénéficier de l'approvisionnement d'eau dont on ne pouvait se servir ailleurs. La stipulation que l'eau serait fournie à perpétuité le démontre, car un engagement perpétuel ne peut se concevoir qu'à l'égard de ce qui dure toujours. Du moment que Joseph Guay vend cette terre, il cesse d'avoir intérêt à l'approvisionnement d'eau, et partant ne peut plus le réclamer pour lui-même. Ce n'est donc pas un droit

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exclusivement personnel, ou attaché à sa personne, que Joseph Guay a acquis de la société Aubin & Perron. D'autre part, l'acheteur de cette terre, l'intimé, a la même prise d'eau ainsi que les mêmes chantepleures qu'avait Joseph Guay; il n'a fait que continuer la jouissance de ce dernier. Voilà donc une stipulation concernant l'approvisionnement d'eau à une terre et aux bâtiments y érigés faite par un propriétaire pour l'utilité de son fonds. Il vend ce fonds. L'acquéreur peut-il, sans une cession expresse, réclamer le bénéfice de cette stipulation?

Il le pourrait sans aucun doute s'il y avait servitude réelle. Mais, au sujet du contrat même dont il s'agit ici, la cour d'appel a décidé qu'il n'y avait pas eu création d'une servitude réelle: *La Compagnie d'Aqueduc du Lac St-Jean* v. *Tremblay* (1).

Les raisons qu'invoque le juge Rivard en rendant le jugement de la cour d'appel sont assurément bien graves, mais il importe peu que le droit au service de l'aqueduc au profit de la terre de Joseph Guay ait ou n'ait pas été acquis à titre de servitude, s'il est constant que le bénéfice de la stipulation passe à tout acquéreur de cette terre même sans une cession expresse.

On peut envisager le droit au service de l'aqueduc comme un droit accessoire qu'on ne saurait séparer de la terre qui en jouit, ou comme ayant été l'objet d'une stipulation faite par le propriétaire de cette terre et dont profiterait, comme son ayant cause, tout acquéreur subséquent de la terre.

Au premier point de vue, il suffirait de citer l'article 1499 C.C. aux termes duquel

> l'obligation de délivrer la chose comprend ses accessoires et tout ce qui a été destiné à son usage perpétuel.

Et si on envisage en elle-même une stipulation de ce genre, il semble qu'on peut lui appliquer l'article 1030 C.C. qui dit:

> On est censé avoir stipulé pour soi et pour ses héritiers et représentants légaux, à moins que le contraire ne soit exprimé, ou ne résulte de la nature du contrat.

La seule différence à noter entre cet article et l'article 1122 du code Napoléon, c'est que notre code emploie les mots "représentants légaux", tandis que le code Napoléon se sert de l'expression assurément plus française, "ayants cause".

(1) [1922] Q.R. 34 K.B. 188.

Il est clair cependant que les auteurs du code ne voulaient pas innover. Ils citent l'article 1122 C.N. et le copient textuellement, sauf la substitution de "représentants légaux" à "ayants cause" et de "contrat" à "convention". Dans leur rapport, ils disent qu'il n'y a, dans les quatre articles de la section V, que des changements d'expressions. D'autre part, les mots "représentants légaux" sont d'un sens équivoque. Ils sont évidemment d'origine anglaise, et on les trouve surtout au titre *Des obligations* (voy. les arts. 1028, 1030, 1085, 1113, 1122, 1123, 1127, 1128, 1129 et 1130 C.C.) qu'on peut croire avoir été rédigé d'abord en anglais, car c'est sous le texte anglais du rapport des rédacteurs du code que se trouvent les renvois aux autorités. Quelle portée peut avoir une telle expression quand elle est accompagnée du mot "héritiers"? Dans un sens, on peut se demander s'il y a d'autres "représentants légaux" que les héritiers, et "héritier" se dit de l'héritier légal comme de l'héritier testamentaire (art. 597 C.C.). Dans le droit anglais, ce mot est également un peu équivoque et s'interprète de diverses façons (Stroud, Judicial Dictionary, vo. "Legal representatives"). Dans le droit civil, on serait bien en peine de le définir, à moins de dire qu'il a le sens de "successeurs" ou "ayants cause". Il paraît évident qu'on peut l'interpréter d'une manière très générale ou d'une manière très restreinte, selon le contexte de l'article où il se trouve, comme du reste dans le cas des mots "successeurs" et "ayants cause". C'est ainsi que dans l'article 1028 C.C. il se confond avec "héritiers", car il est clair que nul ne peut engager un tiers sans son consentement. Dans l'article 1030 C.C., comme on peut toujours stipuler pour autrui, il faut ou bien entendre les "représentants légaux" largement, comme signifiant les ayants cause de toute catégorie, ou bien les confondre avec les héritiers et rendre ainsi l'expression surérogatoire ou inutile. Nous croyons qu'il serait téméraire de donner à l'article 1030 C.C. un autre sens que celui qu'on prête à l'article 1122 du code français. Pothier, comme nous le verrons, était d'avis qu'un ayant cause à titre singulier représente son auteur.

Cette interprétation de l'article 1030 C.C. est d'ailleurs conforme à la tradition. Pothier, le guide ordinaire des

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rédacteurs du code civil, surtout au titre *Des Obligations*, s'exprime clairement à ce sujet, Obligations, nos 67 et 68:

67. Ce que nous stipulons par rapport à une chose qui nous appartient, nous le pouvons valablement stipuler, non-seulement pour nous et nos héritiers, mais pour tous nos successeurs à titre singulier à cette chose, lesquels sont compris sous le terme *d'ayants cause*, usité dans les contrats; ce n'est point en ce cas stipuler pour un autre. * * * Par exemple, je puis valablement convenir "que vous ne ferez jamais valoir contre moi, ni contre mes héritiers ou *ayants cause*, les droits de la substitution qui pourrait être un jour ouverte à votre profit par rapport à un tel héritage"; et cette convention a effet, même par rapport à ceux qui acquerraient par la suite de moi cet héritage à titre singulier * * *

68. Dans cette convention et les autres semblables, que nous faisons par rapport aux choses qui nous appartiennent, non-seulement nous pouvons stipuler valablement pour nos ayants cause, mais nous sommes censés l'avoir fait, quoique cela ne soit point exprimé; soit que la convention soit concue *in rem*, comme lorsqu'il est dit par une transaction passée entre nous, "que vous vous engagez *à ne jamais faire valoir les prétentions que vous pourriez avoir par rapport à un tel héritage*," sans dire contre qui; soit que la convention soit conçue *in personam*, comme lorsqu'il est dit "que vous vous engagez *à ne jamais faire valoir contre moi vos prétentions par rapport à un tel héritage.*"

En l'un et l'autre cas je suis censé avoir stipulé pour tous mes successeurs, même à titre de donation. *Pactum conventum cum venditore, si in rem constituatur, secundùm Proculi sententiam, et emptori prodest.... Secundum autem Sabini sententiam, etiamsi in personam conceptum est, et in emptorem valet, qui hoc esse existimat, etsi per donationem successio facta sit;* L. 17, 5, ff. de *Pact.* La raison est qu'en stipulant *pour moi*, je suis censé stipuler pour tous ceux qui me représentent: or, non-seulement mes héritiers, mais tous ceux qui me succèderont médiatement ou immédiatement, et à quelque titre que ce soit, à l'héritage qui a fait l'objet de la convention, me représentent par rapport à cet héritage (Les italiques sont de l'auteur).

Au n° 69, Pothier donne un exemple qui se rapproche un peu de l'espèce qui nous occupe. Il suppose une convention faite avec le seigneur de n'exiger qu'une pistole lorsqu'un fief tomberait en rachat. Cette convention, dit-il, profiterait à un acquéreur à titre singulier.

Cette doctrine est suivie dans le droit moderne. Ainsi Aubry et Rau (5e édition), tome 2, p. 97, par. 176, disent:

Le successeur particulier jouit de tous les droits et actions que son auteur avait acquis dans l'intérêt direct de la chose corporelle ou incorporelle, à laquelle il a succédé, c'est-à-dire des droits et actions qui se sont identifiés avec cette chose, comme qualités actives, ou qui en sont devenus des accessoires.

On peut, du reste, consulter les autorités suivantes: Dalloz, Répertoire Pratique, *Verbo* Contrats et Conventions en général, nos 238 et suiv.; Baudry-Lacantinerie & Barde, Obligations, tome 1er, nos 223, 224, 225 et 226; Demolombe,

Contrats, tome 1er, nos 278 et suiv.; Paris, 8 juin 1889, Dalloz, 1899, 2.477, et surtout la note.

Ceux qui s'intéressent à cette question bien difficile de la transmissibilité aux ayants cause à titre singulier du bénéfice des stipulations faites par leur auteur, aimeront sans doute à lire un article que publie la *Revue Trimestrielle de Droit Civil* de 1924, p. 481. Cet article a pour auteur M. Jean Lepargneur et porte le titre: *De l'effet à l'égard de l'ayant cause particulier des contrats générateurs d'obligations relatifs au bien transmis.* A la page 504, l'auteur donne la même solution à une espèce qui est presque identique à celle dont il s'agit en cette cause.

Nous adoptons cette interprétation traditionnelle de l'article 1030 C.C. Nous n'ignorons pas que quelques commentateurs modernes restreignent beaucoup le champ d'application de l'article 1122 C.N. s'ils ne le rendent pas à peu près inutile. Nous préférons nous en tenir à la doctrine de Pothier, l'inspirateur de cet article. Il n'y a rien, du reste, dans le contrat dont il s'agit ici qui s'oppose à la transmissibilité du droit au service de l'aqueduc; ce droit, par sa nature, est transmissible à tout acquéreur de la terre et aurait pu être considéré comme une servitude réelle s'il y avait eu désignation d'un fonds dominant et d'un fonds servant (Baudry-Lacantinerie et Chauveau, Biens, n° 1075, et la note). Nous croyons donc que l'intimé peut invoquer le bénéfice de la stipulation faite par son auteur Joseph Guay à l'encontre de l'action de l'appelante lui demandant le paiement du montant exigible en vertu de son tarif pour l'approvisionnement d'eau.

L'approvisionnement d'eau a été payé d'avance par Joseph Guay. C'est tout comme si le propriétaire d'un immeuble payait d'avance la totalité d'un impôt qui aux termes du règlement qui l'impose est payable par versements d'année en année pendant un terme convenu. Il en serait de même d'une exemption de taxes accordée à une usine. Il est clair qu'un acquéreur subséquent de l'immeuble ou de l'usine (continuant à être exploitée comme usine) bénéficierait de ce paiement ou de cette exemption.

C'est tout ce qu'il est nécessaire de décider en cette cause. L'action de l'appelante demande paiement en vertu d'un tarif établi pour les abonnés de son aqueduc, et l'intimé

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invoque en défense le contrat intervenu entre son auteur et les auteurs de l'appelante. Cette dernière n'a pas attaqué le contrat pour la raison qu'il comporterait un engagement perpétuel. Nous n'avons donc pas besoin de nous prononcer sur la possibilité de faire un tel contrat; tout ce que nous décidons, c'est que, vu les stipulations de ce contrat, l'action de l'appelante ne peut être maintenue.

L'appel doit être rejeté avec dépens.

Appeals dismissed with costs.

Solicitor for the appelant: *T. L. Bergeron.*
Solicitor for the respondents: *A. Boulianne.*

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*Nov. 18.
*Dec. 30.

SAMSON & FILION (DEFENDANTS) ..... APPELLANTS;

AND

THE DAVIE SHIPBUILDING & REPAIRING CO. (PLAINTIFFS) ... } RESPONDENTS.

W. ZIFF (DEFENDANT IN WARRANTY) ..... APPELLANT;

AND

SAMSON & FILION (PLAINTIFFS IN WARRANTY) ..... } RESPONDENTS.

W. ZIFF (PLAINTIFF IN SUB-WARRANTY) ..... APPELLANT;

AND

BAKER & BETCHERMAN (DEFENDANTS IN SUB-WARRANTY) ..... } RESPONDENTS.

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

Sale—Vendor and Purchaser—Second-hand dealer—Latent defects—Accident—Liability—Presumed knowledge—Rebuttal—Contractual Warranty—Damages—"Foreseen"—Arts. 1053, 1056, 1074, 1075, 1522, 1526, 1527, 1528 C.C.

These actions arise out of the death of an employee of D. caused by an explosion of gun cotton in an iron "second-hand" pipe in the course of its being heated for use for the purpose for which it had been bought by D. from S. The order given was for "used pipes in good working condition." D. Submitted to a judgment in favour of the

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

representatives of its employee under the Workmen's Compensation Act for $2,560. D. sued to recover this sum from S.; in a second action S. claimed the same sum by way of warranty from his vendor Z., and in a third action Z. sought to recover by way of sub-warranty from his vendor B.

Held, that since no care which could reasonably be expected from the vendors would have disclosed the presence of the gun cotton, there was no delictual liability under Art. 1053 C.C.

Held, that a merchant-vendor, not the manufacturer, is legally presumed to know latent defects in the thing sold only where his calling imports a profession of skill or knowledge in regard thereto on which the purchaser might reasonably rely.

Held that a second-hand dealer is therefore not subject to the legal presumption of knowledge contained in par. 2 of Art. 1527 C.C. He is liable only to the extent indicated in Art. 1528 C.C., unless he had actual knowledge of the latent defect from which injury has arisen, or had some reason to suspect its existence, non-disclosure of which might amount to *dol.*

Held that the presumption of knowledge under par. 2 of Art. 1527 C.C. is rebuttable only by proof that the nature of the defect was such that its existence could not have been suspected by the vendor and that he could not have discovered it by any precaution he might reasonably be expected to take.

Held also that the damages claimed by D. from S. are not recoverable as resulting from a conventional or contractual warranty, as these damages could not "have been foreseen" by the vendor within the meaning of Art. 1074 C.C.

Judgment from the Court of King's Bench (Q.R. 37 K.B. 451) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court by which the action by the Davie Shipbuilding Co. was maintained against the appellants Samson & Filion, the action in warranty by Samson & Filion was maintained against the appellant Ziff and the appellant Ziff's action in sub-warranty against the respondents Baker & Betcherman was dismissed.

The material facts of the case are fully stated in the judgment now reported.

Antonio Langlais K.C. for Samson & Filion.

Belleau K.C. for The Davie Shipbuilding & Repairing Co.

Ryan K.C. and *Budyk* for Ziff.

Fripp K.C. and *Mayrand* for Baker & Betcherman.

(1) [1924] Q.R. 37 K.B. 451.

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Anglin C.J.C.

The judgment of the majority of the Court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—These actions arise out of the death of an employee of the Davie Shipbuilding Company caused by an explosion of gun-cotton in a 6-inch iron "second hand" pipe in the course of its being heated preparatory to the use of a "T" attached to it for the purpose for which it had been bought by the shipbuilding company. The company submitted to a judgment in favour of the representatives of their employee under the Workmen's Compensation Act for $2,560.

In the first suit they seek to recover this sum from Samson & Filion, from whom they allege they had bought the pipe in question, in Quebec, in April, 1919; in the second action Samson & Filion claim over, by way of warranty, from their alleged vendor, Ziff, on a sale made in Montreal, in March, 1919; in the third action Ziff seeks to recover similarly, by way of sub-warranty, from his alleged vendors, Baker and Betcherman, on a sale made in Ottawa, in February, 1919. The first two actions were maintained in the Superior Court and the third was dismissed. All three judgments were upheld on appeal.

Although it is suggested that the pipe in question was at one time in use in a munitions factory and that the presence of gun-cotton in it is thus accounted for, that fact is not established. It is common ground, however, that the explosive substance was in the pipe during all the time occupied in its passing through the hands of the several parties to these actions. It is also common ground that none of them up to the moment of the explosion had any knowledge of the fact that the pipe contained such a substance; nor does it appear that any of them (unless it be Baker & Betcherman) knew that the pipe had been used in, or had come from, a munitions factory.

While anybody even cursorily examining the pipes would probably have noticed white markings upon them, and on more careful investigation might have discovered a white powder in some of them, it is not contended that such a discovery would have given any reason to suspect that the white substance was in reality a dangerous explosive such

as gun-cotton. Indeed the presence of the white powder was noticed by the shipbuilding company's employees in small quantities in a number of the pipes which they handled, but was taken by them to be asbestos. The learned trial judge in discussing the facts says that, however vigilant or distrustful, no buyer of used iron pipe would imagine that it might contain a dangerous explosive. Mr. Justice Flynn, who delivered the principal judgment in the Court of King's Bench, while of the opinion that the vendors of the pipes must have noticed the white substance, is convinced that they had no suspicion of its being an explosive. These findings were not attacked, no doubt because they were regarded as unimpeachable. It seems clear that there was nothing to arouse any suspicion and that only a chemical analysis of the substance in the pipes would have revealed its dangerous character.

The learned trial judge dealt with the first two cases on the basis of delictual responsibility. The Court of King's Bench, on the other hand, treated them as falling within Art. 1527 C.C.—as cases in which there was a legal presumption of knowledge on the part of the vendors entailing the consequences of actual knowledge, i.e., responsibility for all the damages sustained by the purchasers. Consequently Samson & Filion were held liable to the Davie Shipbuilding Company and Ziff to Samson & Filion. Ziff's action against Baker & Betcherman failed in both courts for lack of proof that the pipe in question was one of those bought by him from them.

Samson & Filion v. *Davie Shipbuilding Company*

The plaintiffs in this action rest their claim on three distinct bases:—

(*a*) delictual fault (Art. 1053 C.C.),

(*b*) breach of legal warranty against latent defects (Art. 1522 C.C.) coupled with a legal presumption of knowledge of such defects (Art. 1527 C.C.), and

(*c*) breach of conventional warranty.

The finding of the trial judge that the pipe in which the fatal explosion occurred was one of the lot sold by Samson & Filion to the Davie Shipbuilding Co., affirmed by the Court of King's Bench, could not, upon the evidence, be seriously questioned.

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On the argument it was suggested that the plaintiffs had been subrogated to the rights of the representatives of their employee who was killed. To their right under the Workmen's Compensation Act there could be no effective subrogation. Any claim such representatives might have had under Art. 1056 C.C.

against third parties responsible for the accident

(R.S.Q. Art. 7334) was never preferred and there has been no assessment of damages on that footing; nor was there any discussion of such a claim in this action. The plaintiffs' declaration makes no allusion to it. That ground of claim may, therefore, be dismissed without further consideration.

(*a*) It may also be said at once that, in our opinion, the facts in evidence fall far short of what would suffice to warrant a finding of failure to take such reasonable care as would involve delictual fault entailing liability under Art. 1053 C.C. The learned Chief Justice indeed negatived that basis of liability when he said:

quel acheteur, fut-il le plus vigilant, le plus averti ou le plus méfiant, ira se douter que des tuyaux de fonte puissent contenir un explosif dangereux?

Delictual fault as a basis of liability was properly rejected by the Court of King's Bench.

(*b*) That court, as already stated, held the appellants liable for a breach of the warranty against latent defects imposed by Art. 1522 C.C. and responsible

for all (the) damages suffered by the buyer

as vendors against whom there was a legal presumption, under Art. 1527 (2), of knowledge of a latent defect which caused such damage.

It may be arguable that what is invoked as a conventional warranty given by the appellants, presently to be dealt with, superseded any legal warranty under Art. 1522 and that the claim based on Arts. 1522 and 1527 C.C. would be thereby precluded. But the Court of King's Bench did not take that view, and, as they have rested their judgment on those articles, it will probably be better first to deal with that basis of liability as if there had been no conventional warranty—especially since what is to be said in this case on that assumption will also apply to the case of *Ziff* v. *Samson & Filion*, where there is no suggestion of conventional warranty.

Arts. 1527 and 1528 C.C. read as follows:—

1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.

He is obliged in like manner in all cases in which he is legally presumed to know the defects.

1528. If the seller did not know the defects or is not legally presumed to have known them, he is obliged only to restore the price and to reimburse to the buyer the expenses caused by the sale.

The corresponding articles of the Code Napoléon, 1645 and 1646, are:—

1645. Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix qu'il en a reçu, de tous les dommages et intérets envers l'acheteur.

1646. Si le vendeur ignorait les vices de la chose, il ne sera tenu qu'à la restitution du prix, et à rembourser à l'acquéreur les frais occasionnés par la vente.

Notwithstanding the omission of the second paragraph of Art. 1527 C.C. from Art. 1645 C.N., and the corresponding omission from Art. 1646 C.N. of the words,

or is not legally presumed to have known them,

found in Art. 1528 C.C., the French authorities are agreed that there exists in French law a presumption similar to, if not identical with, that indicated in the second paragraph of Art. 1527 C.C. and that cases within that presumption fall under Art. 1645 and not under Art. 1646 C.N. French text-writers and jurisprudence are, therefore, helpful in determining the scope of, and the limitations upon, the application of paragraph 2 of Art. 1527 C.C., with which we are presently concerned—the more so since the codifiers cite Pothier, *Vente,* 212-3, and *Obligations,* 163, and Domat, Liv. I, tit. II, s. XI, No. 7, as the basis of Art. 1527 C.C., Laurent (v. 24, No. 294) informs us that Arts. 1645-6 C.N. are likewise derived from Pothier.

(1) *Ex facie* it is not every seller who is in fact ignorant of defects in the thing sold by him who comes within the second paragraph of Art. 1527 C.C., but only such vendors as are "legally presumed to know." Since the code does not enumerate or otherwise define the vendors to whom this presumption attaches, we are driven to the common law to ascertain who they are.

(2) Also *ex facie* the presumption is *juris tantum* and not *juris et de jure.* Hence it is rebuttable but by what proof is again a question for careful consideration.

Moreover, although the liability under Art. 1527 C.C., as under Art. 1645 C.N., is stated to be for

all damages suffered by the buyer,

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the damages recoverable are necessarily subject to some restrictions. The basis of the liability under Art. 1527 C.C. is *dol* actual or presumed. The code provides that even where the inexecution of an obligation is due to fraud of the obligor, only the damages immediately and directly resulting therefrom (Art. 1075 C.C.) can be recovered. It would also seem clear that when an article is sold for a definite purpose and is put to some other use entailing greater loss the damages attributable to a latent defect which may be recovered by the buyer under Art. 1527 C.C. may not exceed those that would have been suffered had it been used as intended. (Pothier, *Vente,* No. 214). That is merely an application of the principle underlying Art. 1074 C.C. Whether when the sale is not for any definite purpose, but is of an article the ordinary use of which is well established, and the buyer puts it to some extraordinary use, he can recover under Art. 1527 C.C. to the extent to which his loss is aggravated by reason of such extraordinary use may perhaps be more doubtful. Pothier's view is against such recovery. (*Vente,* 214). Laurent, (v. 24, No. 295 *in fine*), however, suggests that where knowledge of a defect by the vendor is presumed all the resultant loss to the purchaser may be regarded as within the ordinary rule governing damages, the foreseeable damages (Art. 1074 C.C.) in such a case being much more comprehensive than in the case of an " ordinary vendor."

But we are not presently concerned with the limitations on the amount of damages recoverable and they are alluded to merely to indicate that Art. 1527 C.C., notwithstanding the comprehensiveness of its terms, is subject in its application to some restrictions. The damages suffered by the shipbuilding company were undoubtedly the direct and immediate result of the presence of the gun-cotton in the pipe sold to it by the appellants. That pipe was not put to any extraordinary use or subjected to any unusual treatment and, while the buyers gave a written order for the articles they required, specifying the quantity of each size of pipe (thus indicating that they were acquired for immediate use and for some definite purpose), there is no evidence that that purpose was communicated to the vendors, or, if it was, that the pipes were put to a use not contemplated by them.

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(1) Whether the vendors in the present instance, their ignorance in fact of the presence of the gun-cotton in the pipe which they sold having been conceded and knowledge of anything which should have aroused suspicion as to its presence having been negatived, (Pothier, *Vente*, 212; Laurent, v. 24, no. 295), were sellers who should be presumed to have had knowledge of that "defect" may next be considered.

Without so deciding, we shall assume, as was held by the Court of King's Bench, that the presence of the gun-cotton in the pipe in which it exploded, although an extraneous substance, was a defect within Art. 1527 C.C.

The buyers were not seeking either resiliation or compensation for diminished value as provided by Art. 1526 C.C. In pursuing those remedies it would have been unnecessary to establish either knowledge or presumption of knowledge of the defect. But, claiming, as they do, under Art. 1527 C.C., and not averring actual knowledge, it becomes a vital question whether on such a sale as that under consideration—a sale of second-hand pipes by a second-hand dealer—a legal presumption of knowledge by the seller of any latent defect in them arises under the second paragraph of that article.

We naturally turn to Pothier for the principles which must govern this inquiry. He distinctly excludes from the legal presumption of knowledge the vendor who is neither the maker of the goods sold nor a merchant.

> Hors ces cas d'un ouvrier ou d'un marchand, le vendeur qui n'a eu ni la connaissance, ni aucun juste soupçon du vice redhibitoire * * * n'est aucunement tenu du dommage que ce vice a causé à l'acheteur dans ses autres biens. (*Vente*, 215).

Upon this exclusion of the "ordinary vendor" all the text-writers are in accord. Such a vendor is on the same footing as to presumed knowledge and means of knowledge as the buyer. In the absence of conventional warranty the latter will not be justified in relying on the skill or knowledge or means of knowledge of the former. Art. 1527 C.C. cannot be invoked; the only remedies are those provided by Arts. 1526 and 1528 C.C.

Equally distinctly Pothier declares that the manufacturer or artisan who sells his own product is invariably presumed to know of defects in it and to be liable for damages caused by them to purchasers on the same footing

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as if he had actual knowledge of such defects. (*Vente*, 213; *Oblig*, 163). Here again the commentators are in accord. (Guillouard, Vente, 463; Baudry-Lacantinerie, Vente, 436). Indeed the codifiers of the Quebec Code, in their fourth report, at p. 14, give as an instance of legal presumption of knowledge under para. 2 of Art. 1527 C.C.,

> mechanics, who would be presumed to know defects in the quality of the materials used by them in their trade.

The extent and the force of the presumption in such a case is exemplified in *Ross* v. *Dunstall* (1); see *Wilson* v. *Vanchestein* (2); *compare Société Prométhée* c. *Tonna* (3).

It is important to note, however, the nature of the presumption and the basis on which Pothier rests it (*Oblig.* 163, par. 2). It is not a presumption of fault as some French writers seem to opine (Mourlon, no. 607; Guillouard, *Vente*, no. 463; D. Rep. Vices Redhib. 160). It is a presumption of knowledge which Art. 1527 (2) declares and which such a vendor as *un homme du métier* will not be allowed to deny. (Guillouard, *Vente*, no. 463). Against him there is a *fin de non-recevoir* which precludes his alleging a belief that the article sold was free from defects since that would be to aver as a defence what must be imputed to him as a fault, *imperitia culpae annumeratur*, (Pothier, Louage, 119). In such a case the vendor has opportunities of knowledge not open to the purchaser and it is only natural and to be expected that the purchaser should rely upon him for disclosure of latent defects. Hence the presumption of knowledge and its consequences.

We come now to a more debatable case, that of the merchant selling goods not made by himself. Is every such merchant subject to a presumption of knowledge of defects, or does it arise only where from the nature of his business he may reasonably be said to profess possession of it, and a purchaser from him may fairly act on the assumption that he has it? The authorities are in accord that in the case of a merchant-vendor who deals in a definite class of goods in regard to which he may reasonably be supposed to possess skill and special knowledge—*un marchand qui vend des ouvrages * * * du commerce dont il fait*

(1) [1922] 62 Can. S.C.R. 393. (2) [1897] Q.R. 6 Q.B. 217.
(3) [1914] 1 Dalloz Rec. Heb. 433.

profession, (Pothier, Vente, 213); *un marchand faisant le commerce de choses pareilles,* (Baudry-Lacantinerie, Vente, no. 436); *qui n'est pas en effet un vendeur ordinaire,* (D. 73, 2.56)—knowledge of latent defects will be presumed. Such merchants are classed amongst those who are legally presumed *par profession* to know the latent defects in their wares (5 Aubry et Rau, p. 113), and therefore held to be within Art. 1527 C.C. *Beaver Oil Co.* v. *Véronneau* (1); *Lajoie* v. *Robert* (2); 7 Mignault, p. 213; 3 Langelier, p. 526.

Although many French text-writers broadly assimilate the case of the merchant to that of the manufacturer or workman and use terms quite wide enough to include any sort of merchant-vendor (Guillouard, Vente, no. 463, *in fine*), others, more discriminating, confine the application of the presumption of knowledge, or, as some of them put it, of fault, to merchants of whom it may in a certain sense be said that their business is their profession—"*le commerce dont ils font profession.*" For the wider application of the presumption the concluding paragraph of no. 213 of Pothier's treatise on *Vente* is invoked as authority. That learned writer having dealt in the preceding paragraph with the liability of the workman whose lack of skill or knowledge of things concerning the art he professes to exercise is imputed to him as a fault, opens the concluding paragraph with the general statement *il en est de même d'un marchand fabricant ou non-fabricant.* But he had already in the first paragraph of the same section (no. 213) restricted the application of the presumption to *un marchand qui vend des marchandises du commerce dont il fait profession* and had added *ce marchand est tenu de la reparation de tous les dommages,* etc. As an illustration he had put on the same footing the cooper (*le tonnelier*) and the merchant who deals in casks (*le marchand de tonneaux*), assigning as the reason for the liability of each

son impéritie ou défaut de connaissance dans tout ce qui concerne son art, est une faute qui lui est imputée, personne ne devant professer publiquement un art, s'il n'a toutes les connaissances nécessaires pour le bien exercer: *Imperitia culpae annumeratur.*

In no. 215 he contrasts with these the case of a purchase of casks from a vendor who is neither a cooper nor a dealer

(1) [1923] 29 Rev. Leg. N.S. 106. (2) [1916] Q.R. 50 S.C. 395.

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in casks, and whose liability is accordingly restricted to the restitution of the price (Art. 1526 C.C.) The restriction of the presumption of knowledge to a vendor who may be regarded as *un homme du métier* is emphasized in the treatise on *Obligations* (no. 163), where Pothier illustrates it by the case of a sale of defective wood by a carpenter entailing full liability, whereas on a like sale by a person not *un homme du métier,* but an " ordinary vendor," the damages recoverable by the purchaser are confined to a reduction in price. See also Pothier, *Louage,* 119. Since the Codifiers indicate the texts of Pothier, *Vente,* 213, and *Obligations,* 163, as the basis of Art. 1527 C.C. it seems reasonable to hold that the vendors who will be " legally presumed to have known " latent defects for the purpose of par. 2 of that article are only those to whom lack of knowledge would be imputable as fault—those on whose skill or knowledge, because their calling imports possession of it, a purchaser would be justified in placing, and might be expected to place, reliance. It is not, therefore, surprising to find that in the French cases in which merchant-vendors actually ignorant of defects in articles sold by them have been held liable under Art. 1645 C.N. on the footing of presumed knowledge or of fault, attention is generally directed by the courts to the special skill or knowledge which their public carrying on of a particular line of commerce imports. *Spondet peritiam artis* is the underlying principle of liability. Guillouard, (*Vente,* no. 463) puts the basis of responsibility in such cases in these words:

Le vendeur devait, à raison de la profession qu'il exerce, connaître les défauts, même cachés, de la chose qu'il vend;

Pothier (*Vente,* no. 213) as already stated, refers to the "*marchand qui vend les choses du commerce dont il fait profession.*" For a few instances in which the courts have indicated the profession of special skill or knowledge on the part of the merchant-vendor as the basis of his liability under Art. 1645 C.N. (Art. 1527 (2) C.C.), reference may be made to D. 1912, 1. 16 and note; D. 1894,2.573,574 Pand. Fr. Pér. 1892. 2.169; D. 1873,2.55; D. 1863,2.27; *Lajoie* v. *Robert* (1).

But it sometimes happens that, although the appellation merchant may not improperly be given to the vendor, he

(1) Q.R. 50 S.C. 395, at p. 400.

does not deal in the goods sold by him in such a way that they can fairly be said to be *des ouvrages du commerce dont il fait profession.* The business he carries on does not import public profession of any special skill or knowledge in regard to his wares on which a customer might be expected to rely. To such a merchant-vendor the presumption of knowledge does not attach. *Cessante ratione legis cessat et ipsa lex.*

Is there any tenable ground for imputing a profession of skill or knowledge in regard to the wares he sells to the second-hand dealer in scrap pipes or similar material? Can a purchaser reasonably claim that he relied on such a vendor's possession of such special skill or knowledge? In our opinion, assuredly not. In his case, therefore, the basis of responsibility—professed skill or knowledge, on which the imputation of actual knowledge rests—is lacking. The second-hand dealer must, for the purposes of Art. 1527 C.C., be regarded as an "ordinary vendor," not subject to the legal presumption of knowledge under par. 2 of Art. 1527 C.C. and therefore liable only to the extent indicated in Arts. 1526 and 1528 C.C., unless indeed he had actual knowledge of the latent defect from which injury has arisen or had some reason to suspect its existence, non-disclosure of which might amount to *dol.* D. 1873. 2. 55.

A fortiori is this so where, as in the case of the sale by Ziff to Samson & Filion, both vendor and purchaser are second-hand dealers. They stand on an equal footing as to the possession of skill and have equal opportunities of ascertaining any latent defects. Writing recently in 22 La Revue Trimestrielle, at p. 648, M. Réné Demogue says:

> Lorsqu'un professionel passe un contrat, ses obligations sont plus ou moins étroites selon qu'il traite avec une personne de profession voisine, ayant des connaissances spéciales égales aux siennes, ou non.

(II) By what proof is the presumption of knowledge under Art. 1527 (2) C.C. rebuttable? Certainly not, as some writers seem to suggest, (Baudry-Lacantinerie, *Vente,* no. 436 *in fine;* Dalloz, Nouveau Code Civ. Art. 1645, no. 28), merely by proof, however cogent, that the vendor was in fact ignorant of the defect. The hypothesis of the second paragraph of Art. 1527 C.C. is that very ignorance. But there are many cases in which, if the presumption would otherwise have arisen, the circumstances show that know-

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ledge by the vendor was impossible and common sense demands that he should be held free from liability. An instance that at once occurs to the mind is that of a sale by a retail grocer of goods put up by the manufacturer in sealed packages. If such goods should contain some foreign deleterious substance, while the manufacturer might have difficulty in escaping responsibility, it would be absurd to hold the retail vendor liable under Art. 1527 (2) C.C. The circumstances peremptorily rebut any presumption of knowledge by him.

The presumption made in the French law is regarded as rebuttable by proof that the defect was of such a nature that the vendor could not have discovered it; Baudry-Lacantinerie, *Vente*, no. 436; Guillouard, *Vente*, no. 463 *in fine;* Dalloz, Jur. Gén. Vices Redhib. 160; Pand. Fr. Rep. Vices Redhib. no. 344. In the work of Mr. Justice Mignault, (vol. 7, p. 113) the opinion expressed is that proof that discovery of the vice was impossible, notwithstanding *les précautions minutieuses*, will suffice. Vid. D. 59. 2. 153,155. We are inclined to the view that the presumption of knowledge, for such it is, created by par. 2 of Art. 1527 C.C. is rebuttable by proof that the nature of the defect was such that its existence could not have been suspected by the vendor and that he could not, by any precaution which he might reasonably be expected to take, have discovered it, and that, having regard to the findings of fact made by the learned trial judge and by Mr. Justice Flynn, above noted, liability in the present case under Art. 1527 C.C. should on that ground be held not to have been established. Both because they are not vendors against whom a legal presumption of knowledge of latent defects would arise and also because, on the evidence, no care which could reasonably be exacted from them would have disclosed the fact that the pipes they sold contained a dangerous explosive, we are, with deference, of the opinion that in respect of any purely legal warranty, liability under Art. 1527 (2) C.C. does not attach to the appellants Samson & Filion.

(*c*) There remains for consideration what the plaintiffs (respondents) prefer as a conventional warranty. The order given by them to the appellants for the pipes in question was for "used pipes in good working condition." The plaintiffs aver that by accepting and filling an order drawn

in those terms the appellants warranted that the pipes they supplied were in condition for immediate use by the purchasers in an ordinary way, and that any condition, such as the presence of an explosive substance in them, that would render them unfit for such use would amount to breach of conventional warranty and would entail liability for all damages directly resulting.

Whatever obligation the vendors incurred arose out of their acceptance of the order in the terms in which it was couched. They certainly undertook to furnish pipes answering the description given and are subject to whatever liability inexecution of their contractual obligation entails. That liability is subject to the limitation imposed by Art. 1074 C.C., which reads as follows:

1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen (qu'on a pu prévoir) at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

Were the damages suffered by the respondents as a result of the explosion foreseen or foreseeable within the meaning of this article? That they were not actually foreseen is clear. Whether they should be regarded as damages which "might have been foreseen" depends on the purview of that phrase as used in the article, which is in *ipsissimis verbis* as Art. 1150 C.N. The codifiers references under Art. 1074 are to Pothier, *Vente*, 72-3; *Obligations*, 165; Domat, Liv. I, tit. I, s. II, 17-18; and 6 Toullier, 284 *et seq.* In their report (p. 18) they state that the group of articles which comprises Art. 1074 embodies the rules contained in the French code and declares the existing law. The text of Domat throws no light on the question presently before us. Toullier says that, however immediately or directly the damages flow from the inexecution of the obligation, they will not be recoverable if they could not be foreseen. He adds that if the cause of the occurrence which entails loss to the buyer was known to the seller (no doubt meaning was known or ought to be held to have been known), he will be liable for all the damages sustained since he is deemed to have been willing to make them good.

Pothier (Oblig. no. 160) says:

Lorsqu'on ne peut reprocher au débiteur aucun dol, et que ce n'est que par une simple faute qu'il n'a pas exécuté son obligation; soit parce qu'il s'est engagé témérairement à ce qu'il ne pouvait accomplir, soit parce

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qu'il s'est mis depuis, par sa faute, hors d'état d'accomplir son engagement; dans ce cas, le débiteur n'est tenu que des dommages et intérêts qu'on a pu prévoir, lors du contrat, que le créancier pourrait souffrir de l'inéxecution de l'obligation; car le débiteur est censé ne s'être soumis qu'à ceux-ci.

After pointing out that, ordinarily, foreseeable damages are restricted to those which are intrinsic—*par rapport à la chose même*—and do not extend to extrinsic loss, i.e. to that sustained by the obligee *dans ses autres biens* (Oblig. no. 161; *Vente* 72), Pothier adds that sometimes extrinsic damages are recoverable (no. 162), giving as one example a case where an express provision of the contract anticipated the very occurrence which occasioned the loss; and as another a case where the object of the purchase was made known to the vendor and its frustration entailed loss of business by the purchaser. (See also *Vente,* no. 73). In the former the cause of the damage, in the latter the kind of damage suffered was foreseen. In no. 163 (*Oblig.*) he deals with a case in which knowledge of the cause of the damage imputed to *un homme du métier* affords a ground for holding him liable for extrinsic loss—limited, however, to the risk which the circumstances showed he contemplated undertaking. *Vide* Delvincourt, Notes, no. 2, p. 532. Marcadé (v. 4, no. 523) seems to regard the distinction between intrinsic and extrinsic loss as futile, the sole question, he says, being whether the prejudice suffered should have been foreseen.

With the exception of Aubry et Rau (v. 4, p. 308, note 41), the authorities seem to be in accord that the effect of Art. 1150 C.N. is to exclude the recovery of extrinsic damages of which the cause could not have been foreseen at the time of making the contract. (Dal. Rep. Prat. Obligations, nos. 461-2; Gaz. du Palais, 1902, pp. 6-9; 5 Mignault, pp. 419-420; 3 Langelier, pp. 524-6; 5 Labori, Rep. du Dr. Dommages-Intérêts, no. 50; 16 Laurent, 289-293; Demolombe, *Contrats,* 578 *et seq;* 10 Duranton, 470 *et seq;* 7 Huc. pp. 211-12; 5 Demante, 66, *bis* III.) Aubry et Rau (loc. cit.) would further restrict the recovery under Art. 1150 C.N. to compensation in respect of such injury and loss as might themselves have been foreseen.

In the present case, as already indicated, neither the occurrence from which the respondents' loss resulted, nor the cause of that occurrence, nor the nature and extent of

the damages it entailed could have been foreseen by the appellants. If, therefore, the case should be regarded as merely one of inexecution of the vendors' contractual obligation which arose from their acceptance of the order to furnish the goods answering the description "in good working condition," the damages which the plaintiffs claim are not recoverable.

If, however, the words "in good working condition" in the respondents' order should be regarded as something more than descriptive of the quality of the pipes to be supplied, and the acceptance of such an order should be deemed to import some warranty that the pipes furnished pursuant to it were in a condition suitable for immediate use, (*Lamer* v. *Beaudoin* (1)), any obligation in damages arising out of a breach of that warranty would, in our opinion, be subject to the limitations either of Art. 1074 C.C. or of Art. 1528 C.C. Those limitations in such a case as this do not materially differ. Under Art. 1074 C.C. recovery is restricted to damages foreseeable, because only for them is liability impliedly assumed by the obligor. Under Art. 1528 C.C., if it be applicable, recovery is confined to such compensation as is allowable where all fraud or *dol*, actual or imputable, is excluded.

No doubt, by an instrument clearly expressing, or necessarily implying, such an intention, liability may be assumed for all damages consequential upon a breach of contractual obligation, though they be unforeseeable and should arise from a cause of which there is no knowledge either actual or presumable. *Modus et conventio vincunt legem.* But, in view of the fundamental distinction in regard to the measure of the damages recoverable established by the civil law between cases of *dol* or fraud, on the one hand, and those of innocent breaches of contractual obligations, on the other, the intention, in a case falling within the latter class, to assume the wider responsibility imposed by law in cases of *dol* or fraud will not be lightly imputed.

In the present case fraud is not suggested, and, as already stated, there is no basis for any imputation of *dol* arising from presumed knowledge. The occurrence which occasioned the damages and its cause were alike unforeseen and unforseeable.

(1) [1923] Can. S.C.R. 459.

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Viewed as in the nature of a warranty arising out of their acceptance of the order for pipes "in good working condition," the obligation of the vendors would no doubt be conventional in its origin. It would accordingly not be confined to latent defects properly so called. The presence of a foreign substance in the pipes rendering them unfit for use would be a breach. Failure by the purchasers to make such inspection before using the pipes as, having regard to their description as "used pipes," ordinary prudence would, in the absence of such a warranty, have dictated, would not avail the vendors as a defence, even had the defect which caused the damage been readily discernible. But the warranty would, nevertheless, be implied by law rather than expressed and the obligation would attach to the appellants in their character as sellers. Arising, as it does, out of a stipulation incident to a contract of sale, whether express or implied, that obligation would, therefore, seem to be subject, as to the extent of the responsibility in damages which it entailed, to Arts. 1527-8 C.C. *Lamer v. Beaudoin* (1). We find nothing in the terms of the order indicative of an intention on the part of the contracting parties that the vendors should renounce the restriction on the measure of damages afforded by Art. 1528 C.C. and assume the wider responsibility attached by the law only to cases of fraud or *dol.* (Pand. Fr. 1892. 2. 169). The right to recover the damages claimed in this action on the ground of conventional warranty, therefore, in our opinion cannot be maintained.

For these reasons the appeal of Samson & Filion against the judgment condemning them must be allowed.

Ziff v. *Samson & Filion*

The dismissal of the action against Samson & Filion necessarily destroys the basis of their claim in warranty against their vendor Ziff.

Moreover, there certainly was nothing in the nature of a conventional warranty on Ziff's sale to Samson & Filion. On the contrary, in shipping the pipes he sold Ziff was careful to describe them in the Bills of Lading merely as "car pipes scrap" and in the invoice as "78,700 pounds pipe."

(1) [1923] Can. S.C.R. 459.

Neither was the use to be made of the pipes known when he effected the sale.

That the pipe which exploded was one of the pipes sold by Ziff to Samson & Filion is clearly established by the evidence. If the principal action had been maintained we would thus have been confronted in the action against Ziff with a sale of second-hand pipes, without either express warranty or express exclusion of warranty, by one dealer in that class of goods to another. Responsibility for the damages claimed was in the Ziff case rested by the plaintiffs either on delictual fault or on a breach of implied warranty entailing liability under Art. 1527 C.C. For the reasons stated in the Samson & Filion case, liability on neither ground was incurred by Ziff. Indeed, so far as responsibility under Art. 1527 C.C. is concerned, as already stated, he would appear to be in even a better position with regard to Samson & Filion than they were in regard to their purchasers, the Davie Shipbuilding Company, since both Ziff and Samson & Filion were dealers in second-hand pipes and therefore each had, or ought to have had, equal skill and equal opportunities for ascertaining any latent defects in them.

The appeal of Ziff against the judgment condemning him must also be allowed.

Ziff v. *Baker & Betcherman*

The evidence in this action would not justify a reversal of the concurrent findings of the Superior Court and of the Court of King's Bench on the question of identification which is purely one of fact. Moreover, as we think the action against Ziff not maintainable, the basis of his claim in warranty disappears. It is unnecessary, therefore, to consider the contention of counsel for Baker & Betcherman that their liability would depend upon and be excluded by Ontario law. *Jones* v. *Just* (1).

The appeal in Ziff v. Baker & Betcherman fails.

IDINGTON J. (dissenting).—

Samson & Filion v. *Davie Shipbuilding Co.*

The respondent having bought from appellant certain pipes the former needed in its business, which is that which

(1) [1868] L.R. 3 Q.B. 197.

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its name implies, proceeded to make use of them and, in course thereof, an explosion ensued which resulted in the death of one of its employees. As a result thereof the legal representatives of said deceased, were awarded, under the Workmen's Compensation Act of Quebec, damages to the amount of $2,560 against respondent herein.

The respondent paid such damages and costs, and then sued the appellants, who had, in selling said pipes to the respondent, represented them as in good working order, when in fact they were not, but liable, by reason of some material inside same, to produce such an explosion as took place, as already stated. On the trial of said action the learned trial judge found appellants liable and gave judgment for said damages with costs.

From that judgment appellants appealed to the Court of King's Bench, and that appeal was dismissed with costs.

This is an appeal therefrom taken, I infer from the appellants' factum, as a precautionary measure awaiting the result of an action they had brought against one Ziff, from whom they had bought said pipes.

I see no ground for the appeal and think same should be dismissed with costs.

The foregoing was written by me several weeks ago and now I have given me a copy of the judgment of the learned Chief Justice of our court, allowing the appeal with costs, and which I have read with care.

I am, however, unable to change my views expressed in the foregoing; especially seeing that the learned trial judge was the Honourable Chief Justice, Sir F. X. Lemieux, of the Superior Court for the District of Quebec, who entered judgment for the now respondent for the amount claimed, and was upheld by the unanimous judgment of the Court of King's Bench at Montreal, consisting of Chief Justice Lafontaine and four others, said court, however, resting upon article 1527 of the Civil Code, instead of a *quasi delict* —as they seem to think the learned judge had done.

Moreover, the factum of counsel for the appellants for the appeal here does not attempt seriously to argue that said courts erred.

Indeed, as I suggested in my foregoing notes, it seemed to be a matter of practical expediency in view of their claim

over against Ziff, and ended by presenting the following suggestion:—

Appellants had no defence to the action taken by respondent but that negligence of respondent's employee and the fact that they had bought the pipes from Wm. Ziff whom they called in warranty. It is true that defendant in warranty Ziff did not take their place and stead. It is also true that the principal action was one trial and the action in warranty was another, but in those actions in warranty should not the person responsible for the fault be also held responsible for all the costs? The ruling of the Superior Court is to this effect.

Appellants were satisfied with the judgment of the Superior Court. It is only upon defendant in warranty's inscription of his case before the Court of King's Bench that they appealed from the judgment of the Superior Court in the event and only event that the Court of King's Bench would modify the ruling of the trial judge. It is only upon defendant in warranty's inscription before this court that appellants inscribed their case, to see that, somebody having to pay, they shouldering only other people's responsibility, should not be compelled or should have a recourse against someone.

Ziff v. *Samson & Filion*

This appellant (having failed in the action taken by respondent against him in the courts below seeking relief by way of action in warranty, in respect of the pipes sold by respondent to the Davie Shipbuilding & Repairing Company Limited, out of which sale and actual warranty so much litigation has arisen) appeals here.

His appeal here in his action against Baker and Betcherman, I had for my part disposed of by writing my opinion at the same time as I had written in the Samson & Filion appeal; holding that his said appeal should be dismissed.

His liability on the alleged warranty to Samson & Filion, I by no means could hold clear, either on the facts or the law, and I concluded to await the decisions of the Chief Justice and my brother judges.

The learned Chief Justice having sent me a copy of his judgment dealing with all three appeals, I see little hope of anything therein for respondent's recovery against this appellant.

It has always seemed to me very difficult to hold this appellant liable, for he was selling only scrap, whereas Samson & Filion were selling pipes (which by no means was of the scrap order), though picked out of a mass of what had been sold to them as scrap.

If they had only taken due care to clean them thoroughly their express warranty of their being in good working order

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would have been, I have no doubt, quite justifiable, and been justified.

The appellant in the result, of course, is entitled to succeed, with costs throughout.

Ziff v. *Baker & Betcherman*

The appellant carried on the business of an iron merchant in Montreal, in 1919.

There was an incorporated company known as the Davie Shipbuilding and Repairing Company, Limited, which, during said year, carried on the business which said name implies, at Quebec.

There was a firm called Samson & Filion, at the same time in Quebec and, amongst other things, they dealt in second-hand goods out of which they sold, in March, 1919, a quantity of iron pipe of three different dimensions, to the said corporate company and when those in charge of its business come to use said piping an explosion took place which resulted in the death of one of its workmen.

The company being held liable under the Quebec Working Men's Compensation Act, to the extent of $2,560 for damages suffered by the legal representatives entitled to recover same under said Act, paid the same, and some costs.

The said incorporated company then brought an action against said firm of Samson & Filion, who in turn brought an action in warranty against appellant, and he in turn brought an action in sub-warranty against the respondents, who carried on business in Ottawa, and, appellant says, were the parties from whom he had bought the goods he had supplied to Samson & Filion.

The courts below seem to have found it impossible to maintain the said lastly mentioned action, by reason of failure, on appellant's part, to identify the goods he claims respondent sold him, as those which came from Samson & Filion to the Davie Shipbuilding & Repairing Company, Limited.

Any goods of the kind sold by respondent to appellant were of the second hand class known as scrap and were of a mixed lot such as enabled the appellant to pick out piping of the size wanted by the shipbuilding company—but whether the same he picked out is exceedingly doubtful.

The law governing the question raised as to any warranty from the respondent, would be that of Ontario, for the bargain between the appellant and the respondent was actually made here in Ottawa, and for the goods to be put free on board the cars here, and then respondent's duty would end.

There is not pretended to have been any express warranty, and certainly, after reading the evidence of the said parties hereto, there was none to be implied, according to the opinion I have formed.

And in light of the evidence adduced as to our law relevant to such a dealing, I am surprised at this final stage of the course of litigation that has arisen, being continued so far.

Not only do I hold that in applying our Ontario law (of which we must take judicial notice) to the relevant facts to be considered herein, the appellant has no ground to rest upon for its appeal here, but I also incline to agree with those in the courts below who doubt the identity of the goods in question herein with those sold by appellant to Samson & Filion.

I would therefore dismiss this appeal here with costs throughout.

Appeal Samson v. *Davie Co. allowed with costs.*
Appeal Ziff v. *Samson allowed with costs.*
Appeal Ziff v. *Baker dismissed with costs.*

Solicitors for Samson & Filion: *Langlais, Langlais, Godbout & Tremblay.*

Solicitors for Davie Shipbuilding & Repairing Co.: *Belleau, Baillargeon, Belleau & Boulanger.*

Solicitor for Ziff: *J. A. Budyk.*

Solicitor for Baker & Betcherman: *Ovide Mayrand.*

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*Nov. 27, 28.
*Dec. 30.

THE CITY OF MONTREAL (DEFENDANT) ..... APPELLANT;

AND

MALCOLM M. FERGUSON (PLAINTIFF ..... RESPONDENT.

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

Sale of land—Sheriff's sale—Seizure super non domino—Encroachment—Public domain—Non-seizable—Expropriation—Dedication—Arts. 1590, 1591 C.C.—Art. 781 C.C.P.

A sheriff's sale discharges an immovable from all rights of ownership, except when the owner is, at the time of the sale, in possession of the immovable seized *super non domino,* as the right to revendication then belongs to such owner; and if, at the time of the seizure, the real owner is not in possession, he must, in order to retain his right of ownership, make an opposition to the sale in the usual way.

An encroachment however upon a real property constituting a mere holding *de facto,* and not a possession *de jure,* cannot invalidate a judicial seizure and sale made against the real owner, who in such a case must be reputed to be in possession *animo domini.* (Art. 699 C.C.P.); *Dufresne* v. *Dixon,* 16 Can. S.C.R. 596, and *Vézina* v. *Lafortune,* 56 Can. S.C.R. 246 dist.

The principle of law that an immovable forming part of the public domain cannot be seized or alienated does not apply when that immoveable has been so incorporated by unlawful process.

Except in cases of donation, or abandonment or sale by mutual consent, a municipal corporation to become owner of real property must previously and under pain of nullity perform all the formalities required for expropriation proceedings, and unless these have been rigourously executed, the owner of the property, who has been dispossessed against his will, is not restricted to a claim for an indemnity, but he may revendicate his property by way of *action pétitoire.*

An immovable affected by an hypothec cannot be legally dedicated by the owner to the public; and, in such case, Arts. 1590 and 1591 C.C. do not apply.

Judgment of the Court of King's Bench (Q.R. 37 K.B. 399) affirmed.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and maintaining the respondent's action.

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

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Q.R. 37 K.B. 399.

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Laurendeau K.C. and *St-Pierre K.C.* for the appellant.

Lafleur K.C. and *Dugas K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—Ferguson a poursuivi la cité de Montréal pour se faire déclarer seul et véritable propriétaire d'une lisière de terrain faisant partie de certains immeubles situés dans le quartier Côte des Neiges de cette cité, et portant les numéros officiels 1, 2 et 3 de la subdivision du numéro 162 du cadastre fait pour le village incorporé de la Côte des Neiges.

Il prétend que la cité occupe et possède cette lisière de terre illégalement et sans droit, et demande qu'elle soit condamnée à l'évacuer, à lui en remettre la possession intégrale et à le restaurer dans la pleine jouissance de ses droits. A l'encontre des prétentions de Ferguson, la cité de Montréal n'a pas invoqué un titre de propriété. Elle s'est contentée d'alléguer sa prise de possession à la suite de pourparlers avec un M. Antoine Robert, au moment où ce dernier était propriétaire de la lisière de terre dont il s'agit. Elle a ajouté que, dans tous les cas, en tenant compte de cette prise de possession, tout ce que Ferguson pourrait exiger maintenant serait un montant représentant la valeur de cette lisière. La Cour Supérieure a été d'avis que Ferguson n'avait pas établi son titre à la propriété en question; et, comme conséquence, elle l'a débouté de son action.

La majorité de la Cour du Banc du Roi en appel (le juge-en-chef de la province de Québec étant dissident) a décidé, au contraire, que Ferguson avait acquis un titre à la lisière de terre qu'il revendique; que la cité de Montréal n'en était jamais devenue propriétaire; qu'elle l'avait admis; et qu'elle avait même reconnu le titre de Ferguson. En conséquence, la Cour du Banc du Roi a infirmé le jugement rendu par la cour de première instance et elle a maintenu les conclusions de l'action.

Le dossier est plutôt avare d'informations; et, avec le juge-en-chef de la province de Québec, il faut regretter que les renseignements fournis à la cour soient aussi restreints. Plusieurs faits essentiels auraient peut-être donné à la

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cause un aspect différent, s'ils eussent été expliqués. Cela ne permet pas cependant de baser la décision sur des suppositions; et, en dehors des présomptions que l'on peut légalement déduire des faits connus, il est nécessaire de demeurer dans le cadre limité des circonstances que les parties ont bien voulu dévoiler à l'enquête.

Le titre le plus ancien qui ait été produit remonte au 14 juin 1890. C'est un acte de vente par Octave Provost et autres à Antoine Robert. Il importe d'en extraire la description de la propriété vendue, car l'on verra que les actes subséquents ont tous procédé par voie de référence à cette description initiale. Elle se lit comme suit:

Un emplacement composé et formé des lots de terre portant les numéros un, deux et trois de la subdivision officielle du lot de terre portant le numéro cent soixante et deux (162-1-2 & 3) des plan et livre de renvoi officiels du cadastre pour le village incorporé de la Côte des Neiges, district de Montréal, avec la maison et dépendances construites sur les dits lots de subdivision, un et deux, avec droit pour le dit Robert et représentants de mettre et tenir en tout temps un tuyau d'un pouce sur les lots numéros cinq et six de la dite subdivision officielle, appartenant à Zéphirin Lapierre ou représentants, pour conduire l'eau de la source qui existe sur le dit numéro six sur les dits lots numéros un, deux et trois pour l'utilité du dit Robert et représentants lequel emplacement contient environ cinq arpents de superficie plus ou moins, et est borné en front par le chemin public, et avec toutes les dépendances y attenant.

Antoine Robert, le 24 février 1905, par acte reçu devant maître Dunton, N.P., à Montréal, s'est reconnu endetté envers le révérend Anthony Johnston Provost en la somme de $25,000 et le révérend Henry en la somme de $21,000 qu'il promit leur rembourser dans les deux ans qui suivaient; et, comme garantie de ces obligations, il hypothéqua, en faveur de The Royal Trust Company, de Montréal, pour le compte des obligataires, plusieurs immeubles, parmi lesquels était compris celui qu'il avait acquis d'Octave Provost et autres le 14 juin 1890. Dans cet acte hypothécaire, l'immeuble qui nous occupe est décrit par les mêmes numéros officiels que dans l'acte d'acquisition, avec l'addition suivante:

as the whole is mentioned in the deed of sale consented to Antoine Robert by Octave Provost, and others, before M. J.A. Dorval, notary, on the fourteenth day of June, one thousand eight hundred and ninety and registered in the registry office for the counties of Hochelaga and Jacques Cartier under no. 36, 261.

Le 22 septembre 1906, Antoine Robert n'ayant pas rempli ses obligations, The Royal Trust Company fit signi-

fier à ce dernier une action dont les conclusions ses lisaient comme suit:

Wherefore plaintiff brings suit and prays that the defendant be adjudged to pay and to satisfy to it, in its said quality as trustee under the said act and deed of hypothec before Dunton, notary, under date of the 24th day of February, 1905, filed as plaintiff's exhibit P-I herein, and that the said property so hypothecated as aforesaid, and in detail described in paragraph 4 of the foregoing declaration, be seized and brought to judicial sale to the end that the plaintiff in its said quality may be paid by preference out of the price thereof, the said sum of fifty-eight thousand and seventy-four dollars and sixty cents, the whole with costs.

Une discussion s'est engagée devant la Cour du Banc du Roi, et également à l'audition devant nous, sur la nature exacte de cette action.

L'honorable juge-en-chef de la province de Québec, tout en admettant qu'il

existe une action appelée personnelle hypothécaire,

dans notre droit, et que

l'on peut combiner à la fois les conclusions de l'action personelle pour obtenir un jugement de condamnation contre le débiteur pour le paiement de la dette et les conclusions demandant le délaissement qui caractérise l'action hypothécaire,

était cependant d'avis que l'action du Royal Trust ne contenait pas les conclusions nécessaires pour être envisagée comme une action hypothécaire.

L'honorable juge Dorion était disposé à la considérer comme

une action personnelle hypothécaire, malgré le doute que peuvent faire naître ses conclusions à peine suffisantes.

L'honorable juge Tellier a exprimé l'opinion qu'une partie des conclusions étaient celles "d'une action réelle", parce que le Royal Trust réclamait

l'exercice d'un droit réel qui lui appartenait sur la chose d'autrui (et que) le droit de faire vendre les immeubles hypothéqués est de l'essence même de l'hypothèque. On peut exercer ce droit aussi bien contre le débiteur personnel, quand il est détenteur, que contre un tiers-détenteur.

Il réfère, dans ses notes, au sixième rapport des codificateurs, page 61, à Ferrière, *Dictionnaire de Droit,* verbo *Hypothèque,* p. 1061, et à Domat, tome 2, *Hypothèque,* page 23.

Nous avons fait cette digression à cause de l'importance que cette question a prise lors de l'argument; mais nous ne croyons pas devoir pousser davantage la discussion sur ce point, vu qu'elle n'est pas nécessaire pour la solution du litige.

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Le 25 avril 1908, le territoire, dans lequel se trouvait l'immeuble appartenant à Antoine Robert et hypothéqué en faveur de The Royal Trust Company, fut annexé à la cité de Montréal qui s'engagea, entre autres choses, à élargir le chemin de la Côte des Neiges par lequel cet immeuble était borné en front (Statut de Québec, 8 Ed. VII, c. 85, s. 1b, par. 3).

Le 5 août 1910, Antoine Robert offrit de céder à la cité de Montréal

> tout le terrain nécessaire à cet élargissement à prendre sur les lots dont il était propriétaire,

parmi lesquels se trouvaient ceux qu'il avait hypothéqués en faveur de The Royal Trust Company. La superficie de la lisière de terre comprise dans cette offre y est mentionnée comme étant de 19,576 pieds. Le prix est fixé à soixante-quinze cents du pied pour

> la valeur du terrain et tous les dommages;

et les conditions suivantes sont stipulées:

> Je fais cette offre sans garantie et sujette à l'acceptation par les créanciers hypothécaires, si la chose est nécessaire.
>
> Il est entendu que je prendrai la clôture actuelle et que je la placerai dans sa nouvelle position à mes frais. Cette offre est bonne jusqu'au 15ème jour d'août 1910.

Au moment de l'offre, l'action intentée par The Royal Trust était encore pendante. Aucune explication de ce long retard n'est fourni par le dossier.

Le 15 août 1910, délai extrême accordé à la cité de Montréal par Robert pour accepter son offre, la ville n'avait rien fait.

Mais le 15 septembre 1910, le bureau des commissaires a fait rapport recommandant l'acceptation de cette offre et que le maire et le greffier de la cité soient autorisés à signer les contrats conformément au plan préparé à cet effet par l'arpenteur-géomètre de la ville; et, le 27 septembre 1910, le conseil de la ville de Montréal, ayant pris connaissance du rapport des commissaires, résolut de l'adopter suivant sa forme et teneur.

Ce qui s'est passé par la suite est resté dans l'obscurité.

Nous savons seulement que les intéressés n'ont pas donné suite à la résolution du conseil. Elle n'a jamais été notifiée à Antoine Robert. Aucun acte de vente n'a été consenti. Ni l'une, ni l'autre des parties n'a fait la moindre démarche pour qu'il le soit. Le prix de vente n'a été ni payé, ni

réclamé par Robert, ni offert par la ville. Le montant est resté dans la caisse municipale. On ignore s'il a continué de figurer dans les prévisions budgétaires de la ville. On ne sait même pas s'il est encore disponible soit en fait, soit en conformité avec les exigences de la charte.

Dans son plaidoyer, la cité de Montréal ne nous dit pas ce qu'il en est advenu. Elle se contente de soumettre que, dans tous les cas, vu la prise de possession du terrain, Ferguson ne pourrait plus réclamer qu'un

montant représentant la valeur desdits lots.

Bien plus, comme nous aurons l'occasion de le voir plus loin, assignée dans une saisie-arrêt après jugement, la cité de Montréal a déclaré "ne rien devoir" à Robert.

Le 23 décembre 1910, The Royal Trust Company obtint son jugement contre Robert devant la Cour Supérieure. L'action était donc restée en suspens au delà de quatre ans. Pourquoi? Nous l'ignorons. Il y a eu inscription en revision et le jugement initial fut confirmé le 25 janvier 1913. Le dossier ne nous révèle pas si Robert avait produit un plaidoyer à l'encontre de l'action.

Dans l'intervalle, la ville avait pris possession de la lisière de terrain. Mais elle ne s'est pas même donné la peine de nous dire quand, ni comment. Il est clair cependant qu'elle devait posséder toutes ces informations; et si elles étaient de nature à améliorer sa cause, elle seule devra en souffrir. Elle s'est bornée à faire entendre un assistant-ingénieur qui n'avait pas une connaissance personnelle des faits et qui n'occupait pas cette position lorsqu'ils se sont passés. Il nous dit, "d'après les rapports", que le chemin de la Côte des Neiges a dû être élargi en 1911 et que le macadam y a alors été "construit". Il n'a

pas eu connaissance personnellement que la cité ait fait un acte de possession avant 1912 (et, à ce moment-là), la clôture semblait avoir été déplacée.

C'est sa conclusion, après qu'il eut constaté:

C'est comme si elle avait été déplacée; il y avait deux broches, je pense, et les piquets semblaient se tenir à peu près.

Nous n'en savons pas plus long. Cette version n'implique nullement que Robert a déplacé la clôture. Il eût été important d'élucider ce fait, puisque, dans son offre, Robert avait convenu:

Il est entendu que je prendrai la clôture actuelle et que je la placerai dans sa nouvelle position, à mes frais.

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S'il l'eût fait, on eut pu en déduire qu'il avait conclu le contrat avec la ville, malgré l'expiration du délai qu'il avait fixé dans son offre. Mais le maigre renseignement fourni par l'assistant-ingénieur de la ville s'accommode peut-être mieux encore de l'idée que les employés de la ville auraient tout simplement reculé la clôture, en s'emparant du terrain pour faire le chemin, comme le suggèrent ces "deux broches" avec piquets qui "semblaient se tenir à peu près". Robert, pour placer la clôture "dans sa nouvelle position", eut sans doute installé une clôture réelle et solide.

En tout cas, il y avait là un point à approfondir qui eût pu éclaircir la situation. Tel qu'il est, il peut être interprété tout aussi bien comme un second acte d'empiètement de l'appelante que comme un fait tendant à démontrer une renonciation au délai par Robert. C'est dire qu'il reste inutile comme élément dans la solution de cette cause.

Toute information sur les agissements de Robert à cette époque-là fait absolument défaut. Il n'y a pas l'ombre d'une preuve qu'il ait vu ou su que la ville s'était emparée de son terrain. Nous ne savons même pas ce qu'il est devenu; car il n'est plus question de lui par la suite. La présomption est qu'il s'est désintéressé de toute l'affaire, parce que l'hypothèque consentie au Royal Trust absorbait toute la valeur de son immeuble, et dès que le jugement eût été rendu en vertu de cette hypothèque par la Cour Supérieure, le 23 décembre 1910, le parti qui pouvait être tiré d'une vente à la ville concernait plutôt les créanciers hypothécaires, pour qui le Royal Trust agissait comme fiduciaire, et à l'acceptation de qui Robert avait assujetti son offre à la ville, "si la chose était nécessaire".

Il suffit de signaler que l'enquête n'a dévoilé aucun acquiescement même tacite de la part de Robert à l'empiètement commis par la ville.

Le Royal Trust a fait saisir la propriété de Robert par un bref *de terris* émis le 15 avril 1913. Nous n'avons pas le procès-verbal de saisie, mais nous avons l'avis de vente publié par le shérif, le 21 mai 1913. Il décrit la propriété qui va être vendue de la même façon que dans l'acte originaire de Provost à Robert, auquel d'ailleurs il réfère par le nom du notaire qui l'a reçu, la date, le numéro d'enregistrement et le bureau où il a été enregistré.

La vente par le shérif a eu lieu le 26 juin 1913. L'acte est produit et suit textuellement la description de l'avis public et de la vente de Provost à Robert, y compris la superficie qui demeure invariablement fixée à "environ cinq arpents, plus ou moins". The Royal Trust se porta adjudicataire.

A la suite de cette vente, la cité de Montréal produisit entre les mains du shérif une réclamation pour les taxes municipales dues pour les années 1911 et 1912 sur la totalité des lots de Robert (sans restriction). Elle a admis en avoir été payée. L'on remarquera que ces deux années sont subséquentes à l'époque où elle avait prétendu accepter l'offre de Robert et même, à sa prise de possession de la lisière de terrain.

Le 15 juin 1921, The Royal Trust a vendu à Ferguson la propriété acquise à la vente par le shérif; et, dans l'acte, la description est identique à celle de tous les autres actes depuis Provost jusqu'au shérif.

Ferguson y est décrit comme résidant à London, Ontario.

Le 20 juillet suivant, la cité de Montréal, assignée comme tiers-saisie par The Royal Trust tentant de collecter la balance de son jugement contre Robert (suivant l'allusion déjà faite plus haut), "déclare ne rien devoir" à Robert, mais en plus "expose ce qui suit":

Le 5 août 1910, Antoine Robert offre de céder à la cité de Montréal, tout le terrain nécessaire à l'expropriation du chemin de la Côte des Neiges, pour la somme de $14,682, le terrain à prendre sur les lots suivants, savoir:

1. sur le lot no. 11, 13,919 pieds;
2. sur le lot no. 162-3, 2,174 pieds;
3. sur le lot 162-2, 1,862 pieds;
4. sur le lot 162-1, 1,621 pieds, faisant un total de 19,576 pieds à 75c. du pied, comprenant la valeur du terrain et tous les dommages à souffrir pour l'élargissement du chemin.

Le 15 août (évidemment une erreur pour "septembre"), 1910, un rapport du bureau des commissaires a été soumis au conseil et adopté le 27 septembre, 1910, mais le défendeur a toujours négligé de passer titre.

En 1912, le lot no. 11 soit 13,919 pieds a été acheté par la cité du Royal Trust Co. au prix de $10,000.

Le 23 octobre 1913, le Royal Trust Co. est devenu propriétaire par vente au shérif des lots nos. 162, subd. 1, 162, subd. 2, 162, subd. 3 du cadastre de la Côte des Neiges, sur la personne d'Antoine Robert, en vertu d'un jugement en date du 13 décembre, 1910, confirmé par la Cour de Revision le 25 janvier 1913.

Le 15 juin 1921, le Royal Trust a vendu à Malcolm M. Ferguson, les lots 162-1, 162-2, 162-3 du cadastre de la Côte des Neiges.

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Cette déclaration est fort significative; mais on doit y signaler surtout l'information que le lot n° 11 a été acheté par la cité du Royal Trust au prix de $10,000. Or, ce lot faisait partie de l'offre de Robert, en date du 5 août 1910, comme la déclaration le dit elle-même. Si la cité a cru devoir, plus tard, l'acquérir du Royal Trust, c'est donc qu'elle considérait elle-même que la convention avec Robert n'avait jamais été complétée. Et il est difficile de voir pourquoi les autres lots mentionnés dans la même offre seraient traités différemment.

Vainement, la cité prétendrait que cette déclaration émane d'un simple employé. Elle a été faite de la même manière que dans le cas de toutes les corporations; et c'est l'acte de la cité par son représentant dûment autorisé.

La vente par le shérif avait été enregistrée le 25 octobre 1913; celle du Royal Trust à Ferguson le fut le 16 juillet 1921. Le certificat de recherches ne révèle aucune autre inscription au bureau d'enregistrement.

La présente action a été instituée le 1er septembre 1921.

Voilà, dans leur ordre chronologique, tous les faits que nous possédons.

Il faut évidemment commencer par scruter le titre de Ferguson; car si l'intimé ne peut démontrer qu'il possède un titre, il ne peut discuter celui de l'appelante. C'est d'ailleurs ainsi qu'a procédé le tribunal de première instance, qui, étant arrivé à la conclusion que le titre de Ferguson était nul, n'a pas poussé plus loin son investigation.

Nous sommes d'accord avec la majorité de la Cour du Banc du Roi pour dire que Ferguson a un titre à la lisière de terrain en litige.

En remontant à l'acte de vente de Provost et autres à Antoine Robert (14 juin 1890), le plus ancien qui ait été versé au dossier, on trouve la description de l'immeuble comprenant alors d'une façon indiscutable la lisière dont il s'agit.

Cette description a été reproduite dans l'acte hypothécaire consenti par Robert au Royal Trust. A ce moment-là (24 février 1905), il n'était pas question de la cité de Montréal, et il est clair que les parties contractantes avaient en vue d'hypothéquer tout le terrain que Robert avait acquis de Provost et autres.

Partant de là, à moins de trouver dans la rédaction des actes subséquents une restriction dans la description de la propriété (ce que l'on y chercherait en vain), il nous paraît d'une logique inéluctable que la propriété à l'égard de laquelle The Royal Trust a pris des conclusions dans son action du 26 septembre 1906, celle qui a fait l'objet des jugements de la Cour Supérieure et de la Cour de Revision, puis de la saisie et de la vente judiciaires, celle que le shérif a entendu transmettre au Royal Trust comme adjudicataire et que ce dernier a ensuite vendue à Ferguson, est identiquement la même. The Royal Trust, en demandant dans son action contre Robert

that the property so hypothecated as aforesaid and in detail described in paragraph 4 of the foregoing declaration be seized and brought to judicial sale to the end that the plaintiff *in its said quality* may be paid by preference out of the price thereof, etc.,

s'adressait de toute évidence à la propriété intégrale, puisque cette déclaration date de 1906 et que la cité de Montréal n'est entrée en cause qu'en 1910. C'est donc bien la propriété intégrale, sans abstraction de la lisière occupée par la cité, la propriété intégrale sur laquelle portait son hypothèque, que le Royal Trust a fait saisir et vendre en vertu des jugements qu'il a obtenus.

Ce raisonnement ne saurait être entamé par le seul fait que la description dans l'acte du shérif s'accompagne des mots: "bounded in front by Côte des Neiges road". C'est la même idée que la description du premier titre: "borné en front par le chemin public". Les deux expressions ont en vue la même limite; et cela est bien indiqué par l'addition dans la description

as the whole is mentioned in the deed of sale consented to Antoine Robert by Octave Provost and others before Mr. J. A. Dorval, notary, on the fourteenth day of June, 1890, registered, etc., under no. 36261.

Cela résulte aussi du fait que la superficie mentionnée est la même dans l'acte du shérif et dans l'acte à Ferguson que dans le titre de Provost à Robert.

Les mots: "as the said property now subsists", que l'on trouve dans le titre de Ferguson ne s'adressent ni à la superficie, ni à la description de la propriété, mais à son état et à sa condition. La vente comprenait

the house and other buildings thereon erected;

et c'est évidemment par rapport à ces constructions que la clause a été insérée. Cela explique pourquoi personne n'y

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a attaché d'importance et que l'attention n'y a été attirée, pour la première fois, que lors de l'audition devant cette cour.

Et ce n'est pas ainsi, non plus, que l'appelante a interprété le titre de Ferguson. Bien loin d'alléguer que ce dernier n'avait pas acquis cette lisière de terrain, la cité de Montréal a admis implicitement que la vente du shérif, puis celle du Royal Trust à l'appelant, incluaient cette lisière; et elle a prétendu que Ferguson n'y avait pas droit parce que ces deux ventes étaient nulles et illégales. C'est également le motif du jugement de la Cour Supérieure sur ce point.

Cette illégalité et cette nullité résulteraient de ce que la saisie et la vente judiciaires auraient été faites *super non domino* quant à la lisière de terrain dont la ville s'était emparée, et par application des articles 613 et 699 du Code de Procédure Civile.

Cette vente par le shérif a eu lieu le 26 juin 1913. En vertu de sa publicité, une vente judiciaire doit être tenue pour avoir été connue de tous. En plus, la cité de Montréal a, de fait, eu connaissance de celle-ci dès qu'elle a eu lieu, puisqu'elle a remis au shérif sa réclamation pour taxes dues par l'immeuble vendu. Or, ce n'est que huit ans après, le 6 octobre 1921, que, dans son plaidoyer, elle attaque indirectement la légalité de cette vente. (*Guyon v. Lionais* (1).

Le caractère de sécurité qui s'attache, dans la province de Québec, à un titre provenant du shérif donne lieu de se demander si l'on peut de cette façon mettre en doute sa validité. Puisque le décret purge même le droit de propriété (Pothier, 3e éd., Bugnet, v. 10, n° 638; *Renaud* v. *Denis* (2), *Ville d'Outremont* v. *Cabana* (3), en dehors du cas de procédure *ultra vires,* comme celles que cette cour eut à examiner, par exemple, dans la cause de *Lambe* v. *Armstrong* (4), on ne devrait pas admettre sans une étude approfondie qu'un titre du shérif soit absolument nul *ab initio,* qu'il ne soit pas nécessaire, au moins, de le faire déclarer nul par les tribunaux (*Perrault* v. *Chevalier*) (5), et qu'il ne faille pas

(1) [1874] 27 L.C. Jur. 94.
(2) [1901] Q.R. 23 S.C. 16.
(3) [1905] Q.R. 14 K.B. 366.
(4) [1897] 27 Can. S.C.R. 309.
(5) [1918] Q.R. 55 S.C. 92.

pour cela s'adresser à eux de la manière et dans les délais prévus par les articles 784 et suivants du Code de Procédure (Pothier, 3e édition, Bugnet, vol. 10, n° 658, p. 300, 2e al. et n° 659). L'arrêt *re Lambe* v. *Armstrong* (1) est là comme précédent pour indiquer qu'il ne s'agit pas, dans ce cas, d'une simple question de procédure.

Mais nous voulons, pour le moment, mentionner seulement que cet aspect de la question ne nous a pas échappé et que nous en réservons la décision pour un cas où la solution du litige l'exigera. Cela ne se présente pas ici, car nous sommes d'avis que la vente faite en l'espèce par le shérif ne saurait être mise de côté pour l'unique raison invoquée par la cité de Montréal.

Si, comme la majorité de la Cour du Banc du Roi le croit, l'action de Royal Trust contre Robert était une action hypothécaire ou en déclaration d'hypothèque, le jugement obtenu pouvait, sans l'ombre d'un doute, être exécuté sur l'immeuble affecté par l'hypothèque, sans tenir compte de la prétendue possession de la ville (Art. 614 C.P.C.; Arts. 2016, 2074 C.C).

Mais, indépendamment de la nature de l'action de Royal Trust contre Robert, il nous paraît que le Royal Trust, après avoir obtenu jugement contre Robert, avait le droit, dans le cas actuel, de faire saisir et vendre la totalité des lots en question, comme immeubles de son débiteur.

Les biens du débiteur sont le gage commun de ses créanciers et il est tenu vis-à-vis d'eux de remplir son engagement sur tous ses biens mobiliers et immobiliers, présents et à venir (Arts. 1980, 1981 C.C.). Le créancier qui a obtenu jugement contre son débiteur peut faire saisir et vendre, pour satisfaire à tel jugement, les biens meubles et immeubles de ce débiteur (Art. 1585 C.C.; Art. 613 C.P.C.)

Ici, Robert rencontrait toutes les exigences pour que la saisie fut valide.

Il était le propriétaire enregistré et il était réputé posséder *animo domini* (*Ville d'Outremont* v. *Cabana* (2). L'empiètement de la cité de Montréal, étant peut-être une détention *de facto*, mais certainement pas (comme nous nous proposons de le démontrer) une possession *de jure*, ne

(1) 27 Can. S.C.R. 309.

(2) Q.R. 14 K.B. 366.

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pouvait faire obstacle à la légalité de la saisie et de la vente judiciaires.

La cité de Montréal, avec toutes les circonstances qu'elle connaissait et que nous avons énumérées au commencement n'avait certainement pas, au sens juridique, une possession contraire à celle de Robert. Elle ne pouvait ignorer le droit supérieur de Robert. Il y avait, chez elle, absence d'*animus*, comme l'a démontré sa déclaration sur la saisie-arrêt après jugement. (Voir Fuzier-Herman, Répertoire, vo. Possession, nos 2, 3, 4).

Référons à Pothier, 3e édition Bugnet vol. 10, n° 526:

> La saisie réelle doit se faire sur le propriétaire de l'héritage; une saisie faite *super non domino* est nulle. Observez néanmoins qu'on entend par propriétaire, non pas seulement celui qui l'est dans la vérité, mais encore celui qui possède l'héritage *animo domini*, soit qu'il en soit véritablement propriétaire, soit qu'il ne le soit pas; car il est réputé l'être, lorsque le véribable propriétaire ne réclame point; ce qui suffit pour que la saisie faite sur lui soit valable et purge même le droit du véritable propriétaire, s'il ne s'y oppose pas.

Et Bugnet ajoute, dans une note:

> Contre le propriétaire apparent, sauf le droit de revendication de la part du propriétaire véritable, qui pourra même, en règle générale, demander la nullité de l'adjudication. v. art. 717 c. proc. par. 1, l'adjudication (sur saisie immobilière) ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi.

C'est dire clairement qu'une saisie ne sera pas nulle, si elle est pratiquée sur un possesseur *animo domini*, pour la seule raison qu'il ne serait pas le véritable propriétaire; sauf le droit de revendication réservé à ce dernier. Et cette doctrine de Pothier est également celle qui est enseignée par Pigeau (vol. I, p. 779) et d'Héricourt (Traité de la vente des immeubles par décret, tome premier, p. 47). Mais c'est dire également que la saisie sur le véritable propriétaire, en exécution d'un jugement qui l'a condamné, est l'exercice normal du droit du créancier sur son gage, au sens de l'art. 1981 du Code civil, et que jamais une vente judiciaire, à la suite d'une pareille saisie, ne sera déclarée nulle à la demande d'un usurpateur comme la ville de Montréal, qui n'a même pas jugé à propos de se servir de l'opposition à la saisie.

La situation qui résulte du décret est bien expliquée dans le passage suivant du jugement de l'honorable juge Fournier *re McGregor* v. *The Canada Investment and Agency Co.* (1).

(1) [1892] 21 Can. S.C.R. 499, at p. 512.

D'après la loi et les décisions dans la province de Québec la vente judiciaire accompagnée des formalités légales donne un titre complet et absolu à l'adjudicataire de la propriété vendue et purge tous les droits dont la propriété peut être grevée, à l'exception de l'hypothèque résultant de la commutation des rentes seigneuriales, de l'emphytéose, des substitutions non ouvertes et du douaire coutumier non ouvert. Par l'art. 711 C.P.C. le décret purge tous les autres droits.

Comme il a été déjà dit plus haut, le testament McGregor ne contenant pas de substitution, la vente judiciaire a eu son plein et entier effet et a purgé les droits du propriétaire faute d'avoir fait opposition à la vente en temps opportun. On ne trouvera pas de décision de nos cours contraires à ce principe mais on en trouve qui le soutiennent hautement.

Dans une cause de *Patton* v. *Morin* (1), où la nullité d'un décret était demandée comme fait *super non domino* il a été jugé: 1. que le décret purge un immeuble de tous les droits de propriété, excepté dans le cas où le propriétaire est lors du décret en possession de l'immeuble saisi *super non domino;* 2. que si au moment de la saisie de l'immeuble le vrai propriétaire n'en est pas en possession, il doit, pour conserver son droit de propriété s'opposer à la vente par les moyens ordinaires. Un des considérants de ce jugement est comme suit: "Considérant que la vente judiciaire accompagnée des formalités légales, doit être respectée et ne peut être révoquée en droit sans porter atteinte à l'efficacité d'un titre accordé par les mains de la justice, la cour maintient la défense du défendeur et renvoie l'action du demandeur."

Un autre considérant affirme le principe que le demandeur aurait dû se porter opposant à la saisie et vente du dit immeuble, mais qu'au contraire il a laissé vendre et adjuger le dit immeuble en justice sans formuler sa plainte et s'opposer à la dite saisie et vente.

Il s'agit ici d'un cas bien différent de ceux de *Dufresne v. Dixon* (2) et *Vézina v. Lafortune* (3), sur lesquels la Cour Supérieure a voulu appuyer sa décision dans la présente cause.

Dans chacun de ces arrêts, cette cour a reconnu à celui qui, lors du décret, avait à la fois le titre de propriété et la possession, le droit de revendiquer son immeuble contre l'adjudicataire à une vente judiciaire faite sur la tête d'un saisi, *non possidente* i.e. qui n'était même pas "propriétaire apparent", suivant l'expression de Bugnet.

Nous laisserons à l'honorable juge Taschereau, qui a siégé dans la cause de *Dufresne v. Dixon* (2) et dans la cause de *McGregor* v. *The Canada Investment & Agency Co.* (4) le soin d'indiquer lui-même la distinction entre les deux:

I am also of opinion that, as held by the court below, the plaintiff, being of age at the time of the sheriff's sale to the defendant (though I do not see what difference that makes), was bound then to oppose the

(1) [1865] 16 L.C.R. 267.
(2) [1889] 16 Can. S.C.R. 596.
(3) [1918] 56 Can. S.C.R. 246.
(4) 21 Can. S.C.R. 499, at p. 515.

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sale and assert his right, if he had any; that his default to do so precludes him from now attacking the validity of the defendant's title, as this sale has been accompanied with all the formalities required by law, and as Craig upon whom it has been made was then in possession as proprietor of the said lot in virtue of duly registered authentic deeds. The case of *Dufresne* v. *Dixon* (1), cited by the appellant was totally different from the present one, as a reference to the report will clearly show.

There the sheriff had sold Mrs. Dixon's property to which she had a title and of which she was in possession, and so having both title and possession the sheriff's sale thereof against another person was annulled. Here the actual possession was in Devlin, but by the registry office the title was in Craig. Now, under these circumstances, Devlin's possession was Craig's possession. Upon Craig alone could that property be sold, as it was so sold. If at the period of the seizure of an immovable the proprietor is not in possession thereof he must, for the preservation of his rights of property, oppose the sale by the usual means. Such is the law as laid down in the case of *Patton* v. *Morin* (2), to which we must give application in the present case. Assuming that he had rights to this property the appellant has lost them by the sheriff's sale. *Vigilantibus non dormientibus subvenit lex.* In Rodière, Proc. Civ. (2 vol. p. 292) and Bériat de St. Prix (2 vol. p. 658), *inter alias*, the difference between the old and the new law in France on this subject is pointed out.

De même, *re Vézina* v. *Lafortune* (3), Vézina, lors du décret contre Senneville, avait le titre de propriété en son nom et il avait la possession de l'immeuble saisi et vendu pour la dette de Senneville. La cour, étant d'avis que Vézina avait tout le temps continué d'être en possession à titre de propriétaire, annula, à sa demande, une saisie et une vente faites sur Senneville, en vertu d'un jugement condamnant Senneville, qui n'était pas en possession.

Dans chacun de ces arrêts, elle a mis de côté un décret qui avait porté, suivant l'expression de Verdier (vol. 2, "Transcription hypothécaire", n° 299),

sur un bien qui n'était plus dans le patrimoine du débiteur

et qui avait suivi une saisie faite *super non possidente.* Elle l'a fait à la demande du propriétaire ayant titre et possession.

C'était appliquer le principe du droit de revendication que Bugnet reconnaît plus haut et que l'on trouve également dans Pigeau (Procédure du Châtelet, tome premier, p. 779):

Quand on dit que le décret purge la propriété non réclamée, cela ne s'entend que du cas où celui à qui elle appartenait a été constitué en demeure de la faire connaître; et il ne l'est pas, tant qu'on le laisse en possession de son bien, quand même ce bien aurait été compris dans la

(1) 16 Can. S.C.R. 596.
(2) 16 L.C.R. 267.
(3) 56 Can. S.C.R. 246.

saisie-réelle, les affiches, l'enchère et toutes les poursuites. Bardet, tit. I, liv. I, c. 7, et après lui d'Héricourt, page 49, rapportent un arrêt du 14 février, 1627, qui l'a ainsi jugé. C'est l'avis de Gourget, en son traité des Criées, et cela parait conforme à la raison. Ce propriétaire, ne se voyant pas dépossédé, a dû croire naturellement qu'on ne pouvait le dépouiller sans l'actionner, et il a pu ignorer que son bien fût saisi, n'ayant pas été averti d'une manière sensible et non équivoque.

Mais il y a loin entre le cas où, sur l'instance du propriétaire en possession lors du décret, ce dernier est mis de côté parce qu'il a été exécuté pour la dette d'une autre personne qui n'était pas en possession, et la demande actuelle de la cité de Montréal, qui, n'ayant d'autre base que son usurpation, voudrait faire déclarer nulle une saisie pratiquée sur Robert, véritable propriétaire dont le titre est enregistré, et une vente en exécution d'un jugement condamnant ce même Robert à payer une dette garantie par hypothèque sur l'immeuble ainsi saisi et vendu. (*Perreault v. Chevalier* (1).

Nous sommes donc d'avis qu'il n'appartenait pas à la cité de Montréal de demander l'annulation de la saisie et de la vente judiciaires par lesquelles The Royal Trust a acquis la lisière de terrain en litige. Le titre conféré par le shérif était régulier et valide; et Ferguson, qui détient ce titre du Royal Trust, a établi son droit de propriété sur la lisière en question.

Il va sans dire que nous n'écartons nullement le principe de l'inaliénabilité du domaine public, dont il est traité avec tant d'autorité dans l'opinion dissidente de l'honorable juge-en-chef de la province de Québec. Nous faisons simplement la distinction entre une propriété qui est devenue légalement une partie du domaine public et celle qui y a été incorporée sans droit. Toute notre discussion jusqu'ici est basée sur notre opinion (qu'il nous reste à développer) que la cité de Montréal n'a jamais acquis de droits sur la lisière de terrain qui nous occupe. L'honorable juge Lafontaine est d'avis contraire; et c'est, en somme, cette divergence de vues sur ce point essentiel qui est à la base de la différence dans les solutions. Il ne paraît être entré dans l'idée de qui que ce soit que la ville pouvait arbitrairement incorporer cette lisière dans son chemin et, par le fait même, fermer

(1) Q.R. 55 S.C. 92.

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la porte aux revendications ou à l'exercice des droits des intéressés, en vertu du principe de l'inaliénabilité.

Dans l'arrêt rendu par la Cour de Revision (Torrance, Papineau et Loranger JJ.) *en La Banque d'Hochelaga* v. *Compagnie du Chemin de fer de Montréal, Portland & Boston* (1), on répète jusqu'à satiété dans le rapport que la compagnie de chemin de fer avait pris possession "avec le consentement des propriétaires", et le fond du jugement est résumé dans le considérant suivant (p. 583):

> Considérant que, si les propriétaires ne peuvent refuser de céder la propriété de leurs terrains et d'en livrer la possession à la compagnie, moyennant telle indemnité, il ne leur est pas loisible d'en réclamer la propriété et de s'en faire restituer la possession, *lorsqu'ils ont volontairement laissé la compagnie prendre possession du sol et y asseoir son chemin de fer;* et que la seule chose qu'ils puissent légalement demander alors est l'indemnité, qui est censée représenter, tant pour eux que pour leurs créanciers, la propriété qu'ils avaient et dont ils ont ainsi laissé prendre possession.

Avec la majorité de la Cour du Banc du Roi, nous sommes d'avis que les circonstances établies dans la cause actuelle ne permettent pas de dire que Robert a volontairement laissé la ville prendre possession de son terrain.

Et même une corporation municipale ne saurait fonder son titre sur une simple usurpation—sauf si elle persiste assez longtemps pour atteindre la période de la prescription acquisitive.

En l'espèce, la cité de Montréal ne réclame pas la prescription; et, d'ailleurs, il est évident que la durée de sa prétendue possession ne le lui permettrait pas.

Le fait est qu'il est difficile, à l'examen de son plaidoyer, de savoir exactement en vertu de quel titre elle affirme ses prétentions.

Elle allègue l'offre de Robert, les résolutions du bureau des commissaires et du conseil, et sa prise de possession.

Elle ne tente pas de justifier cette possession par l'abandon ou "dédication" du propriétaire. Il est clair, d'après les circonstances exposées au début, qu'elle essaierait vainement d'abriter ses droits derrière cette doctrine. Robert ou The Royal Trust n'ont jamais eu

> l'intention de donner au public le droit de jouir de sa propriété comme chemin,

(1) [1882] 12 R.L. 575.

(Brodeur J. *re Gauvreau* v. *Page* (1). Voir aussi Anglin J. re *Harvey* v. *Dominion Textile Co.* (2), 59; et Mignault J. *re Gauvreau* v. *Page* (1), p. 198.

D'ailleurs, l'existence de l'hypothèque du Royal Trust eût empêché tout abandon efficace de la part de Robert. Quelle que soit la portée des articles 1590 et 1591 du code civil, ils exigent au moins une vente forcée ou une expropriation. Un simple abandon du propriétaire ne saurait prévaloir contre les droits hypothécaires d'un tiers, qu'il ait ou non commencé à les exercer au moyen d'une action hypothécaire ou d'une action en déclaration d'hypothèque.

Il ne reste donc à la cité de Montréal qu'une prétention possible, et ce serait qu'elle aurait acheté de Robert la lisière de terrain en question.

Disons tout de suite qu'il n'y a pas eu d'expropriation et qu'on n'en a même pas commencé les procédures.

Les statuts 8 Ed. VII, c. 85, s. 1, par. 3 et 1 Geo. V, c. 48, s. 3, n'ont rien ajouté aux droits de la ville. Ils n'ont fait que lui imposer l'obligation d'élargir le chemin de la Côte des Neiges; mais ils ne lui ont conféré, pour ce faire, aucuns pouvoirs spéciaux. Il y est dit seulement que, si elle est forcée d'avoir recours à une expropriation, elle devra procéder en vertu de la loi 54 Vict., c. 38. C'est la loi d'expropriation, applicable (sauf exceptions) à toute la province de Québec, et qui, en 1909, s'est trouvée incorporée dans les articles 7581 et suivants des statuts refondus.

Pour les besoins de cette cause, il suffit de signaler que, même si elle avait adopté des procédures en expropriation, la ville, en ce qui concerne la possession du terrain, eût été régie par les articles suivants de la loi:

7595. Sur le paiement ou l'offre légale de l'indemnité ou de la rente annuelle adjugée à la partie qui y a droit, ou sur le dépôt en cour du montant de cette indemnité en la manière ci-dessus mentionnée, la sentence arbitrale donne à la partie en faveur de laquelle elle a été rendue, le pouvoir de prendre possession immédiate des terrains, et d'exercer les droits ou de faire les choses pour lesquelles l'indemnité ou la rente annuelle a été accordée. Si quelque résistance ou opposition est faite à la prise de possession de tels terrains ou l'exercice de tels droits, le juge peut, sur preuve satisfante de la sentence arbitrale, adresser son mandat, au shérif du district ou à un huissier, suivant qu'il le trouve convenable, pour mettre en possession la partie qui y a droit et pour faire cesser toute

(1) [1919] 60 Can. S.C.R. 181, at p. 187.

(2) [1916] 59 Can. S.C.R. 508, at p. 526.

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résistance ou opposition,—ce que doit faire le shérif ou l'huissier, en prenant avec lui l'assistance suffisante.

Le juge ne doit accorder ce mandat que lorsqu'un avis du temps et du lieu auxquels la demande lui en est faite a été signifié dix jours d'avance au propriétaire du terrain, au curateur s'il est absent, ou à la personne ayant droit d'en passer titre translatif, ou ayant un intérêt dans le terrain à exproprier.

7596. Un cautionnement doit être donné par un dépôt dans une banque constituée en corporation désignée par le juge, d'une somme suffisante à sa discrétion, pour défrayer l'indemnité accordée et tous les frais de procédure sur l'incident.

7597. La requête, le mandat de possession, le certificat de dépôt ci-dessus mentionné et tous autres documents se rapportant à telle procédure incidente, doivent rester dans les archives de la cour supérieure du district où telle procédure est faite, et un registre spécial de telle procédure est tenu par le protonotaire.

Nulle partie du dépôt ou de l'intérêt qui en provient ne doit être remboursée ou payée à la partie, ni payée au propriétaire du terrain, sans un ordre du juge, qui est autorisé à l'émettre.

7598. Tout propriétaire qui n'est pas payé intégralement, en capital, intérêts et frais, du montant qui lui est accordé par la sentence arbitrale, dans deux mois de la reddition de cette sentence, peut exercer son recours contre la personne, compagnie ou corporation, pour recouvrer la propriété et la possession de son terrain ou de son droit, par action civile ordinaire dans laquelle il peut demander les dommages que de droit.

Mais, comme il n'y a pas eu d'expropriation, il faut chercher dans le code civil ou dans la charte de la cité de Montréal le principe du droit que cette dernière prétend s'arroger ici.

Il n'y a certainement pas eu vente de Robert à la cité. Sans doute, le consentement des parties était suffisant, et le seul fait que Robert eut "négligé de passer titre" n'était pas concluant. Mais, sans prononcer d'opinion sur l'obligation de traiter avec les créanciers hypothécaires (qui pourrait être considérée comme une des conditions de l'offre de Robert), il fallait pour que la vente fût "parfaite" (Art. 1472 C.C.) que l'acceptation de la cité fût manifestée ou communiquée à Robert. Cela n'a pas été fait; et ce motif du jugement de la Cour du Banc du Roi nous paraît bien fondé.

Il n'y a aucune preuve que Robert ait eu connaissance de la résolution par laquelle la cité prétendait accepter. Et, à supposer qu'il eût pu être lié par la publicité, il est à remarquer que les règlements de Montréal sont suivis d'un avis public (art. 301 de la charte), mais rien n'exige la même chose pour une résolution; et aucun avis de celle dont il s'agit ne paraît avoir été publié.

Il y a cependant une objection encore plus sérieuse à la prétention de l'appelante. La résolution de son conseil municipal n'a été adoptée que le 27 septembre 1910. Or, Robert avait mis dans son offre la stipulation suivante:

cette offre est bonne jusqu'au 15eme jour d'août 1910.

Il s'ensuit que, lorsque la ville a prétendu accepter l'offre, cette dernière n'existait plus. Au moment de son acceptation, la ville ne pouvait plus contraindre Robert. On n'a qu'à se demander si, dans les circonstances, la ville eût pu poursuivre Robert en passation de titre. La réponse négative s'impose.

Ferguson a le droit d'opposer à la ville ce défaut d'acceptation en temps utile, puisque, ayant lui-même un titre à la lisière en question, il peut se prévaloir des défauts du prétendu titre que la cité lui oppose.

Il n'y a donc pas eu de vente de Robert à la ville. Cela dispense de se demander si une pareille vente, au cas où elle aurait existé, aurait eu le caractère nécessaire pour permettre à l'acquéreur d'invoquer le bénéfice de l'article 1590 du code civil.

Mais prétendrait-on que Robert, par sa conduite subséquente, peut être tenu pour avoir renoncé au délai qu'il avait fixé dans son offre ou au droit qui lui appartenait de recevoir un avis d'acceptation de la ville?

En l'espèce, cette renonciation ne pourrait s'induire que de son silence, car, comme nous l'avons déjà fait remarquer, la preuve ne révèle de sa part aucune démarche postérieure à son offre. Depuis ce moment-là, il disparaît complètement.

En droit, nous déciderions que pareille renonciation implicite de la part de Robert ne pourrait être opposée au Royal Trust, créancier hypothécaire, ni au titre du shérif résultant d'une vente judiciaire provoquée par ce créancier hypothécaire.

En fait, la position de Robert était aux antipodes de celle de *Michaud* v. *City of Montreal* jugée par le Conseil Privé (1). A supposer que les principes servant de guides à une "Court of Equity", qui paraissent avoir inspiré le Conseil Privé dans cette cause, puissent être appliqués à un litige régi par la loi de la province de Québec, il reste que

(1) [1923] 129 L.T. 417.

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Michaud était maire de la cité de Maisonneuve, lorsque le conseil municipal avait adopté la résolution par laquelle elle acceptait son offre; que non seulement il avait eu ainsi pleinement connaissance de cette résolution, mais qu'il avait même initialé le projet de contrat préparé à la suite par le notaire représentant la cité; et qu'il était encore maire, lorsque Maisonneuve prit possession de sa propriété,

and proceeded to thrwo it into a public way, to pave it and otherwise to fit it for the public use.

Il avait donc, on peut le dire, participé à la prise de possession par la ville. Dans ces circonstances, il fut décidé non pas même que la ville était devenue propriétaire par suite de sa prise de possession, mais que nos tribunaux

will not permit a man, afterwards, to assert his title to the land in question.

Et lord Cave ajoute (p. 418):

A point was made by the counsel for the appellant based on the formalities required for the exercise of the compulsory powers to take land given by the statute law; but those formalities cannot be applicable to a case like the present, where there was no compulsory taking, but a gift of the land.

Déjà la Cour du Banc du Roi, qui avait conclu dans le sens confirmé plus tard par le Conseil Privé, avait dit même en présence de faits aussi probants que ceux de cette cause de *Michaud* v. *Cité de Maisonneuve* (1), par la bouche du juge-en-chef Lamothe:

Il nous faut trouver, dans le dossier, un abandon clair et non équivoque de ce terrain, sinon le droit de propriété doit être respecté; sinon nous devrons appliquer l'art. 407 du C. civ., qui dit que personne ne peut être force de cédar so propriété, si ce n'est moyennant une juste et *préalable* indemnité.

La donation était complète par la résolution du conseil de ville, résolution à laquelle M. Michaud avait donné son plein assentiment. M. Michaud ne peut reprendre aujourd'hui une propriété qu'il a abandonnée au public et à la ville de Maisonneuve.

Mais en dehors d'un cas de donation ou d'abandon ou de vente de gré à gré, les tribunaux de Québec n'ont jamais dispensé les corporations municipales

d'accomplir *au préalable* les formalités exigées par l'expropriation,

et ce, avec rigueur et sous peine de nullité. On peut référer à *Deal* v. *The Corporation of Phillipsburg* (2), *La Corporation du canton Nelson* v. *Lemieux* (3), *Doyon* v. *La Corporation de la paroisse de Saint-Joseph* (4), *Holton* v. *Cal-*

(1) [1919] Q.R. 30 K.B. 47.
(2) [1866] 16 L.C.R. 342.
(3) [1876] 2 Q.L.R. 225.
(4) [1873] 17 L.C. Jur. 193.

laghan (1), *Corporation du comté de Dorchester* v. *Collet* (3), *King* v. *Corporation de la partie nord du Township d'Irlande* (3), *Walsh* v. *Corporation de Cascapédiac* (4).

Dans la cause de *Compagnie du chemin de fer Central* v. *Legendre* (5), la Cour du Banc du Roi a décidé que:

Un propriétaire a un recours direct par action pétitoire contre une compagnie de chemin de fer qui se serait mise en possession d'un terrain pour sa voie ferrée, sans le consentement du propriétaire et sans lui faire d'offre préalable pour le terrain ainsi occupé.

Et encore plus récemment, dans la cause de *Canada & Gulf Terminal Ry. Co.* v. *McDonald* (6) la même Cour du Banc du Roi a jugé:

La prise de possession d'un terrain par une compagnie de chemin de fer pour la construction de sa voie, avec la tolérance du propriétaire, ne prive ce dernier, tout au plus que des recours en complainte ou en réintégrande. Il conserve le droit d'exercer l'action pétitoire et de revendiquer le terrain, à défaut par la compagnie de l'indemniser selon la loi.

La Cour Suprême du Canada avait déjà approuvé ces principes dans son arrêt *re City of Montreal* v. *Hogan* (7), où l'honorable juge Taschereau, plus tard juge-en-chef, rendant le jugement unanime de la cour, dit à la page 5:

That the respondent has been illegally dispossessed of this property and that he is entitled to revendicate it cannot now be controverted by the appellants. A municipal corporation, it is needless to say, has no right to acquire real property except in the cases and in the manner provided by the statute from which it derives its powers.

Dans cette cause de *City of Montreal* v. *Hogan* (1)

the officers of the corporation had taken possession of the land, made a macadamized roadway over it, removed sidewalks, electric light poles, etc., back to the new line of the street, and opened it to public traffic;

cependant la décision fut (p. 5):

We order judgment to be entered declaring the respondent proprietor of the property in question and ordering the appellant to put him, the respondent, in due possession thereof in the same state as it was when they took possession of it, within fifteen days after the signification of this judgment.

L'affirmation de l'honorable juge Taschereau, qu'une corporation municipale

has no right to acquire real property except in the cases and in the manner provided by the statute from which it derives its powers

pourrait se réclamer de ces deux articles du code civil:

399. Les biens appartiennent ou à l'état, ou aux municipalités et autres corporations, ou enfin aux particuliers.

(1) [1875] 9 R.L. 665.
(2) [1884] 10 Q.L.R. 63.
(3) Q.R. 2 K.B. 266.
(4) [1896] Q.R. 7 K.B. 290.
(5) [1885] 11 Q.L.R. 106.
(6) [1913] Q.R. 23 K.B. 299.
(7) [1900] 31 Can. S.C.R. 1.

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Ceux de la première espèce sont régis par le droit public ou par les lois administratives.

Ceux de la seconde sont soumis à certains égards pour leur administration, *leur acquisition* et aliénation, à des règles et formalités qui leur sont propres.

Quant aux particuliers, ils ont la libre disposition des biens qui leur appartiennent sous les modifications établies par la loi.

On voit la distinction que fait l'article, au sujet du "droit public", entre les biens de l'Etat et ceux des municipalités.

404. Les biens des municipalités et des autres corporations sont ceux à la propriété ou à l'usage desquels ces corps ont un droit acquis.

Aux deux articles du code civil, ajoutons les articles suivants de la charte de Montréal, qui étaient en vigueur lors de la prise de possession et n'ont été abrogés qu'en 1914, c'est-à-dire après la vente du shérif, en l'espèce:

419. La cité n'ouvrira, n'élargira et ne prolongera aucune rue, ruelle, voie ou place publique à moins qu'elle ne soit indiquée et projetée sur le dit plan général de la cité, ou ne soit comprise dans quelque modification ou addition faite à ce plan; ni à moins que deux mois au moins ne se soient écoulés depuis la confirmation par la cour supérieure ou par un juge d'icelle de tel plan, modification ou addition; et l'ouverture, l'élargissement ou le prolongement d'une rue, ruelle, voie ou place publique ne sera commencé, ou n'aura lieu, ou n'aura d'effet à moins que les formalités ci-après prescrites relativement au mode d'expropriation ne soient strictement observées, ni à moins qu'il ne soit pourvu au coût de l'amélioration projetée et au paiement de tous les dommages-intérêts et indemnité qui pourront être payables ou exigibles, y compris les frais de toutes les procédures s'y rattachant.

420a. Toutes les rues privées ou ruelles ouvertes à l'usage du public, sont considérées comme immeubles imposables, tant qu'elles n'ont pas été formellement cédées à la cité et mises sous son contrôle.

En présence de ces dispositions expresses de sa charte et pour toutes les raisons que nous avons exposées, il nous paraît impossible de maintenir les prétentions de l'appelante. Le jugement de la Cour du Banc du Roi qui nous est soumis contient un ordre exactement semblable à celui de cette cour, dans la cause de *la Cité de Montréal* v. *Hogan* (1); et nous sommes d'avis que ce jugement est bien fondé.

Nous ne partageons pas la crainte exprimée, ici, par l'appelante à l'audition que ce jugement soit difficile d'exécution (art. 541 C.P.C.) sous prétexte qu'il ne définit pas suffisamment les bornes de la lisière revendiquée. La chose est bien simple: la cité de Montréal devra remettre ce dont elle s'est emparée. Nul mieux qu'elle ne doit savoir ce que cela comporte. D'ailleurs sa défense écrite (par. 7 et 9)

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

indique qu'elle sait exactement de quoi il s'agit; et elle n'aura, pour compléter son information, qu'à référer soit
au plan préparé par John R. Barlow et daté novembre 1909
mentionné dans l'offre de Robert, soit au rapport de son arpenteur-géomètre, Charles Laberge, annexé à la résolution de son bureau des commissaires en date du 15 septembre 1910, soit au
plan produit par la défenderesse montrant la partie des lots en litige.

Cependant, nous ne devons pas oublier que l'effet du jugement est d'ordonner à la cité de Montréal de livrer à l'intimé la possession d'une lisière de terrain qui, dans le moment, fait physiquement partie d'une rue publique; que, en plus, en vertu des statuts d'annexion, la cité est tenue de porter cette rue à sa largeur actuelle. Pour cette raison, nous croyons que la rigueur du jugement de la Cour du Banc du Roi peut être atténuée. Nous nous inspirons des principes posés par le Conseil Privé dans *Parkdale* v. *West* (1) et dont le très grand nombre pourraient trouver ici leur application. La Cour du Banc du Roi a fixé à quinze jours de la signification du jugement le délai pendant lequel la cité de Montréal devra évacuer le terrain et en livrer possession à l'intimé; elle avait le pouvoir d'étendre ce délai (arts. 579 et 610 C.P.C.). Nous nous servirons de ce pouvoir et accorderons un mois à l'appelante afin de lui permettre de conclure un arrangement avec l'intimé ou de procéder à l'expropriation requise pour obtenir légalement la possession et le titre à la propriété de la lisière de terrain en litige. Sauf cette modification, le jugement *a quo* doit être confirmé avec dépens.

IDINGTON J.—The appellant never either bought or expropriated the land herein in question.

There were some negotiations between it and one Robert, the owner of the equity of redemption, but they never produced anything creating a final result conferring a right on appellant to enter on the premises. And when the mortgagees attempted to get at the supposed price, the appellant rightly denied that it owed anything in regard thereto.

It, therefore, in entering thereon, was a mere trespasser, and has never been anything else. Hence the whole of the fabric of claims it makes herein is unfounded.

(1) [1887] 12 App. Cas. 602.

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The facts upon which other points have been argued do not, under such circumstances, support the contention put forward by the appellant's counsel herein.

The cases of *Dufresne* v. *Dixon* (1), and *Vézina* v. *Lafortune* (2), have not the slightest resemblance in the fundamental facts in question therein to those of the facts in question herein. Hence they cannot affect my opinion above expressed, in the consideration of the facts as presented herein.

(1) 16 Can. S.C.R. 596. (2) 56 Can. S.C.R. 246.

I may speak with deference as to the other leading point argued by counsel as to what constituted an hypothecary action, for my brother Mignault J. (better versed in the code than I am), seemed to be inclined to accept the meaning put forward by appellant's counsel.

Mr. Lafleur, arguing for respondent, convinced me that his view was the correct one. And unless the words "hypothecary action" are to be restricted in a way that I cannot maintain when considering their use in many articles of the code, I cannot agree with the pretensions of the appellant in that regard.

Hence, as I see them, the many other minor features presented by appellant's counsel cannot avail it. Indeed most, if not all, fall as soon as the relevant facts are correctly interpreted as, for example, the use of the words describing the land in question.

There has never been any legal highway constituted over that part of the land in question and hence the pretension that the respective descriptions, in the sheriff's deed to the Royal Trust Company, and by the latter to the respondent, in the respective references to the grantors in said deed to the Côte des Neiges road, as pretended to exist to-day, are wholly unfounded in law. Indeed the expressions used therein are quite incapable, I submit, of meaning anything else than the boundary of that road as it existed before the trespasses of the appellant.

Another question arises out of the pretensions of the meaning of the words "hypothecary sales," for I find, on reference to the Act enabling the appellant to act, and indeed requiring it to act, by way of expropriation in default of obtaining a title by negotiation expressly direct, such expropriation to be made by virtue of the Act, 54 Vict., c.

38, and not by the terms of the charter of the appellant city.

When we turn to the Act we find it expressly recognizes the rights of hypothecary creditors, and that the amount fixed by arbitration must, if the title cannot be cleared up otherwise, be deposited with the prothonotary. See the article 5754s therein, and those preceding it in that statute.

I would dismiss the appeal with costs.

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Appeal dismissed with costs.

Solicitors for the appellant: *Jarry, Damphousse, Butler & St. Pierre.*

Solicitors for the respondent: *Elliott & David.*

THE BRILLIANT SILK MANUFACTURING CO., INC. (PLAINTIFF)..... APPELLANT;

AND

J. KAUFMAN (DEFENDANT) ..... RESPONDENT.

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*Nov. 21, 24.

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*Feb. 3.

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

Sale of goods—Contract price—Increase or decrease—Repudiation—Damages—Price determined or determinable—Art. 1472 C.C.

The respondent, a fur manufacturer in Montreal, bought in December, 1919, from the appellant, a manufacturer of silks in New York, ten pieces of brocade silk as specified to be delivered "as ready." The agreement of sale contained the following clauses: "If at the time of making delivery raw silk has advanced or declined five per cent or more from $12 for Double Extra B. grade, a percentage equal to one-half of this advance or decline shall be added to or deducted from the price. If at the time of making delivery pay-roll and other labour costs have increased or decreased five per cent or more, a percentage equal to one-half of this increase or decrease shall be added to or deducted from the price. This contract ceases to be binding on either party as to goods not shipped by December 31, 1920." The appellant proceeded to manufacture goods ordered, shipped them and sent invoices for same, adding to the contract prices a percentage according to the increase at the date of delivery in the costs of raw silk and labour. The respondent declined to accept such increase; but the appellant insisted upon its interpretation of the contract and continued to make more shipments. On the 20th of March, 1920, the respondent sent written notice to the appellant refusing acceptance of the goods

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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and remitting invoices for same. The appellant discontinued producing, but shipped to the respondent the goods in course of being manufactured at that date. On April 15, the respondent returned the goods, which were sold at auction by the appellant on respondent's account, after due notice to him. The appellant then brought action for $3,956.99, being $345.86 for goods retained by respondent, $1,184.85 for difference of price for the returned goods sold at auction and $2,426.28 for damages on the unexecuted part of the contract.

Held, Rinfret J. dissenting, that the terms of the contract must be construed as meaning that it is the percentage of advance or decline in the price chargeable for the complete article which is governed by the advance or decline in the price of material or labour costs and not the percentage of the value of the silk used in manufacturing the quantity of the complete fabric.

Held also that, although repudiation by a party to a contract of sale entitles *de facto* the other party to recover damages thus incurred, the vendor has the right to insist on preserving the integrity of the contract and to tender the goods for delivery according to the terms of the sale, in which case his claim for damages will be more easily and readily assessed upon refusal to accept by the buyer.

Held further that the appellant had no right to claim damages in respect of loss of profit on the uncompleted part of the contract. Idington J. *contra.*

Per Rinfret J. dissenting. The contract of sale is not binding upon the parties, as in order to validly stipulate a price based on certain conditions prevailing at the time of delivery the contract must fix the date of such delivery; in other words, a price which can vary at the will of the vendor is not a price "certain et déterminé" (Art. 1472 C.C.) which is an essential element of the contract of sale.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming a judgment of the Superior Court and dismissing the appellant's action.

De Witt K.C. and *Harold* for the appellant.

Dessaulles K.C. and *St. Jacques* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Newcombe JJ.) was delivered by

DUFF J.—The radical question in controversy in this appeal concerns the true meaning of two clauses in the agreement between the appellants and the respondent contained in an order signed by the respondent, addressed to the appellants.

The appellants manufacture silks in New York. In November, 1919, one of their travellers, Hanford, called on the respondent, who was a fur manufacturer in Montreal, and there received from him an order for silk brocade, according to samples in his possession. Later, a more formal

order, containing the stipulations to be considered, was sent by the appellants to the respondent for signature, and was signed by him and returned to the appellants on the 8th of December, 1919. Admittedly the stipulations in question were discussed by the respondent and Hanford, and agreed to by the respondent at the interview in Montreal. These clauses are in the following words:—

> If at the time of making delivery raw silk has advanced or declined five per cent or more from $12 for Double Extra B grade, a percentage equal to one-half of this advance or decline shall be added to or deducted from the price.
>
> If at the time of making delivery pay-roll and other labour costs have increased or decreased five per cent, or more, a percentage equal to one-half of this increase shall be added to or deducted from the price.

The appellants proceeded with the manufacture of the goods ordered, and shipments were made on the 7th and 20th of February, 1920, and on the 2nd of March. Invoices covering these shipments were prepared by the appellants, in accordance with their interpretation of the contract, and sent to the respondent; and almost immediately a dispute arose as to the proper method of determining prices under the clauses quoted.

The appellants' procedure may be illustrated by reference to the prices charged in the invoice for the shipment of the 7th of February. On that date raw silk of the grade mentioned in the first of the paragraphs given above was selling at $17.30; that is to say, at an increase of forty-four per cent over the datum price of $12 mentioned in that paragraph; and the labour costs had been advanced approximately twenty per cent. The appellants accordingly added to the prices of the goods furnished a percentage in each case of the price nominated in the contract equal to one-half of forty-four per cent plus one-half of twenty per cent of that price. Thus, brocade of which the price specified in the contract was $5, was charged to the respondent at $6.50, and goods quoted at $3.50 were charged at $4.50. This procedure was repeated in compiling the invoices of the 20th of February and on the 2nd of March.

On the 5th of March the respondent wrote to the appellants, observing that the invoice prices did not correspond with the contract prices, and requested an explanation, and that shipments be discontinued meantime. The appellants replied on the 8th of March, explaining the procedure

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sketched above. On the 10th of March the respondent replied in the following letter:—

Montreal, March 10, 1920.

Messrs. The Brilliant Silk Mfg. Co.,
387 Fourth Avenue,
New York.

Dear Sirs,—In reply to yours of the 8th, wish to state that at the time our Mr. Kaufman gave his order to your Mr. Hanson, Mr. Kaufman understood that the increase would not exceed 5 per cent, if there should be any increase at all.

Probably our Mr. Kaufman has misunderstood, but at any rate, you know fully well that we are not in the raw silk business, and therefore do not understand anything in this line, and cannot be bothered to the learning of this now, nor can we be bothered watching the changing market.

We shall receive the balance of our order at the prices of our original order given to your Mr. Hanson, and at no other prices.

We on our part feel that we are fully justified and more so, in our actions in this matter, and expect that you in turn will act justly; otherwise we shall surely not accept any shipments from you under the circumstances.

Yours very truly,
(Sgd.) J. KAUFMAN.
Per E. R. H.

P.S.—Kindly note that although the prices increase or decrease, we shall keep to the prices of our original order.

To this letter the appellants rejoined, insisting upon observance of the terms of the contract, and stating that four more pieces were being shipped under it. Again, on the 23rd of March, 1920, the respondent wrote the appellants in these words:—

In reply to yours of the 18th, would say that my letter to yourselves has been dictated by myself and the substance of which is exactly as I desired and found correct in this matter.

Under the circumstances and for the various reasons already stated in my previous letter, I refuse acceptance of your goods and herewith remit your invoices for same.

Unless you make such shipments as are correct and in accordance to my previous letter, I will, under no means accept any of your shipments.

After receiving this letter the appellants discontinued producing for the respondent, confining themselves to completing the pieces then in process of manufacture. Still further correspondence ensued, and on the 20th of March the respondent wrote, expressing his willingness to accept the shipments already made, on the condition that the residue of the order should be cancelled; and to this the appellants replied, declining to cancel the order except on the terms of being reimbursed for their expenses and loss of profit. Finally, on the 6th of April, 1920, the respondent

wrote to the appellants, declaring that the letter of March 23, quoted above, evinced his final decision.

In the meantime, the appellants had been proceeding with the completion of goods which had been in process of manufacture when the respondent's letter of March 23 was received, and these goods were shipped and invoiced according to the appellants' interpretation of the contract as explained above. Again there was an exchange of letters, and on April 15 the respondent returned the appellants' invoices for goods shipped on the 2nd of March, the 19th of March, the 7th of April and the 13th of April, and informed them that he had advised the express company to return the shipments. The appellants responded that they would receive the goods from the express company, but would hold them at the risk of the respondent, and on the 25th of May the respondent, whom the appellants had up to this time been urging to accept the shipments, was advised by the appellants that they would proceed to sell the rejected goods on the respondent's account, and hold him responsible for their loss on the unexecuted part of the contract. On the 7th of July, the respondent sent to the appellants a cheque for $982.22, in payment for the goods shipped on the 7th and 20th of February, at prices calculated according to the respondent's construction of the clauses in dispute. This cheque was expressed to be

in full payment up to date for all claims.

On the 9th of July, the appellants replied, stating that the cheque would be applied in part payment. On the 18th of August, the appellants wrote to the respondent, enclosing a bill for expenses in connection with the rejected goods, stating that they were proceeding to sell them, and that the respondent would be liable for any loss, and for selling expenses, and that as soon as the goods had been sold, a bill would be sent for damages for the respondent's breach of contract in rejecting the tendered goods, and in respect of the uncompleted part of the order. They also asked for a cheque for $348.76, the amount which they stated was still due and unpaid upon the goods shipped on the 7th and 20th of February and accepted by the respondent. On the 30th of August the appellants again wrote to the respondent, making a demand upon him on all these accounts for $2,422.81, with $64.72 interest from the 23rd of March, 1920.

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Obviously, the dispute between the parties centres on the difference between them as to the proper construction of the contract. The clauses quoted deal with two classes of contingency; the first, an advance or decline in the price of raw silk; and the second an advance or decline in "pay-roll and other labour costs"; and their object is to provide for a variation in the prices nominated in the contract according to a stipulated rule when one of the designated contingencies occur. In the case of raw silk, a datum price of $12 is fixed, and the price of the delivered article is not to be affected unless the decline or fall of the price of that material equals or exceeds five per cent of that sum. When the percentage of advance or decline has passed that point, then to or from the price of the delivered article is to be added or deducted a

percentage equal to one-half of this advance or decline.

The key to the meaning of this clause, if any key be required, seems to be in the words "per cent," and "percentage." The language of the clause seems rather evidently to contemplate an advance or reduction of the price chargeable as expressed in or defined by a percentage of something. The variation in the price of the finished article is to be a percentage of something which is determined by this; it is to be "equal to one-half of this advance or decline." "This advance or decline" manifestly is the contingent advance or decline, already referred to, in the price of raw silk, which is conceived as expressed in or defined by a percentage of that price. It seems reasonably clear that the parties are speaking in percentages. One percentage governs another percentage; the second is one-half of the first. The second is a percentage of something; of what? It also seems reasonably clear that this must be a percentage of the price nominated in the contract. Speaking with the greatest possible respect for other views, it is rather difficult to suppose that a plain business man, unsophisticated by learning or dialectics, would attach any other meaning to the words employed. An analysis of the second clause produces a similar result.

This construction of the contract is opposed mainly on the ground that in the result the contract becomes in this view of it extremely unfavourable to the purchaser—to such a degree, indeed, as to lead to the inference that no

business man of any prudence would enter into such an arrangement. The respondent puts his argument in this way; the prices quoted in the contract are based upon calculated allowances for cost of materials and labour, overhead charges and profit. Admittedly, the element ascribable to overhead charges and profit is no inconsiderable part of the total, and yet, under the appellants' construction, an increase of the price of material or cost of labour produces in determining the price chargeable a proportional increase in this element.

It is not, however, a self-evident proposition that a competent manufacturer would think it unreasonable to augment his profit proportionately with the increase of the cost of material and labour, or even that the allowance in his prices for overhead costs should increase according to the same scale. At all events it seems impossible to affirm that such a procedure as a method of ascertaining prices is so manifestly absurd or unjust as to require the courts to refuse effect to the language of a contract adopting it according to what appears to be the natural and ordinary meaning of its words. But when it is considered that under the contract to be construed the same procedure is also followed in the case of a decline of the cost of material and labour, in which contingency the allowance for profit and overhead charges is proportionately reduced, it becomes apparent that the contention is without cogency.

The view taken by the learned trial judge and urged upon us by the respondent's counsel was that the second percentage, although to be added to the prices named in the contract, is a percentage of the value of the silk used in manufacturing the quantity of the completed fabric, in respect of which the contract price is quoted. Thus, in the case of the $5 quality, for example, it appears that 1.93 ounce of raw silk would be consumed in the manufacture of one yard of this material, which has a value, at the rate of $12 per pound, of about $1.50. On the construction adopted by the learned trial judge and the majority of the court below, the sum to be added to the contract price is a percentage of this sum of $1.50, the value according to the datum price of the material made use of.

It appears to be sufficient to say that there is not a word in the conditions under discussion about the quantity of

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raw silk consumed in the manufacture of the unit quantity of brocade; the stipulations deal with prices and the advance and decline of prices expressed in percentages, and the natural reading of the language seems to be, as already mentioned, that it is the percentage of advance or decline in the price chargeable for the completed article, which is governed by the advance or decline in the price of material.

It follows that the respondent's refusal of the goods rejected and his refusal further to perform the contract which, as the correspondence already detailed demonstrates, was deliberate as well as intentional, cannot be justified; and that the appellants are entitled to recover for the goods delivered, as well as for non-acceptance of the goods tendered by them; and also damages, if they have suffered any, by reason of this wrongful repudiation.

Admittedly, renunciation by a party to a contract, by the law of Quebec, entitles the other party to recover damages equivalent to the loss he has sustained by reason of the failure of the repudiating party to fulfil his obligation. *New England Paper Co.* v. *Berthiaume* (1); *Morgan-Smith* v. *The Montreal Light, Heat and Power Co.* (2); *Langlois* v. *Ennis* (3). It must be obvious, however, that upon a repudiation by a buyer of his contract to purchase and take delivery of goods in instalments, it is competent to the seller to insist on preserving the integrity of the contract and to tender the goods for delivery according to the terms of sale, in which case, if the buyer refuse to accept, his claim for damages may be more easily and readily assessed. The present appellants, when notified by the respondent, on the 23rd of March, of his repudiation of his obligation under the contract, did not at once treat that repudiation as bringing the contract to an end. They proceeded, as already mentioned, to complete the manufacture of pieces then in process of manufacture, and subsequently tendered them for acceptance to the respondent, and it was only by their letter of the 25th of May that the appellants brought to a termination their attempt to induce the respondent to withdraw from the position he had assumed and accept the goods; and for the

(1) [1892] Q.R. 1 S.C. 65. (2) [1906] Q.R. 30 S.C. 242.
(3) [1899] Q.R. 16 S.C. 64.

purposes of this appeal it is on that date, or thereabouts, that the respondent's repudiation must be deemed to have taken effect. The appellants are, no doubt, entitled to recover such damages as they have shown to have arisen from the wrongful determination of the contract by the respondent as at that date. But what are these damages? Owing to the special terms of the contract, it might, in the event, have proved to be a profitable or an unprofitable arrangement, according (*inter alia*) to the fluctuations of the silk market and the labour market. It is conceivable that evidence might have been produced showing the probable dates at which the unfinished portions of the order would have been delivered which, with the actual records of the prices of silk and the costs of labour during the relevant period, might have enabled a judicial tribunal to arrive at some fair estimate of the appellants' probable loss. But such evidence has not been given. The appellants have based their case upon the theory that they are entitled to recover the amount of their loss, ascertained on the footing of the assumed execution of the unexecuted part of the order on the 23rd of March, which has been taken to be the date upon which the repudiation took effect. Apart from the difficulty arising from the fact already mentioned, that it was not until the 25th of May that the appellants decisively acted upon the letter of the 23rd of March, it is impossible, from the facts in this record, to affirm that damages calculated upon that footing would in fact correspond to the actual loss the appellants have suffered. Indeed, such a conclusion would be nothing better than surmise.

On the record before us, therefore, it is impossible to award damages in respect of loss of profit on the unexecuted part of the contract; and it has been necessary to consider whether an opportunity should be given to the appellants on proper terms to supply the deficiencies in the evidence through a further investigation of the facts. In view of all the circumstances and the course of the litigation, it appears, however, that this is an indulgence which could not with propriety be granted at this stage. The action was begun in December, 1920. The events giving rise to it occurred in the spring of that year. The facts to be considered under this head of the appellants' claim must, in

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no small degree, be facts peculiarly within the knowledge of the appellants. There was a protracted trial, at which the appellants had the fullest opportunity to present their case in the manner which they conceived to be most favourable to themselves, and all the evidence available in support of it. They deliberately elected to rest their claim upon the erroneous theory that they were entitled to be reimbursed as if delivery of the whole order had been completed on the 23rd of March. Probably this course was taken with full realization of the risks involved; and we can hardly assume that at the date of the trial the appellants were not in possession of the facts which would enable them to judge whether it would be worth while to shape their evidence in conformity with another and juster theory as to their legal rights.

Moreover, regard must be had to the point of view of the respondent. In any such investigation he would manifestly be at an appreciable disadvantage, in view of the facts that the decisive evidence must be very largely in the possession of the appellants, and that the facts to be investigated occurred over four years ago.

As to the residue of the appellants' claim, it appears to be well founded. The only element upon which a serious question could arise is that based upon the appellants' right to increase the contract price by reference to the advance of labour costs. As to this, Mr. Frick, the assistant general manager of the appellants, explained in a general way the method pursued in arriving at the rate of advance; and while it is true that the explanation might have been more precise, it seems clear enough that the real reason why the witness was not more explicit, and the explanation not more complete, is to be found in the lack of desire to pursue the subject *au fond* on part of the cross-examining counsel, who directed his interrogatories almost exclusively to the object of bringing out the ratio (among the elements constituting the contract price) between the constituents intended to provide for overhead costs and of labour; an investigation which counsel was pursuing with the object of buttressing his argument on the construction of the contract, and by no means unwisely.

The cardinal elements of the calculations of the witness were produced in tabulated form; the payrolls were in the

possession of the appellants in court, and the fullest opportunity was given for the examination of them by the respondent.

There are two remaining questions which require a brief reference. The first concerns the question of exchange. Since the sums to which the appellants were entitled as prices for goods delivered under the contract or tendered for delivery were payable in New York, they were payable at the figure named in New York funds; and damages should therefore be calculated according to the rate of exchange ruling on the respective dates when such sums would have been paid in New York if the terms of the contract had been observed. In *re British American Continental Bank Ltd.* (1).

The other point concerns the contention advanced and accepted by the learned trial judge, that the cheque of the 7th of July, 1920, having been expressed to be

in full payment to date for all claims,

and having been accepted and cashed in that form, the appellants are concluded from asserting a claim for any larger sum in respect of the deliveries of the 7th and 20th of February.

The appellants made it quite clear by their letter, written on the receipt of the cheque, on the 9th of July, that they declined to accept the condition, and that letter appears to leave no room for doubt that this contention cannot prevail.

The rule laid down in *Day* v. *McLea* (2), has been adopted and given effect to in the Province of Quebec, first in a decision of *La Compagnie Paquet* v. *Paquin* (3), and more recently in *Royal Trust* v. *White* (4), when such a condition is indorsed upon or inserted in the body of the cheque, it is a question of fact in each case whether the creditor has, by words or by conduct, agreed to that condition.

It is assumed that the parties will be able to agree upon the sums due in respect of exchange, as well as the amount payable for interest under the express terms of the contract. In addition to these two items, the appellants are

(1) [1923] 1 Ch. 276.
(2) 22 Q.B.D. 610.
(3) [1910] Q.R. 39 S.C. 58.
(4) [1916] Q.R. 50 S.C. 277, at p. 280.

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entitled to judgment for the sum claimed in respect of goods delivered and tendered for delivery, $1,184.85. They are entitled to four-fifths of the costs of the action and of both appeals.

Should the parties be unable to agree as to the sums due in respect of exchange and interest, the points of disagreement may be mentioned.

IDINGTON J.—The appellant is a corporation manufacturing silks in New York city. The respondent is a fur manufacturer in the city of Montreal.

The appellant's agent solicited from the respondent an order for silk brocade to be manufactured by appellant, and got same which he forwarded to appellant; and the latter drew up, in its printed form, one of its usual forms of contract at the time, and specified therein and thereby the contract conformable with said order, which was dated 28th November, 1920, and executed by both parties hereto.

The contract provided for the purchase by respondent from appellant of ten pieces of brocade silk, each piece to be sixty yards in length and thirty-six inches in width, and each to be of a different colour and a variation in prices, as specified, and to be delivered when manufactured but not later than the 31st December, 1921.

Three of the kinds specified were sold at the price of $5 a yard; two of the kinds specified were sold at $4.50 a yard; two of the kinds specified were sold at $4 a yard, and three others of the kinds specified were sold at $3.50 a yard.

There was set forth in the said contract the following provision for increase or reduction of the prices named:—

> If at the time of making delivery pay-roll and other labour costs have five per cent, or more from $12 for Double Extra B. grade, a percentage equal to one-half of this advance or decline shall be added to or deducted from the price.
>
> If at the time of making delivery pay-roll and other labout costs have increased or decreased five per cent or more, a percentage equal to one-half of this increase or decrease shall be added to or deducted from the price.

There seems to have ensued much pretence on the part of the respondent of his having misunderstood these two paragraphs, which seem to me very clear and plain. I submit, with great respect for the learned trial judge and a majority of the Court of King's Bench, that they got

possessed of a rather confusing conception of what is expressed thereby.

Mr. Justice Tellier, who wrote a dissenting opinion in the appellate court, seems to me to have correctly appreciated the true intent and meaning of said provisions for varying the prices named.

Mr. Justice Flynn also dissented but did not write. As he dissented I assume he probably had taken the same view as Mr. Justice Tellier.

At the time when said contract was entered into the prices of many kinds of goods and labour were liable to sudden changes in the market.

The market price of raw silk was evidently assumed to be $12 for double extra B grade at the time of making the contract.

And the pay-roll and other labour cost was liable to change up or down between the date of signing the contract and the date of delivery.

If these variations did not exceed five per cent no change was to be made in the price, but if they were such as to exceed in either direction five per cent, then the price of the goods so sold must vary accordingly to the extent of a percentage of half the increase or decrease. Surely nothing could be fairer if carried out honestly.

There were two deliveries in February, 1920, and one on the 2nd of March, 1920, before the invoices therefor, made on the basis of such variation, were objected to.

On the 5th of March, 1920, the respondent wrote the appellant manufacturers in New York that the prices quoted in the invoice, covering said shipments, did not correspond with the prices of the contract; and asking them to stop further shipments until explanation made for such change.

To that appellant wrote as follows:—

New York, March 8, 1920.

Mr. J. Kaufman,
944 St. Lawrence Boulevard,
Montreal, Canada.

Dear sir,—Answering your letter of March 5, 1920, the price of raw silk on February 7, 1920, was $16.80, an advance of 40 per cent and labour costs had advanced 20 per cent which under the terms of the contract would average 30 per cent over the basic price of $5 which would make no. 3396 $6.50 and no. 3384 basic price $3.50, $4.55 as charged.

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On February 20, 1920, raw silk was $16.25 and the average increase was 28 per cent, making the $3.50 goods at $4.48; we charged same at $4.47½.

We trust this explanation is entirely satisfactory and we are making shipment to-day of goods just received from the mill, on the basis of $15 for raw silk.

Yours very truly,
THE BRILLIANT SILK MFG. CO. INC.,
Per J. B. Whitney,
Manager.

The respondent's letter in reply thereto was as follows:—

Montreal, March 10, 1920.

Messrs. The Brilliant Silk Mfg. Co.,
387 Fourth Avenue,
New York.

Dear sirs,—In reply to yours of the 8th, we wish to state that at the time our Mr. Kaufman gave his order to your Mr. Hanson, Mr. Kaufman understood that the increase would not exceed 5 per cent, if there should be any increase at all.

Probably our Mr. Kaufman has misunderstood, but at any rate, you know fully well that we are not in the raw silk business, and therefore do not understand anything in this line, and cannot be bothered to the learning of this now, nor can we be bothered watching the changing market.

We shall receive the balance of our order at the prices of our original order given to your Mr. Hanson, and at no other prices.

We on our part feel that we are fully justified and more so, in our actions in this matter, and expect that you in turn will act justly; otherwise we shall surely not accept any shipments from you under the circumstances.

Yours very truly,
J. KAUFMAN,
per E. R. H.

P.S.—Kindly note that although the prices increase or decrease, we shall keep to the prices of our original order prices.

This clearly indicates an intention on the part of respondent to repudiate his contract. But as a matter of prudence and to make that repudiation clear beyond doubt, the appellant wrote to him, on the 18th of March, 1920, insisting that the contract must govern, and concluded by saying that four more pieces of the goods as ordered were being shipped according to the contract.

This shipment was made accordingly and an invoice sent therefor based on the terms of the contract according to the appellant's contention of its clear meaning, and showing, by the percentages given therein, the way in which the net amount was arrived at.

On the 23rd of March, 1920, the respondent replied to appellant as follows:—

Messrs. The Brilliant Silk Mfg. Co.,
387 Fourth Avenue,
New York.

Dear sirs,—In reply to yours of the 18th, would say that my letter to yourselves had been dictated by myself and the substance of which is exactly as I desired and found correct in this matter.

Under the circumstances and for the various reasons already stated in my previous letter, I refuse acceptance of your goods and herewith remit your invoices for same.

Unless you make such shipments as are correct and in accordance to my previous letter, I will, under no means accept any of your shipments.

Yours truly,

J. Kaufman.

He returned the invoices therewith and, as soon as received, returned the goods to appellant, and, thereby, I submit, there is clear evidence of repudiation of the contract and such an anticipatory breach of the same as to entitle appellant to bring this action and to recover the damages as claimed herein.

The appellant replied and insisted upon the respondent carrying out his contract.

A number of letters passed between the parties after this, for the appellant seemed to have imagined that it could persuade the respondent of the folly he was committing in taking the stand he had done.

The respondent simply defied the appellant and no useful purpose is to be served by repeating the later correspondence here.

The goods so returned were sold at auction, after due notice to respondent, and for all the losses incidental thereto, and the necessary expenses, the respondent is, in my opinion, liable.

These and all other items for damages for breach of the contract based on the situation thus created as of the date of 23rd of March, 1920, as claimed and I think, proven herein, the appellant is entitled to, as well as the balance due for the goods retained by the respondent on the prices determined by the terms of the contract as claimed and proven by the appellant, and that including the item of exchange on the draft sent in Canadian currency by the respondent.

Clearly as the payment had to be made in New York and the rate of exchange was at the time of payment against Canada, the respondent as to that item should make it good.

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The damages should bear interest from the said date of the breach; but, as I understand, there is practically no difference now in the rate of exchange between here and New York, that item must not enter further into the estimate of damages.

The appeal should be allowed with costs throughout and judgment entered for the amount of $3,956.99, and interest thereon from said breach of contract on March 23, 1920. I cannot see my way to allowing the 10 per cent claimed thereon. Indeed I may, for want of direct evidence on the point, err in allowing the items of difference in exchange on drafts before breach of contract, but there is slight incidental evidence relative to a notorious condition of things well known, that stands on a different footing from that which the learned trial judge ruled out.

I was, at the argument, inclined to think that inasmuch as the price of silk, and possibly of labour, was for the balance of the year 1920, in a falling condition, the application of the rule of law requiring damages to be assessed as of the date of the breach might possibly be modified, but, on reflection, I am quite clear that there is no room for such modification in this case, if ever in any.

The market price differences between the date of the contract and the respective deliveries of goods, only provide for appellant's protection to the extent of one-half the rises beyond the prices stated in the contract, and we have heard nothing to shew that the fall was such as to reduce same below the prices fixed by the contract.

If there is any serious doubt as to proof of the percentage of rise in either prices of silk, or labour relative to the manufacture of the goods in question, I am inclined to hear and consider any argument tending to entitle the reconsideration thereof. I should be inclined, if on hearing it any serious doubt raised as to the correctness of the result, to give the opportunity of a reference as to such facts as determine the result on the basis of the construction I have put on the contract, but, of course, only at the risk of respondent, in any event, paying the costs of such reference.

At present the course pursued by respondent seems to me not to entitle him thereto, but he and his counsel seem to me to have been so obsessed with their own construction of the contract that possibly they paid no proper attention to

learning the facts as to the market price of either silk or labour, at the respective dates in question.

RINFRET J. (dissenting).—Appellant's traveller, Mr. Walter M. Hanford, came to Montreal and, on the 26th November, 1919, took from the respondent an order for thirty-four pieces of silk brocade of different colours and patterns at prices varying from $3.50 to $5 per yard, delivery to be made as follows; a few pieces as early as possible; balance as ready; no goods after December 31, 1920.

Hanford sent to the appellant, whose head office is in New York, a memorandum of the order. With this memorandum, the appellant prepared a contract in printed form and addressed it to the respondent in Montreal requesting him to sign a slip in confirmation of the contract, then tear it off and mail it to the appellant. This was done by the respondent in Montreal.

It follows that the contract between the parties was completed in Montreal and must be governed by the law of the province of Quebec.

This contract contained the following stipulation as to price:—

> If, at the time of making delivery, raw silk has advanced or declined 5 per cent or more from $12 for double extra B grade, a percentage equal to one-half of this advance or decline shall be added to or deducted from the price.
>
> If, at the time of making delivery, pay-roll and other labour costs have increased or decreased 5 per cent or more, a percentage equal to one-half of this increase or decrease shall be added to or deducted from the price.

As soon as the appellant began to forward the first pieces of silk which were ready and invoiced them according to its method of calculation, the respondent at once complained that the prices asked by the appellant were not in conformity with the contract. In the correspondence which ensued it became apparent that the parties were not at one mind on the construction to be put upon the clauses quoted; and, as they found themselves unable to agree, by its letter of the 25th of May, 1920, the appellant abandoned its attempts at compelling the respondent to accept the goods at the prices invoiced and brought the contract to its termination, subject to the right of claiming all amounts due on the goods already manufactured and shipped and also of sending

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a bill for its expenses and loss of the profit on the unfinished portion of the order.

By that time, two shipments, respectively on the 7th and 20th of February, 1920, had been received by respondent, although accepted by him at prices calculated in accordance with his interpretation of the contract. For these, on the latter basis, the respondent sent to the appellant, on the 7th July, a cheque drawn for $982.22, but marked "with New York funds" (and accordingly representing an amount of $1,116.65 in Canadian money), which the appellant accepted on account.

Four other shipments had been made by the appellant on the 2nd and 19th of March, the 7th and 13th of April, but refused by the respondent, because the appellant persisted in asking for them prices which, in respondent's view, were not called for by the contract. Whereupon, the appellant had notified the express company to return the goods and had advised the respondent that, when this was done, it would take them at respondent's risk and proceed to sell them for respondent's account.

The goods thus returned were later sold at auction at prices inferior to those asked by the appellant from the respondent, and, in this action, the former now claims the difference, with certain express charges in addition.

The balance alleged to be due on the goods shipped on the 7th and 20th of February which were received and kept by the respondent, the difference between the proceeds of the auction sale and the price claimed for the pieces of silk shipped on the four dates already mentioned in March and April, and the damages on the uncompleted part of the contract make up the sum of $3,956.99, for which the appellant sues the respondent, with interest from March 23rd, 1920, and a further sum to represent the rate of exchange between Montreal and New York funds.

The litigation centres on the two clauses already recited.

It should first be noted that, under these clauses, the price of each piece of silk is left to be determined by "the time of making delivery," since it is according to the market value of raw silk and the cost of labour on that date alone that the "percentage" which forms the element of variation is to be established. The actual cost of raw silk or of labour to the appellant is immaterial; and,

notwithstanding the fact that a yard of silk brocade goes through several and different processes such as winding, quilling, warping, twisting, weaving, picking, cleaning, throwing and dyeing, which must necessarily take place at different dates (when labour might well have gone up or down), it does not matter, under this ingenious contract, what the price of such labour was on the particular date when it was actually done; but it is the rate prevailing on the day of delivery which is to govern.

Now there is nothing in the contract to fix the date of delivery. It is left at the will of the appellant. And it is rather apparent, by the record, that the price might be affected appreciably by the withholding of delivery for even one day. The price itself therefore is not fixed by the contract but is left in the hands of the vendor. To quote the trial judge:—

> The price of raw silk varies from date to date, and * * * it would enable plaintiff to choose a date of delivery when raw silk was at its highest price independently of what it might have actually cost,

I do not think that such a contract is legal or binding under the law of Quebec—and I say that quite independently of any element of fraud.

Under this law (Art. 1472 C.C.) it is essential to the existence of a contract of sale that the price should be either determined or determinable; but it must be determinable according to fixed conditions and may not be allowed to vary at the will or the caprice of the vendor.

> Le prix (says Pothier ed. Bugnet, vol. 3, no. 23), qui est de l'essence d'un contrat de vente, doit être un prix certain et déterminé. Il n'est pas néanmoins nécessaire qu'il soit absolument déterminé: il suffit qu'il soit tel qu'il doive le devenir et qu'il ne soit pas laissé au pouvoir seul de l'une des parties.

The same principle is expounded in Carpentier & du Saint, Répertoire du Droit Français, vo. Vente, no. 664:—

> Aux termes de l'art. 1591, "le prix de la vente doit être déterminé et désigné par les parties." Pour déterminer le prix, les parties peuvent adopted le mode qu'elles jugent convenable; mais il faut que ce mode les lie l'une à l'autre, *car il n'y a pas de vente tant que la fixation du prix dépend de la volonté de l'une d'elles.*

He refers to D. 1889, 2.62: Baudry-Lacantinerie & L. Saignat, no. 132; Planiol, t. 2, no. 1376.

In the case of *Ville de Biarritz* v. *Broquedis* (1), it was held:—

(1) D. 89 2. 62.

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Un contrat de vente est nul lorsque les parties ne sont pas d'accord sur le prix et que la fixation de ce prix est laissée à l'arbitraire de l'une des parties contractantes.

A quotation from Planiol (loc. cit.) is unnecessary as it adds nothing to the proposition of Carpentier & du Saint; but the reference to Baudry-Lacantinerie is important:—

132. * * * Les parties peuvent d'ailleurs adopter tel mode de détermination du prix qu'elles jugent convenable, pourvu qu'elles soient liées l'une et l'autre par le mode de détermination qui a été convenu: car il n'y a pas de vente tant que la fixation du prix dépend encore de la volonté de l'une des parties.

Ainsi, au lieu de déterminer le prix en fixant le chiffre même les parties peuvent le désigner en se référant à un fait qui ne dépende de la volonté ni de l'une ni de l'autre pourvu que ce fait en procure la détermination précise: on pourra, par exemple, vendre un immeuble pour le prix pour lequel le vendeur l'a lui-même acheté; s'il s'agit de choses ayant un cours, on peut les vendre au cours du jour de la vente ou de tel autre jour *indiqué*. (Aubry & Rau IV, paragraphe 349, p. 388; Guillouard, Vente et échange. I.N.109: Huc, Comm. du Code civil, X, n. 36).

Huc. (vol. X, n. 36) says:—

Donc il n'y a pas vente quand la fixation du prix est au pouvoir du vendeur seul ou de l'acheteur, car dans ce cas il n'y a pas encore consentement ni lien de droit. Mais le prix est déterminé, quoique le montant ne soit pas encore connu des parties au moment du contrat, s'il n'est plus au pouvoir de l'une d'elles de l'augmenter ou de le diminuer.

And Laurent, (3e éd., vol. 24, no. 73):—

L'article 1591 veut que le prix soit déterminé par les parties. Cela veut dire que le consentement des deux parties doit porter sur le prix, comme sur la chose qui est l'objet de la vente. *C'est un principe élémentaire qu'il n'y a point de prix si le vendeur s'en rapporte à la discrétion de l'acheteur ou si l'acheteur déclare qu'il paiera ce que le vendeur voudra;* ce n'est pas là un concours de volonté, c'est la volonté d'une seule des parties; il en résulte qu'il n'y a pas de consentement sur le prix.

He had already said at No. 72:—

Mais si le prix est indéterminé et incertain, quand même *il ne le serait que dans l'un de ses éléments,* on doit dire qu'il n'y a pas de prix, et partant il n'y a pas de vente.

It follows from this doctrine that the parties herein could validly stipulate a price based on certain conditions prevailing "at the time of making delivery" only if such time had not been left, as here, at the choice of the vendor. The appellant, in the present case, must make delivery "as ready," but is not obliged, nor can he be compelled to be ready at any time before the 31st December, 1920.

Quoting again from Pothier—Bugnet Vol. 3):—

16. La seconde chose requise pour former un contrat de vente, est qu'il y ait un prix couvenu entre les parties: *sine preto nulla venditio est.* * * *

17. Le prix nécessaire pour former un contrat de vente doit avoir trois qualités: 1. Il doit être un prix sérieux; 2. certain et déterminé, ou du moins qui doive se déterminer; 3. il doit consister en une somme d'argent.

In my humble opinion, a price which can vary at the will of the vendor, as in this case, is not that price " certain et déterminé," which is an essential element of the contract of sale. The consequence is that, lacking such essential element, the contract here *nulla venditio est.*

For that reason alone, the appellant had no standing before our courts on the agreement which he tried to have enforced. His only right was for the payment, on the basis of *quantum meruit,* of the goods received and kept by respondent. The action was not taken on that basis; but, the plea having alleged the bad quality of the goods, the parties had opportunity of submitting their evidence in that respect sufficiently to obviate the necessity of reopening the enquête or of reserving the right of the appellant to recover, for the value of the goods actually delivered, any amount in excess of what has already been paid.

There is however, in my view of the case, yet another difficulty standing in the way of the appellant.

It is a rule derived from Pothier that:—

On doit dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes,

which has been embodied in Art. 1013 of the Civil Code thus:—

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

With due respect, I am inclined to the opinion that there never existed between the parties a "commune intention" as to the method by which the price was to be determined. This is not a case of error; but one where the minds of the contracting parties have failed to meet, the consequence being that there was no completed contract.

The trial judge has submitted the problem in this way:—

The plaintiff's contention is that the percentage of increase in raw silk and labour must be added together, divided by two, and then applied to the price of the finished product.

It seems to us that the fair and reasonable interpretation of this clause is that half of the percentage of increase in the price of raw silk should be applied to the quantity of raw silk going into a yard of manufactured silk, and one-half the percentage in the increase of labour should be applied to the actual amount of labour, exclusive of profit and overhead expenses, required to make up a yard of finished product.

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The contrary view is expressed by Mr. Justice Tellier, in his dissenting judgment in the Court of King's Bench, thus:—

Après avoir pris connaissance du dossier, étudié soigneusement la clause dont il s'agit, et même conféré ou discuté avec quelques-uns de mes collègues du Banc, il m'est impossible de trouver que la dite clause a le sens que la Cour supérieure lui a donné. Je suis d'avis, au contraire, que c'est la demanderesse qui a raison. Du moment que la hausse de la soie brute s'élevait à 44 pour cent, à la date de la livraison, la demanderesse avait le droit d'ajouter au prix de $5 fixé dans le contrat un percentage égal à la moitié de cette hausse, c'est-à-dire un percentage de 22 pour cent. Il lui était également loisible d'ajouter au dit prix de $5 un autre percentage égal à la moitié de la hausse du coût de la main-d'oeuvre. Or, c'est là précisément ce qu'elle a fait. Le défendeur a donc eu tort de s'opposer à l'augmentation et de faire obstacle à l'exécution pleine et entière du contrat.

Now, the latter scale of advance of the price cannot, I submit, have been within the contemplation of the buyer—(I am assuming that the vendor knew what he was at, when he drafted the clause)—and, when such effect as suggested by Mr. Justice Tellier does not necessarily follow from the language used, I am constrained to the view that there is lacking in the present case the "commune intention" without which it is impossible to find that "les deux volontés se sont rencontrées" and which is essential to the formation of the contract.

Le consentement (says Laurent vol. 24-no. 6, at p. 11), doit intervenir sur le prix. Si l'un entend vendre pour une somme plus grande que celle pour laquelle l'autre consent d'acheter, *il n'y a pas de contrat de vente,* faute de consentement; c'est un contrat inexistant, c'est le néant. Pothier, vol. 3, no. 36.

Sir François Lemieux, Chief Justice of the Superior Court of the province of Quebec, in *Martineau* v. *Plante* (1), quotes the above passage from Laurent and adds (p. 105):

Le prix est donc une condition de l'existence de la vente. Or, si le consentement des parties fait défaut sur un prix déterminé et désigné par les parties, ou s'il n'y a pas de concours de consentement sur le prix, il n'y a pas de vente. Les deux parties n'ont pas concouru dans le prix: l'un a cru vendre pour un prix élevé et l'acheteur a cru acheter pour un prix moindre. Les parties ont donc été en désaccord sur le prix et ce désaccord empêche la vente.

The result herein is aptly expressed in the following passage of the reasons for judgment of the Chief Justice of the Court of King's Bench:—

Tout d'abord, le prix de vente * * * étant indéterminé, comme les parties ne pourraient s'entendre sur le mode de procéder pour faire cette détermination, il s'en est suivi qu'il n'y a pas d'accord de volonté sur un

(1) [1916] Q.R. 50 S.C. 102, at p. 104.

élément essentiel du contrat, à savoir: le prix; et que, sans prix, il n'y a pas de vente, et, par conséquent, pas de contrat entre les parties dont l'exécution pouvait être exigée; et, par conséquent, pas d'action.

See *Béland* v. *The Quebec Southern Railway Company* (1), where Mr. Justice Lamothe, afterwards Chief Justice of the province of Quebec, says:—

Quand un doute raisonnable existe sur la question de l'existence du consentement de l'une des parties, une cour de justice doit décider que ce consentement n'existe pas et ne peut être mis à effet.

However, *magis ut valeant quam ut pereant.* Assuming therefore that the contract was valid and binding, and following the guidance of Sir Montague Smith in *McConnel* v. *Murphy* (2), "in questions of difficult interpretation," I would, with the greatest respect, think that the "true construction" is that of the trial judge, with whom the majority of the Court of King's Bench concurred.

Such construction, in the judgment of Mr. Justice Duclos, is thus stated:—

In our opinion, this clause means that the percentage of increase in raw silk should be applied to the value of the raw silk used in one yard; and the percentage in actual labour, exclusive of profits and overhead expenses, should be applied to the actual cost of such labour, and one-half of this percentage of increase should be added to the price.

The disputed clause has not acquired any recognized meaning in the province of Quebec, nor even in Montreal; and the proper construction to be placed upon it cannot be gathered from usage under the rule laid down in article 1016 of the Civil Code.

Even in the United States, it is not a standard clause. Mr. W. R. Frick, the assistant general manager of the appellant in New York, tells us:—

I don't know that anybody else has it.

Such a clause is not known in the silk trade, for Mr. Reynolds, general manager of the Belding-Corticelli Ltd., large silk manufacturers of Montreal, testifies:—

Well, it is very hard to tell just what the meaning of that contract is. It gives two specific items and says that in case of either of those items changing there would be a change in the price. Now it says "if at the time of making delivery raw silk has advanced or declined 5 per cent for double extra B grade the quantity equal to one-half of this shall be added to the price." It is very hard to state what was in the minds of the men who drew up this contract, whether they were adding that percentage to the total cost of the goods, or whether they were adding it only to the raw silk, which is the item that is specified in the paragraph.

(1) [1917] 24 R.L. N.S. 58. (2) [1873] L.R. 5 P.C. 203.

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Then, on the other hand, the second paragraph says that "if the payroll and other labour costs have increased or decreased 5 per cent a percentage equal to one-half of this increase or decrease shall be added to or deducted from the price." Now, I don't know whether they meant they are going to add or decrease this total price of the goods, or whether they are speaking only of adding this item to the labour cost. They mention labour cost and they mention the raw silk.

Now, if the interpretation of the minority of the Court of King's Bench be adopted, "by reason of this stipulation," as indicated by the trial judge,

the plaintiff could add 30 per cent to its profits and to all its overhead expenses,

merely because the value of raw silk and the labour costs have advanced from the basic price stated or assumed in the contract.

This is put very clearly and forcibly by Mr. Hope, an accountant called by respondent:—

The invoices which were sent by the plaintiffs to Kaufman do not show any basis for the increased prices so that Kaufman would not be able to estimate what he ought to pay on those invoices, and I find that subsequently in the claim for damages filed by the plaintiff that there are two very manifest errors in figuring.

In the first place, he takes, according to the evidence of Mr. Frick that I saw there, he says he takes the increase of silk at 44 per cent and the increase of labour at 17 per cent, he adds the two together and divides them by two, and increases the basic selling price of say $5 by that one half, which is 30 per cent. That is manifestly wrong.

Just to give you an illustration of how that would work out, taking Exhibit P.-29, items 1, 2, 3, and 4, showing the saving of labour and silk costs. Add those items together. You will find that the total silk is $1,838.56 and the total labour cost $993.70: in other words, the silk is twice too much if you divide your percentage into two. You are manifestly overcharging the defendant on your increased prices. I have no intention of interpreting the contract, but since a $5 quality is given as the base price and you put on this extra 30 per cent, if you get away from the condition of extra silk and extra labour on that $5, you are also paying that extra per cent on the overhead and profit that might be in the basic price.

It is not meant to pretend that the latter proposition is unreasonable; but it does not seem to be the intention which the reading of the clause in question naturally conveys.

Many a contract, even calling for deliveries spread throughout one year, stipulates a fixed price, calculated by the parties on conditions as they exist at the date of the contract. If such conditions change, in course of performance, one or the other of the contracting parties stands to lose or to gain thereby. It is only natural that the appellant and the respondent herein should have been willing

to share in the risk attending such a contingency; but it would seem that the usual way of providing against it was to stipulate for an increase or decrease in that portion of the price representing the elements of cost which were likely to vary. The two most important of those elements of cost—if not the only ones—were raw silk and labour. Both parties wished to be protected; and, for that reason, they agreed to a variation of the price based on half the increase or decrease of the value of raw silk or labour as it existed on the date of the contract. But there was no apparent reason why the overhead expenses and the profits should be greater or smaller in proportion to the increase or decrease in value of the raw materials and, it would not appear to be what the parties intended to contract for.

Of course, the stipulation is expressed in percentages. But, as the trial judge says:

> There is a wide difference between *adding* the percentage to this price, and *applying* the percentage to the said price;

and, at all events, the percentage must always be converted into a sum and that sum be afterwards added to the price.

Therefore, whether you apply the percentage only to the basic cost of raw silk and labour or whether you apply it to the price of the finished article, you add none the less to the price, in each case, a sum resulting from the calculation of a percentage. You *add it to the price* stipulated in the contract and the language of the clause is satisfied.

So that, for the purpose of confirming the judgment *a quo*, it is not necessary that one construction only should be possible. It is sufficient that the clause should be at least equally susceptible of the construction placed upon it by the trial judge and the majority of the Court of King's Bench, bearing in mind always that the rule of article 1013 of the Civil Code is that the "commune intention" of the contracting parties should be arrived at by interpretation rather than by the literal meaning of the words used. And, most respectfully, it would seem that such interpretation leads to the conclusion that it is a sum produced by applying the percentage to the amount included for raw silk and labour, which is to be added to the price stipulated for the finished article, and

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not a percentage of the total price of the finished article by which such price is to be increased.

In the latter case the price is augmented by a percentage of the price itself. In the first instance it is augmented only by a percentage of the value of raw silk and labour. That is what the courts below have held the clause to mean and with such a construction I agree.

It might, at all events, be conceded that a clause, such as this, is ambiguous and equivocal. This would flow from the evidence of MM. Reynolds and Hope already quoted and the difference of opinion in the Court of King's Bench. It took the appellant two continuous days of enquête and the filing of numerous exhibits to establish the price according to his view. Apparently it is wanting in that element of certainty or of clearness as would meet with the requirements of the law.

And I fail to see, under such circumstances, why the respondent should not have the benefit of the principle which was the recognized rule as early as the time of Ulpian, and is expressed in Dantoine, 46:—

Lorsqu'il y a de l'obscurité au fait dont il s'agit, on doit prendre le parti le plus doux, c'est-à-dire qu'il faut réduire la disposition au plus petit point où elle puisse aller.

This principle is the seventh rule laid down by Pothier (Traité des Obligations, Bugnet, vol. 2, no. 97):—

Dans le doute, une clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté l'obligation;

and article 1019 of the Civil Code reproduces it practically verbatim.

Ambiguitas contra stipulatorem est, and Demolombe (vol. 25, p. 29) is authority for the proposition that article 1019 C.C. applies equally to the lessor or to the vendor and that it is against them that obscure or ambiguous stipulations must be construed.

However that may be, it is well established jurisprudence in Quebec (*Rooney* v. *Fair* (1); *Consolidated Car Heating Co.* v. *Came* (2); *Canada Glue Co.* v. *Galibert* (3); *Canestrari* v. *Lecavalier* (4); *Guay* v. *Provident Accident & Guarantee Co.* (5); *Desjardins* v. *Great West Life Assur. Co.* (6); that, in case of doubt, the contract is interpreted

(1) [1879] 10 R.L. 103.
(2) [1903] A.C. 509.
(3) [1909] Q.R. 36 S.C. 473.
(4) [1915] Q.R. 47 S.C. 296.
(5) [1916] Q.R. 51 S.C. 328.
(6) [1916] 23 R.L. N.S. 398.

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against him who has prepared or drafted it or, in the present case, the appellant.

By that rule, the judgments below have been guided:—

Si le contrat tel que rédigé par le vendeur (says Chief Justice Lafontaine), est tellement obscur qu'il soit difficile de le comprendre et qu'il soit susceptible de deux interprétations, le doute est contre lui; et c'est le sens imposant la moindre obligation qu'il faut prendre, suivant la règle: *id quod minimum sequimur.*

I have, for the above reasons, reached the conclusion that the appeal should be dismissed, with costs.

I think there has never existed herein a valid and complete contract of sale, on account of the absence in it of the legal requirements with regard to the price. As for the two shipments of silk brocade received and kept by the respondent, the record does not warrant a reference back for the purpose of establishing *quantum valebat,* and I am satisfied on the evidence that the cheque sent by the respondent was sufficient to fully indemnify the appellant.

On the other hand, I would at least concur with the trial judge and the majority of the Court of King's Bench in construing the contract against the appellant. Upon such interpretation, there follows that the appellant has sought to overcharge the respondent; he has refused to carry out the contract according to its terms; and the respondent was justified in the stand which he has taken.

Appeal allowed with costs.

Solicitors for the appellant: *DeWitt, Howard & Harold.*

Solicitors for the respondent: *Dessaulles, Garneau, Désy & St. Jacques.*

IN RE N. H. GILBERT

1925

*Feb. 21.

DAME MARIE BOIVIN.....APPELLANT;

AND

LARUE, TRUDEL & PICHE.....RESPONDENTS.

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

Appeal—Jurisdiction—Bankruptcy—Leave to appeal—Delay—Enlargement—Filing of petition in the registrar's office—Sufficiency—Bankruptcy Act (D) 9-10 Geo. V, c. 36, ss. 63, 66, 74 and rule 72—Supreme Court Act, R.S.C. (1906), c. 139, rule 108.

A judge of the Supreme Court of Canada cannot, under rule 108 of that court, enlarge or abridge the statutory delay provided by rule 72 of

*PRESENT:—Mr. Justice Mignault in chambers.

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the Bankruptcy Act for making "an application for special leave to appeal" to this court which rule 72 is not inconsistent with the provisons of the Act (s. 74).

The filing of a petition for leave to appeal in the registrar's office within the delay will not suffice to meet the requirements of rule 72.

MOTION for leave to appeal to this court by the appellant in bankruptcy proceedings.

The facts are stated in the judgment of Mr. Justice Mignault.

A. Langlais K.C. and *Paul Leduc* for the motion.

Gagné contra.

MIGNAULT J.—The appellant moves before me for leave to appeal from a judgment of the Quebec Court of King's Bench of the 12th January, 1925, dismissing her appeal from a judgment of the Superior Court, sitting in bankruptcy, which condemned her to pay to the respondents, in their quality of trustee to the insolvency, $23,555, for money she had received from the insolvent, her husband, and also to return to the insolvent estate certain movable effects which were in the house occupied by the consorts.

A motion was also presented to me by the appellant to enlarge the time for applying to a judge of this court for leave to appeal, which time is fixed by rule 72 of the general rules under the Bankruptcy Act. The motion for leave to appeal was filed in the registrar's office on February 10 within thirty days after the judgment of the Court of King's Bench, with a notice to the respondent that it would be presented on the 19th of February. By consent of counsel, this latter motion was presented to me on the 20th of February to avail as if presented on the 19th. It is however obvious that it is outside the time prescribed by rule 72.

At the argument on both motions, an affidavit was filed on behalf of the appellant alleging that the trustee had not proceeded against her before the Superior Court of the province of Quebec, the only court having jurisdiction in reference to civil rights of persons not under process of liquidation; that the trustee proceeded in the court of bankruptcy not with a writ of summons but with a petition, and that she had been dragged before the court of bankruptcy and deprived of her natural jurisdiction and

of her right to inscribe this case before the Supreme Court of Canada *de plano* and without leave to appeal; that she was in no way a party to the liquidation of the insolvent; that this question of jurisdiction was raised before the Superior Court and before the Court of King's Bench and was decided contrary to her contentions; that the judgment condemning her had interpreted Art. 1265 C.C. in a way which she contends is contrary to its meaning thus affecting her civil rights; that a federal law cannot deprive any citizen of the province of Quebec of rights granted him by the *British North America Act* and that the decision of this court will be of general interest to all the citizens of that province.

The first point to be determined is whether this application for leave to appeal is made within the time prescribed by bankruptcy rule 72. It is to be observed that these rules, provided they are not inconsistent with the terms of *The Bankruptcy Act,* must be judicially noticed and have effect as if enacted by the Act (s. 66 of *The Bankruptcy Act*).

Paragraph 1 of rule 72 is in the following terms:

> An application for special leave to appeal from a decision of the appeal court and to fix the security for costs, if any, shall be made to a judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

This rule is not inconsistent with the terms of the *Bankruptcy Act* for this Act merely provides (s. 74) that the decision of the appeal court upon an appeal to it shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court. The time for making application for leave is not determined by the Act and therefore could be fixed by the general rules adopted under s. 66.

The appellant relies on rule 108 of the Supreme Court Rules which states that

> in any appeal or other proceeding the court or a judge in chambers may by order, enlarge or abridge the time for doing any act, or taking any proceeding upon such (if any) terms as the justice of this case may require, and such order may be granted, although the application for the same is not made until after the expiration of the time appointed or allowed.

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I am however of opinion that the time fixed by bankruptcy rule 72 for applying for leave to appeal goes to the jurisdiction of the judge to whom this application is made and who here acts as *persona designata*. Supreme Court rule 108 applies to delays of procedure in appeals already before the court and at all events could not prevail against a statutory delay such as that provided by bankruptcy rule 72.

It is true that the petition for leave was filed in the registrar's office within the thirty days, but rule 72 requires that the application for leave to appeal shall be made to a judge of this court within thirty days after the pronouncing of the judgment complained of. This has not been done and I am now without jurisdiction to grant leave.

In my opinion therefore the application is made too late and cannot be entertained.

I may add that I am also of opinion that the grounds of appeal alleged in the appellant's affidavit would not justify me in granting leave. The appellant was not dragged before a court which had no jurisdiction over her. The so-called court of bankruptcy is merely the Superior Court of the province of Quebec exercising jurisdiction under a statute which applies throughout Canada (s. 63 of the *Bankruptcy Act* as amended in 1922 by c. 8 of the statutes of that year, s. 8). The right of appeal from the Superior Court is restricted in bankruptcy matters by the *Bankruptcy Act*, as it is restricted in many other matters by provincial statutes. The circumstance that the appellant might have had a right of appeal *de plano* if the proceedings had begun by a writ instead of a petition—and no opinion is expressed as to such right of appeal—is certainly no reason to grant her in these proceedings a right of appeal to which she is not entitled under the statute and the rules.

The two motions should be dismissed with costs.

Motions dismissed with costs.

GRACE TYTUS McLENNAN (PLAINTIFF) ..... APPELLANT;

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*Feb. 17.
*Mar. 10.

AND

JOHN S. McLENNAN (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Appeal—Final judgment—Substantive matter—Pleading—Action on separation agreement—Defence—Breach of conditions—Reply—Excuse for breach—Scandalous charges—Custody of infant.

The Supreme Court of Canada entertained an appeal from a judgment confirming an order by a judge in chambers to strike out as scandalous and irrevelant a paragraph of the plaintiff's reply to the defence pleaded.

By a separation agreement the husband undertook to pay his wife an annual sum by monthly instalments and it was provided that the wife should be given the custody of their son but that his father should be allowed to see him with reasonable frequency and should be consulted as to, and satisfied with, his up-bringing. To an action by the wife for overdue instalments of her annuity breach of the condition as to the son was pleaded. In a paragraph of her reply the plaintiff set up facts which were scandalous and vexatious if not material and sought to justify such breach by alleging that she had become aware since the agreement was made that the character and conduct of the defendant was such that she would not be justified in taking his advice as to, or permitting him to associate with, their son on account of the bad influence that would likely result therefrom. On application of the defendant a judge in chambers struck out this paragraph from the reply as scandalous and irrelevant and the court *en banc* confirmed his order affirming the judgment of the Supreme Cour of Nova Scotia ([1925] D.L.R. 277).

Held, Idington J. dissenting, that such order was properly made; that the reply alleging the husband's bad character is no excuse for a breach of the conditions in the agreement; and that the only way in which she can avail herself of such a matter would be by producing a judgment or order of the court under the Custody of Infants Act giving her the custody of the son free from the father's right of access.

Held also, that she cannot in this action claim such judgment or order from the court. Order XIX, rule 16, of the court rules.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming an order of a judge in chambers which struck out a paragraph of the reply to the defence pleaded.

The material facts are stated in the head-note.

Jenks K.C. for the appellant. A Court of Equity will not enforce a provision in a separation agreement affecting the interests of young children if the moral welfare of the

*PRESENT:—Anglin C.J.C. and Idington, Mignault, Newcombe and Rinfret JJ.

(1) [1925] 1 D.L.R. 277.

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children will be endangered thereby. 16 Hals. 449; *In re Besant* (1); *Besant* v. *Wood* (2).

By the general law as to contracts if one party by his neglect or default prevent performance of a condition precedent that is equivalent to performance by the other. *Hotham* v. *East India Co.* (3); *Jefferson* v. *Peskell* (4).

The cases cited by Mr. Justice Ritchie are distinguishable. In *Duryea* v. *Bliven* (5) no excuse was pleaded for not allowing the visits of the husband as stipulated in the agreement. In *Muth* v. *Wuest* (6) the husband was to be allowed to visit the children weekly but the wife's action in taking them abroad for six months, without necessity, was held to be a good defence to an action for payment of her allowance.

Lafleur K.C. and *J. McG. Stewart* for the respondent. The appellant rests her case entirely on the authority of *Besant* v. *Wood* (2) in which the court exercised its jurisdiction, as it was bound to do, in the best interests of the child.

The breach of the condition by the wife justified the husband in refusing to be longer bound by the contract. *Hochster* v. *De La Tour* (7); *Withers* v. *Reynolds* (8).

The judgment of the majority of the court (the Chief Justice and Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The parties are husband and wife who are living apart; the wife, under an informal separation agreement made in July, 1921, and evidenced by correspondence set out or referred to in the pleadings, claims as plaintiff to recover $3,854.14, being the sum of the monthly payments of $833.33 for the months of April, May, June and July, 1924, thereby conditionally promised by the husband to the wife, and for interest upon the aggregate amount at 5 per cent for the periods during which the respective payments were withheld. The agreement is admitted, and by its terms it is agreed that the parties shall,

(1) 11 Ch. D. 508.
(2) 12 Ch. D. 605.
(3) 1 T.R. 638.
(4) [1916] 1 K.B. 57 at p. 73.
(5) 122 N.Y. 567.
(6) 76 N.Y. App. Div. 332.
(7) 2 E. & B. 678.
(8) 2 B. & Ad. 882.

without prejudice to the rights of either, live apart, and that the husband will make to the wife an allowance at the rate of $10,000 per annum for herself, and $2,500 per annum on account of their son while he is living with his mother, "upon the following understanding and conditions." Follows a statement of these terms and conditions, the first of which is that the payments shall be made in substantially equal monthly instalments; by clause 3 it is provided that the son, who was, at the time of the making of the agreement, under eight years of age, should be in the general care and custody of his mother, and supported and maintained at her expense, but that

the general conditions, the people in whose care he is placed, other than Mrs. McLennan, his education, the place or country where he shall be, etc.,

should be satisfactory to his father. Moreover, it was provided by clauses 4 and 5 that Mr. McLennan should have an opportunity to see his son with reasonable frequency, and for periods of reasonable duration and at reasonably convenient places; that the terms of the agreement, so far as it concerns the son, should be subject to reconsideration upon his reaching the age of eight years, and that nothing in the agreement should prejudice the rights of either party as to their son at that time. Other terms and conditions were also stipulated, and the agreement concludes with a provision that in case of any material decrease or increase in Mr. McLennan's income, the amount of the allowance may, after six months' notice, be reconsidered upon the footing that the amount intended for Mrs. McLennan is approximately one-third of his income. Then follow the words

otherwise this agreement shall, as long as the understanding and conditions are observed by the respective parties, continue in force until the death of either party, except that when their son John shall have reached the age of eight years, the arrangements, financial and otherwise, with regard to him, shall be subject to reconsideration, and the rights, of neither party shall be prejudiced by anything in this agreement.

The defendant pleaded in answer to the statement of claim among other defences paragraphs 3, 4, 5 and 9 which read as follows:

3. In breach of the said agreement referred to in paragraph 2 of this defence, the plaintiff has neglected and refused to consult with the defendant as to the general conditions where, or the people in whose care the said John S. McLennan, Jr., was or was to be placed, his education, and the place of country in which he was or should be.

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4. In further breach of the said agreement referred to in paragraph 2 of this defence, the plaintiff has refused to afford to the defendant an opportunity to see the said John S. McLennan, Jr., with reasonable frequency or at all, or at reasonably convenient places or at all, or for periods of reasonable duration or at all, but that the said plaintiff at all times during the continuance of the said agreement refused to permit the said defendant to see the said John S. McLennan, Junior.

5. In further breach of the said agreement set forth in paragraph 2 of this defence, the plaintiff has refused to reconsider the terms of the said agreement in so far as the same concern the said John S. McLennan, Jr., when the said John S. McLennan, Jr., attained the age of eight years, and the said plaintiff has notified the defendant in writing that she the said plaintiff will not at any time reconsider the terms of the said agreement in so far as the same concern the said John S. McLennan, Jr., or permit the defendant to see him.

9. The defendant further says that he was on the 20th day of June, 1919, duly appointed guardian of the said John S. McLennan, Jr., by the Court of Probate at Sydney, in the county of Cape Breton, and that the plaintiff unjustly and unlawfully detains the said John S. McLennan, Jr., and refuses to permit the defendant to see him or to communicate with him and further neglects and refuses to consult the defendant in relation to the upbringing or education of the said John S. McLennan, Jr., or otherwise.

The plaintiff by the third paragraph of her reply, which refers only to the paragraphs quoted, alleges that the character and conduct of the defendant is such that the plaintiff would not be justified in consulting him or in affording him an opportunity to associate with their son or to reconsider the terms of the agreement, because of the bad influence which this would be likely to exert upon the boy, and therefore that the plaintiff is excused

notwithstanding the said agreement, in neglecting and refusing to consult with the defendant, and in refusing to afford the defendant an opportunity of associating with the said John S. McLennan, Jr. (their son), and in refusing to reconsider the terms of the said agreement as alleged, such consultation, association and reconsideration having been made impossible

by reason of the defendant's bad character and conduct. I do not quote in the terms alleged the charges against which the motion was directed because they are admittedly scandalous and vexatious if not pertinent; and moreover, as the words have been stricken out by the court below as scandalous and vexatious, and as the judgment of this court will not restore them, they ought not to be republished.

The defendant applied to Chisholm J. in chambers to strike out the third paragraph of the reply upon the following grounds:

1. That the allegations contained and set forth in the said paragraph 3 of the reply herein are unnecessary, scandalous and untrue, and would tend to prejudice, embarass and delay the fair trial of this action.

2. That the said allegations are frivolous and vexatious.

3. That the said allegations constitute degrading charges which are irrelevant to the issue, and are in their purport prejudicial to the reputation of the defendant.

4. That the said allegations do not, nor do any of them, constitute an answer at law to the defence filed herein or to any part thereof.

The defendant's affidavit was read in support of the motion in which, by paragraphs 2 and 3, he deposed that every one of the allegations set forth in paragraph 3 of the reply is contrary to fact, scandalous and untrue, and moreover that the plaintiff falsely stated and circulated each and every one of the allegations therein set forth on different occasions prior to the making of the separation agreement. The learned judge in chambers was of the view that the promises by the respective parties to the agreement were mutually dependent; that the payments promised to the plaintiff were to be made upon condition that the defendant should have reasonable access to his son and should be consulted with respect to him; that the plaintiff could not approbate and reprobate the contract, and therefore that the pleading in question was not relevant, and not an answer to the defendant's allegations, and should be struck out. The appeal was heard by the court *en banc* consisting of Ritchie E.J. and Rogers and McKenzie JJ. The two first named agreed with Chisholm J.; they held that the pleading was not relevant, afforded no answer to the defence and was scandalous and unnecessarily offensive. Rogers J. concluded his judgment with the observation that

the suggestions which the plaintiff desires to spread upon the pleadings with wholly unnecessary display or vulgarity are in my opinion as scandalous in the legal sense as defendant swears they are in fact, and they must be struck out as affording no answer to the case set up by the defendant.

McKenzie J. dissented, holding that the facts pleaded by paragraph 3 of the reply, if true, constituted a good answer to the defence, although they might be scandalous and regrettable; he reached his conclusion upon review of two cases, *In re Besant* (1), and *Besant* v. *Wood* (2), considering, as I apprehend, that the facts alleged by the

(1) 11 Ch. D. 508.

(2) 12 Ch. D. 605.

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reply would be material in determining the right to the custody of the infant.

The allegations of the pleading in question are introduced by the words " the plaintiff says that it having come to her knowledge that the character of the defendant is," (followed by the statements alleged to be scandalous), and concluded with the submission that the plaintiff is therefore justified in her refusal to comply with the stipulated conditions. The order of Chisholm J. contains a recital that upon the hearing of the motion he was pleased to reserve his decision, and that subsequently, having pronounced it, the plaintiff moved to amend the words last quoted by adding immediately after the word " knowledge " the words " after the making of the said agreement," and the order proceeds thus:

said amendment being allowed; but notwithstanding the allowance of such amendment, upon motion it is ordered and adjudged that paragraph 3 of the plaintiff's reply herein be and the same is hereby struck out as being scandalous and irrelevant and as disclosing no answer to the defendant's defence herein.

From this it follows that the amendment which is said to be allowed never became effective, because the pleading was struck out by the same order which allowed it; but the amendment, such as it is, becomes of no material consequence when it is considered that the pleading, even as amended, would be satisfied by proof that the alleged knowledge came to the plaintiff immediately after the making of the agreement. The date of the agreement was 28th July, 1921, and it appears from the statement of claim that it was not until April, 1924, that the plaintiff ceased to receive the stipulated allowances. Therefore upon the pleadings the case must be considered on the assumption that although the plaintiff was aware of the alleged vice in her husband's character and conduct at a time immediately following the making of the agreement, 28th July, 1921, she was not disposed on that account to rescind the agreement or to renounce the payments which had been thereby promised to her, and which had been undertaken and made only conditionally upon her affording to her husband reasonable opportunities of intercourse with their son, and consultation as to his upbringing and education and the arrangements which should be made for him after he became eight years of age. The agreement, it will be perceived, is not

only strictly conditional but it is expressed to continue in force only

so long as the understanding and conditions are observed by the respective parties.

If Mrs. McLennan knew the facts which she alleges when the separation agreement was made she could not now set up her knowledge for the purpose of avoiding the conditions subject to which the promise, upon which she claims, was given, and she is in no better position if, having acquired the knowledge which she possesses after the making of the agreement, she continued to abide by it and to receive the payments, as she did for many months. There is no question involved in the case as to the $2,500 a year payable on account of the son; that annuity has apparently been paid; the action is brought solely for the benefit of the wife who pleads for her personal advantage the knowledge which she claims to possess.

The Besant cases are material, not to justify the reply, but because they enunciate a principle upon which the court proceeds in the application of agreements between husband and wife affecting the custody of infants. It is there laid down that one of the parties might so misconduct himself or herself that a Court of Equity would refuse to enforce specific performance at his or her instance. The Master of the Rolls (1) referring to the Act of Parliament, 36 V. c. 12, s. 2, an enactment which is reproduced in the revised statute of Nova Scotia, (1923) The Custody of Infants Act, c. 138, s. 5, says:

As I read that statute, it refers to an agreement between the father and mother, and to that extent says that they may agree—it says no deed shall be void. It appears to me there entirely to confirm the view of the law which I think is the correct view, but it does introduce a proviso that the court shall not enforce the agreement as regards the children unless it be to the advantage of the children.

And, at page 629, having stated that before the Act of Parliament the covenant which the husband had made committing the custody of his children to his wife was void by the policy of the law, but that afterwards it became a covenant controlled by the Act, he proceeds to say:

It is a covenant, though it is not to be enforced by the High Court, unless the court is of opinion that it would be for the benefit of the infant that it should be enforced. The deed therefore stands precisely in the same position as if the words of the Act of Parliament had been put into

(1) 12 Ch. D. 625.

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the deed that she shall have the custody unless the court takes the custody away. That is really the contract between the parties. She knew he could not covenant absolutely by law, he could not give away absolutely and forever the custody of these children, and there was always a power in the court to intervene and take them away, and that being so, and the court having intervened, how can I say that that act of the court is a breach on his part of the covenant, because he happened to be of the same opinion as to the custody of the infant as the court? The covenant being a covenant subject to the interference of the court, and the interference having been made, it does not appear to me to be possible for her to say that is a breach of covenant on his part which will destroy the effect of the deed or prevent his enforcing it.

It is thus the interference of the court in appropriate proceedings, not the will or knowledge of either party to the agreement, which may be pleaded to justify non-compliance with the terms which have been made competent to the parties by the legislature. If Mrs. McLennan were alleging a judgment of the court denying the rights of her husband as defined by the conditions of the agreement, there would be a question for the opinion of the court appropriate to be considered at the trial; but upon the case as it stands, if, as contended on her behalf, the promise made by her husband upon which she sues does not depend upon performance of the conditions, it is nothing less than scandalous that she should introduce the allegations pleaded by the third paragraph of her reply; while if, as was the view of the court below, the defendant's promise and the plaintiff's promises, the latter expressed as conditions, are inter-dependent, it would appear that the reply is defective for lack of an averment of any determination of the court to interfere with the performance of the agreement; and, when the wife is endeavouring to recover the payments stipulated by the agreement and at the same time refusing to perform the conditions upon which the promise was made, she is in conflict with well established principles.

Moreover, the appellant cannot, by her reply, claim for the benefit of her son that the court should interfere with the father's right of custody, or order that the conditions of the agreement respecting the son are not to be enforced. If that be the object of the reply it offends against Order XIX, Rule 16, and is bad for that reason; it would appear indeed that if the reply is designed to be useful for any purpose it is to invoke the jurisdiction of the court to take away

that measure of intercourse, control or custody which by the agreement of the parties was to remain with the father, and in that view it constitutes a departure. It is no answer of course for the appellant to plead that the respondent is such a bad man that a contract made with him is not binding or may be ignored. While the contract by its express terms requires that the conditions respecting the boy shall be observed, it is by implication of law a further term that the court may for the advantage of the boy otherwise order, and the appellant can be excused from performance of the conditions only by showing an order of the court to justify her neglect or refusal to comply with them.

Rogers J., in his judgment, outlines the provincial practice; he refers to the revised statute above cited respecting the custody of infants; it provides that the mother may have access to her infant child, subject to such regulations as the court or judge deems proper; or that the infant may, by authority of a court or judge, be delivered to the mother and remain in her custody or control, or may, if already in her custody or under her control, remain therein until he attain his majority, or such age as the court or judge may direct, subject to such regulations as regards access by the father or guardian and otherwise as the court or judge may deem proper; the learned judge indicates the procedure under this statute as apt for the purpose of enabling the court to exercise its authority with regard to the operation of an agreement between husband and wife for the custody and control of their infant offspring. It is by this means that the legislature in Nova Scotia has provided for the determination directly of such questions as the apppellant attempts by her reply to bring forward collaterally. If Mrs. McLennan be not content that her husband shall have the limited opportunities to converse or associate with his son which the separation agreement provides for, she may invoke the statutory jurisdiction of the court, but paragraph three of her reply serves no purpose except that of scandal and vexation and is in both senses of the word impertinent.

In the result I find myself substantially in agreement with the learned judges who constitute the majority of the court below and I would dismiss the appeal with costs;

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execution to be limited in a manner corresponding to that directed by the judgment of the court below.

IDINGTON J. (dissenting).—There is an implication, binding I think, upon the respondent that he should be (at least from the time when the separation agreement in question was entered into), a person whose habits and principles were such that in law he would be entitled to have access to his son, and a voice in the direction of his training and education, and continue worthy of such confidence and trust.

If, on the contrary, his conduct, habits and principles were, at the time of said agreement being entered into, or thereafter, such that in law he might, by the court having to pass thereupon, be debarred from either the custody of his son or access to him, or any right to direct, or have a voice in the direction of, his training or education, then the appellant had the right to reply, in the sense so indicated, and thus answer and avert the assertion of the conditions respondent sets up by way of debarring her of her rights under the agreement in question, and the pleading in question should not, in such alleged circumstances, have been struck out.

It is absolutely necessary in a case such as presented to protect the appellant's rights under the separation agreement.

However I can conceive that the pleading as first presented, as many do, goes further than necessary, but a pleading so interpreted and entitling appellant to adduce evidence thereunder excusing her from the non-observance of the condition respondent sets up as a release from his said agreement, should be allowed plaintiff as she is in law entitled, I submit, to set up if the facts warrant it.

It is for the learned trial judge to guard against abuse of the rights plaintiff has to set up the reply.

I agree so thoroughly with the reasoning of the Honourable Mr. Justice McKenzie in the appellate court below, that I need go no further than to say that I think this appeal should be allowed with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *N. A. McMillan.*
Solicitor for the respondent: *H. P. Duchemin.*

J. A. PERODEAU (DEFENDANT) ..... APPELLANT;

AND

DAME J. HAMILL AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Feb. 27.
*Mar. 27.

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

Partnership—Real or nominal—Notaries—Loss by a client—Reimbursement—Liability of partners—Joint or joint and several—Arts. 1128, 1712, 1730, 1732, 1850, 1851, 1854, 1856, 1857, 1863, 1869 C.C.

The liability of a notary practising his profession in real or nominal partnership with another notary to reimburse money of a client entrusted to the firm and converted by the latter to his own use is under article 1854 C.C. a joint liability imposing upon the former an obligation to contribute one-half of the loss, and not a joint and several liability involving an obligation for the whole.

The effect and application of articles 1730 and 1869 C.C. considered. Judgment of the Court of King's Bench (Q.R. 34 K.B. 500) varied.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court and maintaining the respondents' action for the full amount claimed by them.

Geoffrion K.C. and *Languedoc K.C.* for the appellant.

Laurendeau K.C. and *St. Germain K.C.* for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—When on 28th November, 1916, the late William J. Rafferty of Montreal was confined at the Hôtel Dieu in his last illness, his wife, at his request, communicated by telephone with the firm of notaries known as Stuart, Cox, McKenna & Pérodeau, practising at Montreal, and requested Mr. McKenna of the firm to come to the hospital to transact some business for her husband. Mr. Rafferty desired to change his will and also to make provision for the immediate discharge of a balance of purchase money to the Montreal Realty Company upon a deed of sale of immovable property at the city of West-

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Q.R. 34 K.B. 500.

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mount, which was to fall due two days later. Mr. McKenna came immediately to the hospital in response to this message and he had an interview there with Mr. Rafferty and his wife, who was also representing her husband under power of attorney. At this interview Mr. McKenna received instructions to see to the discharge of Mr. Rafferty's obligation to the Montreal Realty Company. It would appear that Mr. and Mrs. Rafferty had not at the moment the information necessary to determine the precise amount which would be required, but that Mr. McKenna prepared a cheque payable to the order of his firm, Stuart, Cox, McKenna & Pérodeau, for $6,069 which Mrs. Rafferty signed in her husband's name, the cheque being drawn against the Dominion Bank in which Mr. Rafferty carried his account. Mr. McKenna explained that there was some interest or other particulars to be ascertained and adjusted, but he took away with him the cheque which he had received, and, on 1st December following, he obtained from Mrs. Rafferty a cheque for the further sum of $900 to make up the exact balance payable to the company. The body of this cheque was written by Mrs. Rafferty's daughter, under her instructions, and Mrs. Rafferty signed it in the same manner as the former cheque and sent it to Mr. McKenna; the cheque was, however, by some accident or for a reason which is not explained, made payable to the order of Stuart, Cox & McKenna. Mrs. Rafferty was asked in her re-examination at the trial how it was that the cheque was made payable to the order of the firm of Stuart, Cox & McKenna, but the court, upon the objection of defendant's counsel, would not permit the witness to answer, and so the reason for the omission of the name of Pérodeau in the later cheque is left to conjecture. Mr. McKenna indorsed both these cheques, the first in the firm name of Stuart, Cox, McKenna & Pérodeau and the second in the firm name of Stuart, Cox & McKenna, adding in each case his own individual indorsement after that of the firm. Upon these indorsements he drew the money, but he did not pay the company, neither did he give credit in the books of the firm for the money received. Mr. Rafferty died on 17th May, 1917, and Mr. McKenna died on 25th June in the same year; it was not until the day of the latter's funeral that Mrs. Rafferty ascertained that the

money had not been applied in accordance with her instructions; it was by letter from the Montreal Realty Company of 26th June, 1917, demanding payment, that she became aware that the obligation was still outstanding. The usual occurrences followed; inquiries were made; the defendant disclaimed responsibility; the Rafferty estate paid off the charge, and Mrs. Rafferty, as the executrix of her husband's will, and their two children, son and daughter, having accepted the succession, brought this action in the Superior Court against Mr. Pérodeau, claiming an account of the sum of $6,969, and in default of account to recover that amount with interest.

At the time of the transaction, the Stuart firm consisted of only two members, McKenna and Pérodeau, the appellant. Stuart and Cox were dead and McKenna and Pérodeau were carrying on under the name, style and firm of Stuart, Cox, McKenna & Pérodeau. There is room for some question as to the appellant's actual status in the firm —whether he were in reality a partner or only a nominal partner, as he claims to have been. The learned trial judge finds that

> the said firm was composed of one McKenna now deceased and the present defendant;

also that

> it appears from the evidence that the defendant and the late F. E. McKenna practised together as notaries and commissioners in the city of Montreal under the firm name of Stuart, Cox, McKenna & Pérodeau, which name was on the sign at their office door, in the telephone directory and on the ledger kept by them * * * that in the books of account indorsed with the said firm name, the entries concerning the business done by the defendant and the said McKenna N.P. were duly entered, including charges concerning administration, commissions on real estate and loan transactions as well as the notarial work performed by each of the said parties, and the bank account was kept in the said firm name, controlled by the signatures of said McKenna and defendant.

It is found that defendant's share of the profits was limited to the sum of $150 per month paid as salary. It is also found that

> the said firm name was used by McKenna and defendant in order to obtain credit.

The learned judge finds moreover that the association of the defendant with McKenna

> and their manner of carrying on business without any apparent limitations as regards each other or the public, tacitly indicated the willingness of each of them to accept and ratify the acts of the other in the transaction of the business for which they were associated and to accept responsibility therefor.

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There is some variety of opinion expressed by the learned judges of the King's Bench who heard the appeal as to whether the respondent were actually or only in name and appearance a partner. But in the result the judgment of the Court of King's Bench is founded upon the

considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure,

and for the purposes of this appeal it is not necessary to express any finding more definite as to whether the obligations of the respondent were more than those which are incident to nominal partnership.

The trial judge, having found for the plaintiffs, condemned the defendant to render an account to the plaintiffs within fifteen days and in default to pay the plaintiffs $6,969 with interest. The Court of King's Bench consisting of the learned Chief Justice and four of the judges was unanimous in upholding the judgment. Upon appeal to this court two principal points were submitted. First, it was said that the appellant was only a nominal partner, and therefore, under Art. 1869 C.C., liable as a partner only to third parties dealing in good faith under the belief that he was a partner, and that the evidence, far from establishing belief, pointed rather to the conclusion that neither the deceased William J. Rafferty nor his wife entertained any belief as to Pérodeau's association in the business, or as to whether he were or were not a partner. Secondly, it was argued that having regard to the true interpretation of Arts. 1854, 1856, 1712, 1732 and 1128 of the Civil Code, if the appellant be subject to any liability, it is not joint and several, and that the appellant as a partner contributes only one-half, or in equal shares with the estate of McKenna, his deceased associate.

Upon the question of liability, the evidence shows that Mr. Rafferty, when he had occasion to consult a notary, had been in the habit of going to the firm of notaries with which the appellant became or was connected. It would appear, if I do not misunderstand the proof, that Mr. Stuart, whose name stood first in the firm, died before Mr. McKenna joined it. It was some time after the death of Mr. Cox that the partnership was formed, such as it was, between Mr. McKenna and the appellant. Mr. Lonergan was a notary preceding Mr. Cox who acted in his notarial

capacity for Mr. Rafferty, but whether associated with Mr. Stuart or Mr. Cox does not appear. Then for a good many years after Mr. Lonergan's death Mr. Rafferty used occasionally to consult Mr. Cox, and after Mr. Cox's death it was his successor Mr. McKenna whom Mr. Rafferty consulted; he was the notary who, on 30th September, 1914, passed the deed of sale in the case.

Previously to the time when Mr. McKenna came to the hospital to see Mr. and Mrs. Rafferty the latter did not know either Mr. McKenna or the appellant, but she knew that their firm transacted her husband's notarial business, and she knew that the appellant was "in the firm." She gives the following answers in her cross-examination:

Q. At the date of your husband's death you did not know Mr. Pérodeau, did you?

A. I knew he was in the firm but I did not know him personally.

Q. How did you know he was in the firm?

A. I knew at the time he was taken into the firm by the talk that was going around.

Q. What do you mean by "talk that was going around"?

A. I heard people saying that Mr. Pérodeau was taken in by Mr. McKenna.

Q. Did you know Mr. McKenna at that time?

A. Only by name.

Q. As your husband's notary?

A. Yes.

Q. Prior to taking in of Mr. Pérodeau?

A. What do you mean?

Q. Did you know Mr. McKenna was your husband's notary before he took Mr. Pérodeau in?

A. Yes.

Article 1869 of the Civil Code enacts as follows:

1869. Nominal partners, and persons who give reasonable cause for the belief that they are partners, although not so in fact, are liable as such to third parties dealing in good faith under that belief.

It is admitted that the appellant was a nominal partner. The article, as I interpret it, provides in effect that nominal partners are liable as partners to third parties dealing in good faith under the belief that the nominal partners are in reality partners, and the learned counsel for the appellant very justly did not hesitate to concede that everything has happened requisite under the article to establish the appellant's liability, except proof of belief; but he contends that there is no finding, nor evidence to justify any finding, that the belief existed which is essential to establish the liability of a nominal partner. It is, I think, a just

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inference from the facts that Mr. Rafferty dealt with the firm in ordinary course, although his transactions were not unnaturally and most conveniently carried out through the agency of a single member. Indeed, by the law, notaries practising together cannot sign deeds or contracts passed before them in the name of their firm, although they may sign in that name their advertisements, notices and documents, other than notarial deeds (R.S.Q. 1909, art. 4621), and so a client is likely to come into contact with only one of the members of a firm. Upon cross-examination the following information was elicited from Mrs. Rafferty referring to time subsequent to the death of Mr. Cox:

Q. The late Mr. Rafferty was subsequently a client of Mr. McKenna's?

A. He was a client of the firm; he was not personally acquainted with Mr. McKenna.

Q. He did not know him?

A. No, not any more than the other members of the firm, but the firm was a good firm, and he dealt with them.

The appellant, if not an actual partner, was such according to all appearances. He had caused his name to be published as that of a member of the firm. It appeared upon the door plate and upon the letter heads and bill heads of the concern, and it may be assumed that it would have been inconsistent with the arrangements existing between Mr. McKenna and the appellant, and with their purposes, that information should have been handed out to clients disclosing the fact, if it were a fact, that there was in reality no partnership, or to rebut the inferences which would naturally and legitimately be drawn by clients from the representations appearing by the advertisements of the firm; there is moreover nothing suggested in the proof on either side of the case to give rise even to a conjecture that either Mr. Rafferty or his wife had at any time, previous to the discovery of the misappropriation of the money, any knowledge or reason to suspect that the relations between Mr. McKenna and Mr. Pérodeau were otherwise than as so represented. It is reasonable therefore to conclude that Mr. Rafferty, in going to the office and transacting his business there, in the course of his transactions, had acquired and accepted as matter of belief those particulars with reference to the constitution of the partnership which it was an object of the associates to make known in the

manner described. At the time when Mr. McKenna received the money and instructions for its payment to the Montreal Realty Company, Mrs. Rafferty held her husband's power of attorney, and the cheque for $6,069 which she was asked to sign by Mr. McKenna, and did sign at his request, was by his hand made payable to Stuart, Cox McKenna & Pérodeau, and thus there was a direct request and representation by one of the nominal partners to the client that she should entrust her money, or her husband's money, to the firm in the name of which Mr. McKenna was practising, and which was described by the latter in a manner to indicate no difference in quality or status as between Mr. McKenna and the appellant, except that the name of the latter followed that of the former. Belief or intention or state of mind is proverbially difficult of proof but inferences may be drawn from the facts and circumstances of the case. Lord Blackburn said in the well known case of *Smith* v. *Chadwick* (1):

> I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.

The parties here were engaged in a serious transaction of some magnitude, a sum of upwards of $6,000 was being entrusted to a notary to apply for Mr. Rafferty's benefit, and it is, I should think, extremely unlikely that in these circumstances Mrs. Rafferty would be apt to reject, or to accept with any degree of credence less than belief, a statement made to her by the notary, as in effect it was made, that he had a partner in the execution of the business, Mr. Pérodeau, who assumed with him the responsibilities which the law imposed upon partners in the like circumstances; and of course it was entirely within the scope and intent of the nominal partnership that the one partner should bind the other in such a transaction by the representations which they had publicly announced and were holding out. I think that the belief of Mr. Rafferty and his wife in the existence of a real partnership is involved in the findings; and, for the reasons which I have stated, I do not think that the findings should be disturbed.

(1) [1884] 9 App. Cas. 187 at p. 196.

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I come now to the question as to whether the liability of Mr. McKenna and the appellant was a joint liability, imposing upon the latter only an obligation to contribute one-half of the loss, or a joint and several liability, involving an obligation for the whole. The answer depends upon the interpretation of several articles of the Civil Code. It is provided by art. 1857 that partnerships are either civil or commercial, and, by art. 1863, as follows:

1863. Commercial partnerships are those which are contracted for carrying on any trade, manufacture or other business of a commercial nature, whether general or limited to a special branch or adventure. All other partnerships are civil partnerships.

Partnership between notaries for the practice of their profession is not of the character here described as commercial, and is therefore a civil partnership. The general subject of partnership is regulated by the 11th title of Book III of the C.C. "Of Partnership," and, in the 3rd chapter of this title, there are two articles, 1854 and 1856, to be considered, which read as follows:

1854. Partners are not jointly and severally liable for the debts of the partnership. They are liable to the creditor in equal shares, although their shares in the partnership may be unequal.

This article does not apply in commercial partnerships.

1856. The liabilities of partners for acts of each other are subject to the rules contained in the title of mandate, when not regulated by any article of this title.

Now referring to the title of Mandate, which is the 8th title of Book III of the Civil Code, it is provided by the 2nd chapter, which regulates the obligations of the mandatary, article 1712, that:

1712. When several mandataries are appointed together for the same business, they are jointly and severally liable for each other's acts of administration, unless it is otherwise stipulated.

And, moreover, it is provided in the 4th chapter, "Of advocates, notaries and attorneys," article 1732, that

advocates, attorneys and notaries are subject to the general rules contained in this title, in so far as they can be made to apply.

This article is relevant only as showing that notaries may be subject to the general rules of mandate, but it throws no light upon the question as to how far these general rules can be made to apply. One other article was referred to at the argument; it is art. 1128 of the 3rd title of Book III, "Of obligations," and it is as follows:

1128. The obligation to pay damages resulting from the non-performance of an indivisible obligation is divisible.

But if the non-performance have been caused by the fault of one of the co-debtors, or of one of the co-heirs or legal representatives, the whole amount of damages may be demanded of such co-debtor, heir or legal representative.

This article might be of some importance in ascertaining the amount of the liability of Mr. McKenna's estate, but it does not assist in the case of the appellant. The obligation is, for present purposes, divisible or not, depending upon the application of the other articles to which I have referred.

Assuming that Art. 1869 may be applied to determine the liability, and it was upon that assumption that the case was argued, there seems to be no occasion for invoking the provision of art. 1856. By arts. 1850 and 1851, which belong to the second chapter of the title of partnership, bearing the description "Of the obligations and rights of partners among themselves," it is provided that when several of the partners are charged with the management of the business of the partnership generally, and without a provision that one of them shall not act without the others, each of them may act separately; that partners are presumed to have mutually given to each other a mandate for the management, and that whatever is done by one of them binds the others. The relation of agency or mandate in which the persons carrying on a joint business stand to each other is a material subject of inquiry upon the question of partnership; and so, for the regulation of the liabilities of partners for the acts of each other, resort must be had to the rules of mandate, and these are conveniently and naturally introduced into the partnership articles of the code by reference to the rules contained in the title of mandate. But in this case the appellant's liability is not for the act of his partner or nominal partner; it arises by reason of the fact that the partnership has failed to account for, or to apply to the purpose directed, the money which was received by the partnership for that purpose. The money was paid to Mr. McKenna who had authority to receive it and did receive it on behalf of the firm to be applied in accordance with the instructions which were communicated to him, and there can be no doubt that in this he was acting within the scope of his authority. Hence arose at least a debt of the partnership to repay the money, if the mandate were not executed, and for this art. 1854 declares that

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the partners are liable to the creditor not jointly and severally, but in equal shares; this article regulates the measure of the appellant's liability, because it is a partnership liability, and because, with respect to partnership liabilities, the article is not controlled or qualified by the provisions respecting mandate. Moreover, upon the only assumption upon which art. 1856 can be considered to apply, namely, if the liability be that of a partner for the act of his co-partner, it will be perceived that such liabilities, in so far as they comprehend debts of the partnership, are regulated by art. 1854, and therefore expressly within the exception to art. 1856. It seems consequently to be clear, subject to what I am about to say, that, upon the true interpretation of the relevant articles of the Civil Code, the appellant is liable, not, as found by the learned trial judge and the court of King's Bench, for the entire debt, but only for one-half.

There are some other considerations however which should not be overlooked and which were suggested, although they were not discussed, at the hearing. It is declared by art. 1854 that this article does not apply in commercial partnerships. The partnership between these two notaries was admittedly not a commercial partnership; it was a civil partnership. Commercial partnerships are divided into four classes, the first of which is called general, and in the fascicle of articles descriptive of general partnerships is placed art. 1869, which provides for the liability of nominal partners; unless therefore it is to be supposed that this article has been misplaced, and reason for that supposition may be found in the aptitude of the provision as affecting every partnership, it would be necessary to confine the article to partnerships of the general commercial variety. It will be realized however that, if it be assumed that the apparent partnership between Mr. McKenna and the appellant was no more than a nominal partnership, there was as between Mr. McKenna and the appellant in fact no mandate, although they had concurred in representing in the manner which has already been explained that each was the mandatary of the other; such a condition of fact would admit of the application of art. 1730 of the Civil Code, which is to be found under the title of mandate in section II, "Of the obligations of the

mandator towards third persons"; the article provides that:

> 1730. The mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator has given reasonable cause for such belief.

And, by the application of this article to the present case, the appellant, as the mandator, became liable to the third party, Mr. Rafferty, because the latter in good faith contracted with Mr. McKenna, a person who, upon the hypothesis, was not the appellant's mandatory, under the belief that he was so, the appellant having given reasonable cause for such belief. If therefore the appellant can escape liability under art. 1869 upon the pretension that that article does not apply to civil partnerships, he is nevertheless held to liability upon the same state of facts under the provisions of art. 1730; but, even so, the measure of his ability would be regulated by art. 1854, because his liability would be shown by proof of his holding himself out as a partner; and, if he is bound by his representation of partnership, it would be strange indeed if, by reason of so representing himself, he would incur a responsibility greater than that to which he would have been subjected as a true partner. Therefore under art. 1869, if it apply, or under art. 1730, if the former article do not apply, the result is the same, and the extent of the appellant's liability is in either case measured by the same rule.

It was said that however the case might stand as to the first payment of $6,069, there could be no liability for the second payment of $900, because that payment was made by a cheque signed by Mrs. Rafferty in which the firm of Stuart, Cox & McKenna is named as the payee, and moreover that the fact that the name of Pérodeau did not appear among those nominated by the drawer as payees of the latter cheque was strong evidence to show that Mrs. Rafferty was not engaging the credit of the appellant in the transaction. I am not disposed however to permit this circumstance to effect the case in the one way or the other. There can be no doubt that the second cheque was supplementary to the first, nor that it was intended to pass through the same channel and to be applied for the same purpose, and therefore the appellant became responsible in like degree for the application of both cheques. It is

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found that the firm name was used by McKenna and the appellant in order to obtain credit, and the fact that Mrs. Rafferty's daughter happened to omit the name of Pérodeau in describing the firm in the cheque for $900, which she drew at her mother's request, might reasonably have been explained, if it required explanation, in a manner which would exclude any thought of ignoring the appellant's responsibility. The explanation may be imagined; it is not stated; but the objection now comes with little propriety from the appellant, seeing that it was through the interposition of his counsel that the testimony which Mrs. Rafferty would have given upon the subject was rejected.

According to the views expressed by the French commentators, members of a civil partnership are not severally liable. See Bugnet's 3rd ed. of Pothier, vol. 4, *Traité du Contrat de Société,* par. 96; Baudry-Lacantinerie, *Traité de Droit Civil,* 3rd ed. par. 349; Laurent, vol. 26, pars. 348 and 349. The decisions in the province of Quebec are not uniform. The Court of King's Bench has followed a decision pronounced by that court in 1878 in the case of *Ouimet* v. *Bergevin* (1), in which Chief Justice Sir A. A. Dorion, pronounced the judgment, and it is very briefly stated as follows:

> This is an appeal from a judgment rendered by the Superior Court (Mackay J.) at Montreal, on the 12th of February, 1877, condemning the appellant, as having been a member of the professional firm of attorneys, Messrs. Bélanger, Desnoyers & Ouimet, to pay to the respondent certain moneys collected by said firm and claimed by respondent to be payable to her. The only question raised under this appeal is, whether practising attorneys who carry on business as such under a firm name, are jointly and severally liable to their clients for moneys collected by the firm. We are all of opinion that they are liable just as solicitors in England are. (Troplong, *Société,* No. 373; *Plumer* v. *Gregory* (2). The judge below so found and we therefore confirm his judgment.

There is no further explanation of the facts; they are not stated. The passage in Troplong to which the learned Chief Justice referred has to do with the practice of holding out, and *Plumer* v. *Gregory* (2) is an English decision by Malins V.C. which is not an authority for the province of Quebec. It would not be inconsistent with the statement of the case that the attorneys although practising under a firm name were not partners, and that they were

(1) [1878] 22 L.C.J. 265 (2) [1874] L.R. 18 Eq. 621.

acting under a joint mandate unaffected by any question of partnership, actual or represented. When a question of partnership liability came before the Superior Court in 1881, in *Loranger* v. *Dupuy* (1), Johnson J. who pronounced the judgment said:

Art. 1854 only creates a joint liability between partners and not a several one, except in commercial partnerships; but the Court of Appeals held in *Ouimet & Bergevin* (2), that there was solidarity between the members of a firm of attorneys.

But he found that the partnership which he was considering was commercial, and it was for that reason that he held the partners jointly and severally liable. In *Julien* v. *Prévost*, decided by the Circuit Court (3), where the defendants were practising the profession of advocate in partnership, Loranger J., pronouncing the judgment, said:

Il est admis que les associés sont responsables solidairement pour l'argent reçu par la société. La question a été le sujet d'une longue controverse, mais la Cour d'Appel l'a décidée dans la cause de *Bergevin* v. *Ouimet* (2), et cette décision est devenue la jurisprudence. On a prétendu que cette cause ne s'appliquait pas. J'ai lu les factums, et je trouve que le principe décidé dans la cause de Bergevin s'applique à la présente cause. Le vice-chancelier Wood, dans la cause de *Plumer* v. *Gregory* (4) dit clairement: "Each partner is the agent of the other and bound by his acts and representations." L'article 1712 du Code Civil dit: "Lorqu'il y a plusieurs mandataires établis ensemble pour la même affaire, ils sont responsables solidairement des actes d'administration les uns des autres, à moins d'une stipulation contraire.

And he accordingly found joint and several liability. It would appear however from the judgment of the Court of Review in *Baron* v. *Archambault* (5) that, although the question was as to the nature of the liability of notaries who carried on their notarial business in partnership, it was nevertheless because their partnership business also embraced real estate and insurance agency, and because the transaction involved in the case was of a commercial character, that the partners were held to be jointly and severally liable. In *Drouin* v. *Gauthier* (6), the Chief Justice, Sir A. Lacoste, who gave the judgment of the King's Bench, held that a firm of advocates who, as a civil partnership, had made a promissory note in their firm name should be held not severally liable but in equal shares under art. 1854. No reference is made in this case to the deci-

(1) [1881] 5 L.N. 179.
(2) 22 L.C.J. 265.
(3) [1884] 8 L.N. 143.
(4) L.R. 18 Eq. 621.
(5) [1900] Q.R. 19 S.C. 1, at p. 22.
(6) [1903] 5 Q.P.R. 211; 9 Rev. de Jur. 176.

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sion in *Ouimet* v. *Bergevin* (1) or in *Julien* v. *Prévost* (2), but it appears to be the latest deliverance of the Court of King's Bench upon the subject preceding the judgment in the present case, and, curiously enough, it escaped reference upon this occasion.

In this state of the decisions one is forced to conclude that the jurisprudence cannot be regarded as established by the *Bergevin Case* (1); and, seeing that the liability of civil partners is regulated explicitly by Art. 1854 of the Civil Code, a legislative enactment which is not of doubtful meaning; that the partnership or nominal partnership existing between the notaries in this case is within the application of the article, and that it is the office of the judges to declare the expressed intention of the legislature, the liability must, in accordance with the legislative rule, be adjudged in equal shares.

For these reasons the judgment below should be varied by reducing the amount by one-half.

IDINGTON J.—I concur in the result.

Appeal allowed in part.

Solicitors for the appellant: *Greenshields, Greenshields & Languedoc.*

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

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*Feb. 13.
*March 27.

THE CANADIAN BANK OF COMMERCE (CLAIMANT) ..... } APPELLANT;

AND

JOHN MUNRO (DEFENDANT) ..... RESPONDENT.

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

Chattel mortgage—Failure to renew—Goods sold by mortgagor—Existence of mortgage known by purchaser—Good faith—Bills of Sale Act, R.S.A. (1922) c. 151, s. 19.

The appellant was a mortgagee of goods but failed to file a renewal statement within the time required. The respondent purchased the goods from the mortgagor, paying full value. He knew that the mortgage

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 22 L.C.J. 265. (2) 8 L.N. 143.

was unpaid but considered he was entitled as a matter of law to rely upon the mortgagee's failure to file renewal, which fact he had ascertained by having caused a search to be made at the registry office. No collusion on respondent's part to protect the mortgagor was found.

Held, reversing the judgment of the Appellate Division ([1925] 1 W.W.R. 1), Idington and Mignault JJ. dissenting, that the respondent was not a "purchaser * * * in good faith" within the meaning of s. 19 of the Bills of Sale Act.

Per Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.—A purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third person, cannot be said, either legally or morally, to be a purchaser "in good faith" and therefore cannot maintain his claim to the goods as against such third person.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Simmons J. at the trial (2) and dismissing the appellant's motion for an order allowing the removal and sale of certain chattels seized under a chattel mortgage, the respondent claiming the chattels as purchaser for value from the mortgagor.

Bennett K.C. for the appellant.

McGillivray K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The appellant bank held a chattel mortgage, bearing date of the 20th of April, 1921, from one Cline. There was due upon it for principal and interest, on the 29th of August, 1924, $4,602.17. Default was made in April, 1924, in filing a renewal of this mortgage as prescribed by s. 19 of the Bills of Sale Act (R.S.A. 1922, c. 151), with the consequence that, while it remained effective *inter partes,* the mortgage

ceased to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration.

Cline sold the mortgaged goods to the respondent Munro by bill of sale for $2,000 on the 31st of May, 1924, and received payment in full by cheque on the 4th of June, 1924. This bill of sale was recorded as prescribed by the statute.

(1) [1925] 1 W.W.R. 1. (2) [1924] 3 W.W.R. 229.

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On the 30th of August, 1924, the goods were seized by a sheriff's bailiff acting under a distress warrant issued by the appellant. This seizure is contested and the issue to be determined is whether the respondent was a purchaser of the goods "in good faith for valuable consideration."

The learned trial judge found that the price paid by Munro to Cline represented the full value of the goods. That finding, accepted on appeal, is not now challenged. The sale, therefore, was not simulated and Munro was a purchaser "for valuable consideration."

The learned judge was unable

> to say that Munro entered into the bargain with Cline collusively with the object of protecting the mortgagor.

But it was clearly found that, when he purchased, Munro knew of the mortgagee's claim and appreciated the fact that his purchase, if upheld against the mortgagee, would deprive it of its security on the chattels for the debt owing to it. While there is no "specific finding" by the trial judge that Munro knew or believed that Cline intended dishonestly to appropriate the purchase money and not to pay it, or any part of it, to the bank, he makes this significant statement:

> It is suggested that he (Munro) was entitled to assume that the purchaser (sic)—obviously the vendor is meant—would use the money to pay off the liability to the bank. It is a fact, however, that he went to the bank with Cline, immediately after the sale, cashed the cheque for $2,000 given for the goods and that the same was drawn in currency by Cline.

The only fair inference from this statement seems to be that the learned judge was satisfied that Munro, when carrying out the transaction, was fully alive to the fact that "the obvious result would be to defeat the claim of the bank."

On the other hand, it would seem to have been assumed that Munro believed that the statute would protect the title he acquired from Cline against the claim of the mortgagee. Having searched the record and found that the mortgage had not been renewed, to use his own words, he "took the chance." Was he a purchaser in good faith?

The Appellate Division of the Supreme Court of Alberta (Stuart J. dissenting), reversing the judgment of Simmons C.J., has held that he was. The ground for that judgment appears to be that if the purchase is real, i.e., not simulated, and if the motive of the purchaser is to acquire the pro-

perty sold and is not to aid the vendor to defeat the claim of the mortgagee, he meets the exigency of the phrase "in good faith," although he has full knowledge that his vendor has no title or right to sell the goods, that the title is in the mortgagee, and that the mortgage debt is unpaid and believes that his purchase will defeat the mortgagee's claim and destroy his title.

With great respect, we cannot accept that view of the law.

The sole authority cited for the majority judgment of the Appellate Division is *Sydie* v. *Saskatchewan Land Co.* (1), considered and distinguished in *Ross* v. *Stovall* (2). Counsel for respondent supported the judgment, however, by reference to *Moffatt* v. *Coulson* (3); *Vane* v. *Vane* (4); *Roff* v. *Krecker* (5); *Ferrie* v. *Meikle* (6), and *Assets Company Limited* v. *Mere Roihi* (7). It is, perhaps, desirable that these cases should be examined.

Sydie v. Saskatchewan Land Co. (1) and *Ross* v. *Stovall* (2) were cases under the Land Titles Act of Alberta (c. 24, 1906), which absolutely protects certificates of title (s. 44) and dealings with registered owners (s. 135), except in cases of fraud, and provides that

> knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud (s. 135).

The court took the view that in the former case there was, in the latter case there was not, "actual fraud" on the part of the transferee. Obviously decisions based on a statute which admits only fraud as a ground of relief and declares that proof of actual knowledge of an adverse interest "shall not of itself be imputed as fraud," afford little assistance in determining how far, without such a statutory exclusion, that knowledge would affect a purchaser's good faith. In passing it may be observed that knowledge that the owner had agreed to sell to another person and that by taking a transfer of the property he would deprive that other person of his right, was held in the *Sydie Case* (1) to be fraud. It may be that the case at bar falls within this authority. In the *Ross Case* (2) the transferee honestly believed that his agreement for the purchase was prior to that of the

(1) [1913] 6 Alta. L.R. 388.
(2) [1919] 14 Alta. L.R. 334.
(3) [1860] 19 U.C.Q.B. 341.
(4) [1873] 8 Ch. App. 383 at p. 399.
(5) [1892] 8 Man. R. 230.
(6) [1915] 8 Sask. L.R. 161.
(7) [1905] A.C. 176.

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plaintiff of which he had knowledge when he took his transfer. Nothing more need be said of these Alberta decisions. But the statute on which they rest shows that the Alberta Legislature regarded mere knowledge of an adverse interest as something from which fraud might be inferred and excluded that inference in unmistakeable terms when it meant that it should not be drawn.

In *Moffatt* v. *Coulson* (1) the purchaser was not informed by the vendor of the existence of the chattel mortgage and, although a witness deposed that the purchaser had told him he knew of it when he bought, he added that he believed that, either by reason of expiration of the mortgage or by arrangement with the mortgagee, the vendor had a right to dispose of his property. Actual knowledge of an unpaid existing mortgage and intent that by purchasing from a vendor who had no right to sell he should defeat the mortgagee's title was, therefore, lacking. In the course of his judgment Robinson C.J., undoubtedly uses language which imports that in his opinion notice (presumably actual notice) of the adverse title of the mortgagee would not affect the good faith of the purchaser. But such observations were *obiter*. Knowledge by the purchaser that an unsatisfied adverse interest was outstanding in the mortgagee was not shown. Moreover, the Chief Justice apparently held the view that the chattel mortgage had not passed the property in question to the mortgagee because the description of the goods was insufficient. *Edwards* v. *English* (2), cited by Mr. Justice McLean is not in point. The claimant there was an execution creditor as to whom the statute imposed no requirement of good faith. *Edwards* v. *Edwards* (3), was also the case of a seizure under execution. McLean J. also rested his judgment on the plaintiff mortgagee's lack of title.

The observations of James L.J., in *Vane* v. *Vane* (4), at p. 399, afford little or no assistance. It was held in that case that a person whose agent bought with knowledge of a fraud was not a

bona fide purchaser for value who at the time of the purchase did not know or had no reason to believe that any such fraud had been committed (s. 26).

(1) 19 U.C.Q.B. 341.
(2) [1857] 7 E. & B. 564.
(3) [1876] 2 Ch. D. 291.
(4) 8 Ch. App. 399.

James L.J. expressed the view that in this context the words "*bona fide*" meant a real purchaser and not merely a donee taking under the guise of a purchase; these words

were not meant to include and cover all, and more than all, that is afterwards expressed in the remainder of the proviso.

There is no difficulty in regarding the words "*bona fide*" used as an adjectival phrase preceding the word purchaser, especially when accompanied by such a context, as meaning merely "real" or "actual" as distinguished from "feigned" or "simulated." Thus a "*bona fide* traveller" means merely a traveller. *Atkinson* v. *Sellers* (1). But it is something quite different to place a like limitation on the purport of the words "in good faith" in the Chattel Mortgage Act, following the word purchaser and unaccompanied by any such context as James L.J., had before him. On *Moffatt* v. *Coulson* (2), and *Vane* v. *Vane* (3), rest very largely the decisions in *Roff* v. *Krecker* (4) and *Ferrie* v. *Meikle* (5).

In *Roff* v. *Krecker* (4) the Manitoba Court of Queen's Bench (Taylor C.J., Dubuc and Killam JJ.) purporting to overrule *King* v. *Kuhn* (6), likewise a decision of the full court (Wallbridge C.J., Taylor and Killam JJ.) held that

a second mortgage made in good faith and for valuable consideration has priority over a prior unregistered chattel mortgage of which the second mortgagee had actual notice and that where a mortgage is taken for valuable consideration and not for a collusive purpose the mortgagee is "in good faith" within the meaning of the Chattel Mortgage Act (Con. Stat. Man., 1880, c. 49, 48 Vic., c. 35) although he has notice of a prior unfiled mortgage.

King v. *Kuhn* (6) was a case of failure to refile, with a statement of the debt, as prescribed by the Chattel Mortgage Act, Con. Stat. Man., 1880, c. 49. The Manitoba court unanimously held that a purchaser who had actual knowledge of the unrenewed mortgage was not "in good faith," citing the well-known passage from *LeNeve* v. *LeNeve* (7),

the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser—not that he is not a purchaser for valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate.

(1) [1858] 28 L.J.M.C. 13.
(2) [1860] 19 U.C.Q.B. 341.
(3) 8 Ch. App. 399.
(4) 8 Man. R. 230.
(5) 8 Sask. L.R. 161.
(6) [1887] 4 Man. R. 413.
(7) 1 Amb. 436.

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Roff v. *Krecker* (1) was a case of competing chattel mortgages, the prior in time being unregistered. Much weight was attached in the judgments to the fact that the words "without actual notice" found in both sections of the Con. Statute of 1880 (c. 49) had been dropped in 1885 from the section of the Act dealing with chattel mortgages, whereas they were retained (whether intentionally or inadvertently does not appear) in the section dealing with Bills of Sale. This was apparently regarded by the court as tantamount to a legislative declaration that in the case of an unregistered chattel mortgage actual notice by a subsequent mortgagee or purchaser of the prior right it conferred was immaterial. After indicating this view Taylor C.J. proceeded on the authority of *Moffatt* v. *Coulson* (2), *Tidey* v. *Craib* (3), presently to be noted, and *Vane* v. *Vane* (4), to hold the title of the second mortgagee to be unaffected by his notice of the prior encumbrance. It may be observed that the notice in this case was probably only to an agent and that personal knowledge by the second mortgagee was not established.

Both Dubuc and Killam JJ. stated that if they felt at liberty to dispose of the case as *res integra* on general principles and apart from the language of former statutes and the history of the law they would have held the second mortgage not in good faith. After expressing a view as to the effect of the deletion of the words "without actual notice" similar to that of Taylor C.J., Dubuc J., citing *Moffatt* v. *Coulson* (2), *Tidey* v. *Craib* (3), and *Marthinson* v. *Patterson* (5), concludes that notice of the prior unregistered mortgage did not affect the good faith of the second mortgagee.

Marthinson v. *Patterson* (5), a decision of the Queen's Bench Divisional Court (*vide* p. 728 in *fine*) was reversed on appeal (6). The question now before us is not there disposed of, although notice of a prior unregistered mortgage was treated as immaterial by Burton and Maclennan JJ.A. Osler J.A., however, refers without disapproval to

(1) 8 Man. R. 230.
(2) 19 U.C.Q.B. 341.
(3) 4 O.R. 696.
(4) 8 Ch. App. 399.
(5) [1891] 20 O.R. 720.
(6) [1891] 19 Ont. A.R. 188.

the view of Esten V.C., in *Fisken* v. *Rutherford* (1), that actual notice of an unregistered incumbrance binds a subsequent mortgagee or purchaser. The same learned judge (Osler J.A.) delivering the judgment of the court (Burton C.J.O., Osler, Maclennan, Moss and Lister JJ.A.) in *Winn* v. *Snider* (2), at least impliedly indicates his opinion that proof of actual notice of a prior purchase might be fatal to a subsequent purchaser's claim that he had bought in good faith.

Killam J. in *Roff* v. *Krecker* (3) came reluctantly to the conclusion that the second mortgagee was "in good faith" within the meaning of the Manitoba statute. The only authorities he cites are *Vane* v. *Vane* (4) and *Moffatt* v. *Coulson* (5). He regarded the course of the Manitoba legislation—the fact that the statute originally (1874, 38 Vic., c. 17) did not contain the words "without actual notice," their insertion in the Consolidated Statute of 1880, both in s. 3, dealing with Bills of Sale, and in s. 2, dealing with chattel mortgages, but not in the renewal provision (s. 8), and their deletion in 1885 from the chattel mortgage section, but not from the bills of sale section—as sufficiently indicating an intention that actual notice of an unregistered chattel mortgage should not affect the good faith of a subsequent mortgagee or purchaser, though it would be otherwise in regard to actual notice of an unregistered bill of sale. It should also be noted that towards the close of his judgment Killam J. seems to express the view that, inasmuch as the mortgagor still had an equity of redemption upon which the second mortgage might be considered a real and valid charge, in the absence of any suggestion of an object or desire to defeat the prior mortgage, except in so far as that might lawfully and properly be done, there was good faith on the part of the second mortgagee.

There has been no such insertion and deletion of the words "without actual notice" in the legislation of the North West Territories and of the province of Alberta regarding bills of sale and chattel mortgages. These words do not appear ever to have had a place in this legislation:

(1) [1860] 8 Gr. 9, 25-7.
(2) [1899] 26 Ont. A.R. 384, at p. 389.
(3) 8 Man. R. 230.
(4) 8 Ch. App. 399.
(5) 19 U.C.Q.B. 341.

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vide 0. 5, 1881, N.W.T. ss. 3, 5, 9; 0. 7, 1887, N.W.T., ss. 5, 7, 11; Rev. O., N.W.T., 1888, c. 47, ss. 5, 7, 11; 0. 18, 1889, N.W.T., ss. 5, 7, 11; Con. 0., N.W.T., 1898, c. 42, ss. 6, 9, 17, 19; Con. 0., N.W.T., 1905, c. 43, ss. 9, 17, 19; R.S. Alta., 1922, c. 151, ss. 6, 9 (3), 18, 19. We are not presently concerned with the Conditional Sales Act referred to by counsel for the respondent.

Ferrie v. *Meikle* (1), seems to have been decided on the authority of *Roff* v. *Krecker* (2). It was a decision upon unregistered lien notes, not upon a chattel mortgage, and was governed by the Conditional Sales Act, R.S.S. 1909, c. 145, s. 1. It is, perhaps, unnecessary to express an opinion on the correctness of this decision. We would, however, require to give it very careful consideration before accepting it. It may be noted that the original N.W.T. Ordinance (no. 8 of 1889) avoided unregistered hire receipts, etc., as against "any mortgagee or *bona fide* purchaser without notice." These terms were changed in 1897 (O. No. 39). The statute now reads (R.S. Sask. 1920, c. 201, s. 1)

> as against any purchaser or mortgagee * * * in good faith for valuable consideration.

Referring to this change, Mr. Justice Duff, in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (3), says at p. 498,

> the legislation has substituted the condition of the existence of good faith for the condition of the want of notice.

The learned judges of the Court of Appeal in Saskatchewan in the *Lanston Case* (4) would seem to have taken

> the view that when a purchaser relies upon these provisions of the statute it is in every case a question of fact to be decided under the circumstances in evidence whether or not the purchaser did in fact act in good faith, and that if he failed to establish honesty in fact then his plea under the statute must fail,

Vide Lanston Case (5).

Assets Co. Ltd. v. *Mere Roihi* (6) is not in point. Effect was there given to a statute making a registered title conclusive, except in a case of fraud.

In *Morrow* v. *Rorke* (7) the absence of the words "in good faith" from s. 9 of the Chattel Mortgage Act (C.S. U.C. c. 45) was the ground on which a purchaser for valu-

(1) 8 Sask. L.R. 161.
(2) 8 Man. R. 230.
(3) 63 Can. S.C.R. 482.
(4) [1921] 14 Sask. L.R. 371.
(5) 63 Can. S.C.R. 482, at p. 492. 492.
(6) [1905] A.C. 176.
(7) [1876] 39 U.C.Q.B. 500.

able consideration of goods, which, after registration of the chattel mortgage, had been removed into another county, was found entitled to hold them free from the mortgage of which he had notice.

In *Tidey* v. *Craib* (1), Ferguson J., a very careful judge of undoubted ability, held an unregistered chattel mortgage void as against subsequent mortgagees who had knowledge of it when they took their security.

We find it impossible to accept the view that a purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third party, can be said, either legally or morally, to be a purchaser "in good faith." He is knowingly taking part in a dishonest dealing. He is assisting his vendor to commit a fraud. He cannot establish in regard to such a dealing that "honesty in fact" which is prescribed by the words "in good faith" Those words import the requisite of honesty in the transaction and not merely that it be real and not feigned or simulated. Munro's *mala fides* in abetting Cline's illegal transfer to him of the bank's property is not purged by any opinion he may have held that the statute would protect the title Cline purported to give him. On the contrary, his belief that the success of Cline's "*machinatio ad circumveniendum*" was thus assured would rather seem to establish complicity in his vendor's attempt to defraud the bank. In so far as the judgments in *Roff* v. *Krecker* (2) and *Tidey* v. *Craib* (1), may be contrary to these views, these decisions must be overruled.

This conclusion is in accord with English and American judicial opinion. As instances, *Jones* v. *Gordon* (3), and *Farmers' Loan and Trust Co.* v. *Hendrickson* (4), may be referred to.

We are, for these reasons, of the opinion that the judgment of the learned trial judge was right and should be

(1) 4 O.R. 696.
(2) 8 Man. R. 230.
(3) [1877] 2 A.C. 616, at pp. 628-9.
(4) [1857] 25 Barb. 484, at p. 488.

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restored. The plaintiff is entitled to its costs in this court and in the Appellate Division.

IDINGTON J. (dissenting).—One Cline, a farmer in the Calgary District of Alberta, having become indebted to the appellant, gave it a chattel mortgage by way of security therefor, on the 20th April, 1921.

The appellant failed entirely to keep same renewed, as required by s. 10 of c. 151 of the Revised Statutes of Alberta, known as the Bills of Sale Act, which provides as follows:—

> Every mortgage filed in pursuance of this Act shall cease to be valid as against the creditors of the persons making the same and as against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless, within thirty days next preceding the expiration of the said term of two years, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district wherein the property is then situate together with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees, as the case may be, stating that such statements are true and that the said mortgage has not been kept on foot for any fraudulent purpose, which statement and affidavit shall be deemed one instrument.
>
> (2) Such statement and affidavit shall be in Form C of Schedule 1 hereto or the like effect.

Thereafter said Cline offered the respondent the goods which had been so mortgaged for sale and they arrived at a bargain by which the said respondent bought same for the sum of $2,000, paid Cline in cash, for which he got a bill of sale under said Act, dated the 31st May, 1924, and that with the necessary affidavits was duly registered in conformity with the requirements of said Act, within the thirty days prescribed thereby.

Thereafter the appellant brought an action against Cline to recover judgment for his indebtedness to it, and upon the recovery thereof, issued execution, and examined Cline, and it ensuing that an issue seems to have been directed to test the validity of the seizure of said goods, made under a distress warrant, issued by the appellant, presumably.

That issue was tried as directed before Chief Justice Simmons, said appellant being the plaintiff therein and respondent the defendant.

The said learned Chief Justice having tried the said issue, by hearing the evidence of respondent and of said Cline, of whom the latter called by the appellant says he had told the respondent that he, Cline, had given a mortgage some three or four years ago to the appellant and that he imagined he told him it was not cleared off but tells nothing of the amount of it. Nothing was said between them about any renewal of said mortgage being filed or not. He testified also that the price of two thousand dollars paid him by respondent for the goods when he give him the bill of sale was the full value of the goods so sold; and further that he, Cline, did not, at the time of selling to respondent, know how much he owed the appellant.

Respondent testified that when negotiating with Cline for the purchase and figuring out that it was good business and hearing from the said Cline that he had given a mortgage to the respondent, he caused a search to be made. That part of his examination-in-chief, reads as follows:—

Q. What led up to your purchase of these chattels?

A. Well Mr. Cline came along and wanted to sell them to me, he was hard up and I figured it was good business so I just bought them.

Q. He mentioned something to you about the bank having a mortgage on these chattels?

A. Yes, he told me that, or had had. And I had it searched.

Q. What did you discover?

A. That the mortgage had run out.

Q. You had it searched?

A. Yes.

Q. And the result of that search was brought to your attention.

A. Yes.

Q. You were told that the mortgage had run out?

A. Yes.

Q. How much money did you pay Mr. Cline?

A. $2,000 by cheque.

Q. Have you your cancelled cheque for the amount, is it here?

A. Yes.

Q. Let us see it.

In cross-examination he was asked quite a number of questions evidently directed to his good faith—such as to whether he had intended farming, and he answered that he had a farm in Manitoba, but in fact he had figured on another farm proposition, but it blew up when the crops went bad; and again as to being indemnified in any way against the $2,000, and he positively denied any such thing and tells further through what channel he made the search and names the office in Calgary, and that it was one he had

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previously done considerable business through, naming the proprietor and assistants there. Whether they were members of the legal profession or ordinary conveyancers is not expressly stated, but I infer from the examination that counsel knew them well and hence did not press for further details as to that.

The respondent is very positive as to the parties he names, or one of them, assuring him that search had been made, and telling him that the property was clear of the mortgage to the appellant, and that it had run out and, thereupon, that he directed the bill of sale in question to be prepared.

Upon the evidence the learned Chief Justice sets forth fully his view of the facts, and in no way suggests any doubt of the veracity of either of the witnesses who had testified.

He expressly finds as to the question of good faith, as follows:—

> I am bound to say I am not able to go so far as to say that Munroe entered into the bargain with Cline collusively with the object of protecting the mortgagor. He paid the full value of the goods; he knew of the mortgagee's claim but he considered he was entitled as a matter of law to rely upon the failure of the mortgagee to register the renewal and that he was under no obligation to concern himself as to whether the bank was paid or not.

The Chief Justice, however, gave judgment for the appellant solely on the basis of respondent having been told of Cline having given a mortgage, even though that had run out as above set forth. He does not seem to have understood, as counsel for appellant herein seems (I respectfully submit) to have understood, the actual grounds upon which *Lanston Monotype Machine Company* v. *Northern Publishing Co. Limited* (1) was decided, but refers to some *obiter dicta* of myself and others in disposing of that case —to which I shall advert presently.

The Appellate Division of the Supreme Court of Alberta allowed the appeal to that court, and unanimously—saving Mr. Justice Stuart who dissented—reversed the said judgment of Chief Justice Simmons.

Hence this appeal herein.

There is an aspect of the law which I am afraid and very sorry to find was overlooked by me in the observations I

(1) 63 Can. S.C.R. 482

made in the *Lanston Monotype Company Case* (1) brought before us by the factum of counsel for respondent, and that is the history of the legislation bearing on the question raised herein and, I submit, accounts for and justifies the ruling in a number of cases decided in the western provinces.

The grounds upon which the majority of this court proceeded in deciding the *Lanston Monotype Case* (1) were clearly and explicitly upon the peculiar terms of the bargain therein in question, and could not fall within the protecting terms of the statute herein in question even if the parties concerned had been honest though counsel sought to bring it thereunder—and the decision of the Saskatchewan Court of Appeal in the case of *Ferrie* v. *Meikle et al* (2) was relied upon.

That led to the *obiter dicta* I have referred to. No one really went into the history of the legislation or presented that in such a way as it has been presented in the course of this appeal, especially in the excellent factum of counsel for the appellant herein.

The legislature of the province of Manitoba, shortly after it was created, passed, in 1880, by c. 49, s. 1, a statute (which I may abbreviate as follows) dealing with mortgages of goods and chattels and not accompanied by immediate and continued change of possession, requiring an affidavit of the mortgagee, as usual in such like enactments, verifying the alleged indebtedness and good faith, and for the express purpose of securing payment of the money and not to the prejudice of creditors. Then by s. 2 thereof it provided as follows:—

> II. In case such mortgage or conveyance and affidavits be not filed as herein provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration without actual notice.

There were later amendments but nothing material to what we are concerned with, until 1885, when there was an amendment (48 Vic., c. 35) in which the words "without actual notice" were left out.

Prior to 1892 there had been decisions of the Manitoba courts holding that the man having "actual notice" was

(1) 63 Can. S.C.R. 482. (2) 8 Sask. L.R. 161.

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not protected, but in that year, after the change leaving out the words "actual notice," the case of *Roff* v. *Krecker* (1) came before the Manitoba Court of Appeal and the appeal was allowed, the court evidently agreeing that effect must be given to such an important amendment. Mr. Justice Killam seemed inclined to think that the enactment as it stood with the words "without actual notice" was the better legislation, but was too good a lawyer to allow himself to be led to discard, or fail to give effect to, the change made by the elimination of these words, and agreed with the other members of the court that, despite the actual notice as in that case there was to the appellant's agent taking the mortgage attacked, the change in language used by the legislature must be observed and acted upon.

There is a curious episode just there for the Manitoba Revised Statutes of 1891, falls back to the use of the words "without actual notice" (of course that could not affect the case before them which had arisen out of transactions which happened a year or more earlier), and when revised in 1902 these words "without actual notice" are dropped out, as appears by 63-64 Vic., 1900-1901, c. 31, s. 5, as follows:—

5. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made in the province of Manitoba, which is not accompanied by immediate delivery and an actual and continual change of possession of the things mortgaged, shall be registered, as by this Act provided, within fifteen days from the execution thereof, together with an affidavit of a subscribing witness thereto of the due execution of such mortgage or conveyance, and with an affidavit of the mortgagee or his agent that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, otherwise such mortgage or conveyance shall be absolutely null and void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for good or valuable consideration.

This short bit of history shews how the question has been threshed out in at least one province.

Are we to set aside, by our confidence in ourselves, the law so declared and acted upon since 1902, and, in such an important province as Manitoba, where people have got accustomed to so acting upon the law?

(1) 8 Man. R. 230.

Indeed I am inclined to think from what the respondent testifies to in his evidence as to owning a farm in Manitoba, that it is quite probable he had lived there, and learned there, as a man of business, that he was quite within his rights in searching the office in Calgary to see if the appellant's mortgage had been renewed, and acting upon the results so found. He did that of his own motion, or that of his adviser, for Cline and he never alluded to it between them.

I am, from the consideration I have given the matter, quite clear that the great majority of those who have to do business of the kind in question, are better served and the general public also, by such an interpretation of the words used, as the court below has given, than by leaving the business to turn upon "actual notice" or "notice" given. Why should people, and above all bankers, who have the facility for keeping before their eyes records of need for filing on such and such a date as required by a renewal, not observe the law in that regard? Why should all the rest of the world be worried by reason of their neglect and the lawyers have a chance to still add to the worries over distinctions between *notice, actual notice* and *constructive notice?*

Then again to call what the respondent did a fraud under such circumstances of the law as declared, not only for so long a time now past in Manitoba, but ever since 1915, at least, in the province of Saskatchewan, seems to me rather a peculiar conclusion. With all due respect I submit that is not what the public are entitled to expect from this court which has to determine such far reaching consequences. For my part I am far more concerned as to that aspect of this case than aught else in it.

The history of the law in question in the North West Territories, out of which Saskatchewan and Alberta were carved, in 1905, is briefly as follows:—

I cannot find any Act of the Council of the North West Territories especially dealing with chattel mortgages earlier than June, 1881. That Act seems clearly to have been founded upon the lines of the statute of Ontario as it appeared in the then last Revision (1877) of the statutes of the province, c. 119; having been in great part copied therefrom.

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Section 4 of the said Ontario statute is as follows:

4. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

And s. 5 of the said Ordinance of June, 1881, is identical in its language and leaves no question to be raised by the use of the word "notice" or "actual notice" such as appeared to disturb the legislators and judges of Manitoba. It does appear, however, in the next Ordnance of a like nature, passed in 1889, being No. VIII of the North West Ordinances, sec. 1, and which is as follows:—

1. From and after the first day of February, A.D. 1890, receipt-notes, hire-receipts, and orders for chattels, given by bailees of chattels subsequent to the said date, where the condition of the bailment is such, that the possession of the chattel should pass without any ownership therein being acquired by the bailee, shall not be entitled to any precedence or priority and shall be of no effect whatsoever as against judgments or attachments, in any court of record or against any mortgagee or *bona fide* purchaser *without notice,* unless the said receipt-note, hire-receipt, or order shall have been within thirty days from the date thereof registered in the office of the registration clerk of the registration district, as defined by c. 47 of the Revised Ordinances, within which the maker of the said receipt-note, hire-receipt, or order is resident, by filing in the office of such registration clerk a copy of the said receipt-note, hire-receipt or order for the chattel or chattels, together with the endorsements thereon, verified by affidavit of the owner or his agent as to its correctness and as to the *bona fides* of the transaction; and for filing the same the said clerk shall be entitled to have and receive at the time of filing a fee of ten cents.

It is to be observed that that contains the words "without notice."

The said ordinance seems to have been blended with chattel mortgages in 1897 by an ordinance no. 39, of that year, which is as follows:—

Section 3. The seller or bailor, his executors, administrators or assigns, or his or their agent, shall within 30 days next preceding the expiration of two years from the date of such registration, file with such registration clerk a renewal statement verified by affidavit shewing the amount still due to him for principal and interest (if any) and of all payments made on account thereof, and whether or to what extent the condition (if any) of the bailment is still unperformed, and thereafter from year to year a similar statement similarly verified within the 30 days next preceding the expiration of the year from the filing of the last renewal statement, and in default of such filing the seller or bailor shall not be permitted to set up any right of property or right of possession in the said goods as against the creditors of the purchaser or bailee, or any purchaser or mortgagee of or from the buyer or bailee in good faith for valuable consideration of the goods.

That seems necessarily to have continued the law in Saskatchewan, save as to minor changes not important in this connection, until changed by its own legislature by an Act respecting Mortgages and Sales of Personal Property, being c. 144 in the legislation of 1909, s. 19 of which is as follows:—

19. Every mortgage or conveyance intended to operate as a mortgage filed in pursuance of this Act shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless within thirty days next preceding the expiration of the said term of two years a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district where the property is then situate with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees duly authorized for that purpose, as the case may be, stating that such statements are true and that the said mortgage or conveyance has not been kept on foot for any fraudulent purpose which statement and affidavit shall be deemed one instrument.

The law so enacted contained no reference to the question of *notice* or *actual notice,* nor were these words resorted to in any future legislation that I can find, so far as Saskatchewan was concerned.

The Act under which *Ferrie* v. *Meikle* (1) above referred to, was decided by the Saskatchewan Court of Appeal, on a statute substantially the same as that first quoted above, as being the Alberta Act which must govern the decision of this case, and, so far as Alberta was concerned there was no resort back to the words *without notice* or *actual notice,* and I can find no substantial difference from the Act I have referred to above, as having been taken from the Ontario Act.

Having as result of most careful search thus demonstrated the history of the legislation in said three prairie provinces, and that there was a most distinct feature of the same kind in discarding in the later legislation the condition or the qualification of *actual notice* or mere *notice* of prior mortgage, and that has been given effect to by each of the appellate courts respectively of each of said provinces.

(1) 8 Sask. L.R. 161.

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Therefore I conclude it is our duty to observe such concurrent jurisprudence. I do not think any number of mere decisions upon other statutes of other countries can be of any avail herein, except to mislead.

If I am correct in my appreciation of the result of tracing the legislation in question and the jurisprudence of the said provinces ensuing upon the changes in said legislation ultimately discarding the question of *actual notice* or *notice* of any prior bill of sale or chattel mortgage as having any bearing upon the question of good faith, or such like question as raised herein by appellant, then I see no useful purpose to be served by such citations as counsel for appellant present in their factum.

I think, however, the opinion of such eminent jurists as Lord Justice James, when speaking in *Vane* v. *Vane* (1), where he points out that a *bona fide* purchaser means that the purchasers should be really purchasers and not merely donees taking gifts under the form of purchases, is entitled to great weight.

The view expressed by the late Mr. Justice Ferguson in the case of *Tidey* v. *Craib* (2), when he discarded the claims set up by counsel in a somewhat similar case to this, upon a similar Act of the Ontario legislature, is well worthy of giving to it great weight.

Other Ontario judges evidently held the same opinion.

In good faith means nothing more than *bona fide* as expressed in many ways in many Acts, and to restrict or enlarge the meaning to be attached thereby and impute fraud when, as the learned trial judge finds, there was none intended, I most respectfully submit, in face of the jurisprudence I have referred to, should not be the attitude assumed towards the grave question raised herein.

The case of *Fernie* v. *Meikle* (3), as well as a decision of Walsh J. preceding this in Alberta and the decision of the Appellate Division in this case have doubtless ere this been relied upon in cases which never reached the appellate courts, much less here, should therefore be followed as well as the case of *Roff* v. *Krecker* (4), above referred to.

(1) 8 Ch. App. 399.
(2) 4 O.R. 701.
(3) 8 Sask. L.R. 161.
(4) 8 Man. R. 230.

Moffatt v. *Coulson* (1), is also an outstanding decision upon an Act similar to this, when stripped of any reference to *actual notice* or *notice* in the statute.

That was a court of common law not afflicted with the equity jurisdiction and therefore expressing that what the statute said must be held to govern.

The decision in the case of *Marthinson* v. *Patterson* (2), raised so many points and involved so many questions that I omitted reading it through before I had written the foregoing, assuming that it might not throw much light upon the question presented to us herein. I find, however, that the evidence clearly disclosed that the second mortgagee there had full knowledge of the existence of a prior mortgage and that if the several courts hearing that case had taken the view of the law that appellant asks this court to take and uphold the learned trial judge, the said several courts hearing that case then could easily have saved themselves a lot of trouble by ruling that such an objection was fatal.

The first court of appeal from the learned trial judge, however, could not, but ruled distinctly that they were bound by the case of *Moffatt* v. *Coulson* (1), to hold otherwise.

That court was composed of the late Chief Justice Armour and the then Mr. Justice Falconbridge, later on promoted to the Chief Justiceship of said court.

True the judgment was reversed in appeal, but again, not on the ground taken by appellant herein that the knowledge by the second mortgagee of the first mortgage was such as to render him fraudulent and not acting in good faith and his security thereby voided. They need not have worried over the manifold intricacies of the case if such had been their view.

I submit, that such being the case, we must assume this as some of them expressly declare against it being a correct view.

We have thus a body of Ontario judges, well conversant with the law, evidently against appellant's contention herein, and, I may be permitted to say, we of Ontario have long been proud of such judges.

(1) 19 U.C.Q.B. 341. (2) 20 O.R. 720.

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The action of Mr. Justice Osler referring to another learned judge who had passed an opinion on facts arising under former legislation, repealed by said 20 Vict., c. 5, is just what a judge might do out of deference to argument of counsel, but Mr. Justice Osler never indorsed such a contention as set up herein.

I was not aware until to-day (when it occurred to me while tracing up the North West legislation, and I then verified it as I point out above) that the Act in question there was taken from Ontario legislation so far back as 1877. I have traced it back beyond that date to the Consolidated Statutes of Upper Canada and that really shews it was presented to the several judicial authorities cited as it remained in the essential feature in question herein to 20 Vict. a period antedating the case of *Moffat* v. *Coulson* (1),

That fact renders the judicial opinions from cases there decided of great weight, and that obviously against appellant's contention.

It certainly is most remarkable that such a contention as set up by appellant upon such phraseology as that used in the legislation in question has not succeeded in being upheld after sixty-five years of opportunity.

Moreover I find that the ultimate judgment of the Ontario Court of Appeal, in *Marthinson* v. *Patterson* (2), when reversing the Divisional Court judgment of Armour C. J. and Falconbridge J. rested their judgment finally upon the fact that the second mortgagee had taken possession of the goods before the first mortgagee interfered and hence as between two manifestly defective for other reasons than knowledge by the second mortgagee of the existence of the first (but including that considered of no consequence) was entitled to succeed and the judgment of Mr. Justice Street was restored.

That reason is open clearly to the respondent herein who had taken possession of the goods in question long before the appellant herein moved, and, as a sequel thereto, issued the distraint warrant above referred to.

It is quite clear that, in *Marthinson* v. *Patterson* (2), the entire number of the judges in Ontario (including the late Mr. Justice Street, one of the best lawyers we ever had in Ontario on the bench) and the said Divisional Court

(1) 19 U.C.Q.B. 341. (2) 20 O.R. 720.

and the Court of Appeal have decidedly refused to accept, in such like circumstances as presented herein, the contention of the present appellant.

The legislation in question therein was substantially the same as we have to pass upon herein and, in the essential features in question, almost the exact wording as taken from that sixty-five year old statute.

The reversal of such jurisprudence would entail the like consequences in Ontario to that I have already pointed out in three of the prairie provinces.

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

MIGNAULT J. (dissenting).—The question with which we are concerned in this case is whether the respondent, when he purchased from one Cline some live-stock and farm machinery, was a purchaser "in good faith for valuable consideration" within the meaning of s. 18 of c. 151 of the Revised Statutes of Alberta, 1922. That the respondent gave valuable consideration, indeed full value, for the goods was found by the learned trial judge and is admitted by the appellant. The only controversy is whether he was also "in good faith."

It would be pretentious, and it might be futile, to attempt dogmatically to define "good faith." Some things are better understood than they can be adequately expressed. There is moreover the added consideration that the question is not one which should be approached in any dogmatic spirit. For our conceptions of good faith are not the *criteria* we should follow, but rather should we seek to discover what was in the mind of the legislature when it protected, against the assertion of a non-registered right, "subsequent purchasers and mortgagees in good faith for valuable consideration."

There is no controversy as to the facts. Cline had previously granted to the appellant a chattel mortgage affecting the goods, and he so informed the respondent. This mortgage had been registered but the appellant had subsequently failed to file a renewal statement in the office of the registration clerk of the district where the property was situate as required by the statute. Under these circumstances, the respondent agreed to purchase the chattels for a price representing their full value, but only after he

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had caused a search to be made at the registry office and had ascertained that no renewal statement had been filed.

From these facts should we conclude that the respondent was a purchaser in good faith, for it is admitted that he was a purchaser for valuable consideration?

The learned Chief Justice of the Trial Division (who tried the case) expressly excluded any fraud on the part of the respondent. He said:—

> I am bound to say I am not able to go so far as to say that Munro entered into the bargain with Cline collusively with the object of protecting the mortgagor. He paid the full value of the goods; he knew of the mortgagee's claim, but he considered he was entitled as a matter of law to rely upon the failure of the mortgagee to register the renewal and that he was under no obligation to concern himself as to whether the bank was paid or not.

He added, however, and on this the appellant relies:

> I am of the opinion that the purchaser here cannot successfully maintain his claim for the goods, when he had reason to believe that the obvious result would be to defeat the claim of the bank if Cline was dishonest.

In terms this is not a finding that the respondent was not a purchaser in good faith, although it may be a possible inference from the remarks of the learned Chief Justice. Certainly all idea of collusion with Cline must be dismissed from our minds for the learned judge himself rejected it.

The Chief Justice relied on the views expressed by the majority of this court in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (1). That case is, however, entirely distinguishable from the one under consideration, the circumstances were different, and there was no determination by the court of the point with which we now have to deal. I may add that I see no reason to depart from the view I personally expressed as to the law, while differing on its application to the facts from the other members of the court, except Mr. Justice Brodeur.

I do not construe the finding of the learned trial judge as meaning more than that Munro, who was aware of the unregistered chattel mortgage, had reason to believe that if Cline did not pay the bank out of the purchase monies, the latter would be unable to assert its mortgage against the goods and its claim would be defeated. This however is the penalty of non-registration or of non-renewal of

(1) 63 Can. S.C.R. 482.

registration where the subsequent purchaser has paid a valuable consideration for the goods and has purchased them in good faith.

If good faith within the meaning of the statute is excluded by knowledge of the non-registered chattel mortgage, however adequate may be the price which the subsequent purchaser has paid, then the statute will apply only where the purchaser was ignorant of the chattel mortgage, and mere notice of the incumbrance will be equivalent to its registration.

I have been unable so to construe this statute. The historical development of the law as to chattel mortgages and liens to which I referred in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (1), shews that the legislature intended to depart from the equitable doctrines with respect to the effect of notice on rights acquired by subsequent purchasers for valuable consideration. Thus in Ordinance no. 8 of the North West Territories for 1889, the language was "*bona fide* purchaser *without notice.*" This ordinance was repealed by Ordinance no. 39 of 1897, and the words " without notice " were dropped, the expressions used in sections 1 and 3, and which in substance have been repeated in subsequent enactments, being

> any purchaser or mortgagee of or from the buyer or bailee in good faith for valuable consideration.

With regard to land, there is an express provision in the Land Titles Act (R.S.A., 1922, c. 133, s. 175) that

> knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

This enactment *in pari materia* shews what is the policy of the legislature when it requires registration of titles or deeds conferring ownership or creating liens. It is not bad faith, within the intendment of the statute, to rely on such a statute and to purchase goods under its protection. Here it is inconceivable that the respondent would have paid full value for the live-stock and farm machinery had he not considered that he could safely rely on the protection of the statute. I certainly do not wish to say that only persons ignorant of prior unregistered rights can depend on the statute; as a rule they do not require the statute for their protection. And I think the intention clearly was to put an end to the controversies to

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which the equitable doctrines of notice and constructive notice had given rise.

As I observed in the *Lanston Monotype Machine Co. Case* (1) in three provinces, to which should now be added the province of Alberta, the law appears settled in the sense that mere knowledge of a prior unregistered right does not deprive a purchaser of the protection of the statute where an adequate consideration has been paid for the goods, and I would be extremely reluctant to overrule the long standing decisions by which the statutes have been so construed. It is more important that the policy of the law should be carried out, than that a negligent lien owner should be saved from the consequences of his own negligence. I may perhaps add that if I have misconceived the policy of the registration law, the last word rests with the legislature which can place its meaning beyond the possibility of further question.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*
Solicitors for the respondent: *Burns & Mavor.*

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*Feb. 12, 13.
*Feb. 26.

MID-WEST COLLIERIES, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

T. M. McEWEN (PLAINTIFF) ..... RESPONDENT.

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

Company—Powers of directors—Managing director—Power to give chattel mortgage for past indebtedness—The Companies Act, R.S.A. (1922) c. 156, art. 55 of table A.

Even independently of the express provision of art. 55 of table A. of *The Companies Ordinance,* the directors of a company constitute its governing and managing body, and, except to the extent that their powers are expressly restricted by statute or the articles of association or the by-laws and regulations they possess authority to exercise all the powers of the company.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 63 Can. S.C.R. 482.

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When a board of directors of a company appoint one of them "managing director," they may be taken to have *ipso facto* delegated to him their powers as a board of directors, subject to such direction and control as it is their duty to exercise.

A board of directors can validly execute chattel mortgage securing a past due indebtedness without the sanction of the shareholders and the company cannot use as a valid ground of dismissal the fact that a managing director, whose powers have not been restricted by the resolution appointing him, has executed such a mortgage without the express authority of the directors or shareholders.

Judgment of the Appellate Division (20 Alta. L.R. 472) affirmed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge and maintaining the respondent's action for wrongful dismissal.

The material facts of the case are fully stated in the judgments now reported.

Bennett K.C. for the appellant.

McGillivray K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—This action was brought to recover a balance of salary and expenses due to the respondent by the appellant company arising out of a contract for services, or, in the alternative, damages for wrongful dismissal. There was added a claim of $400 and interest for money loaned by the respondent on the 31st October, 1921.

Mr. Justice Ives, of the Supreme Court of Alberta, gave judgment in favour of the respondent for the sum of $7,793.55. In this sum were included the capital and interest of the money loaned, the salary earned by the respondent and an agreed commission of 10 cents per ton for every ton of coal sold by the appellant up to the date of dismissal, moneys paid by the respondent as travelling expenses or freight charges and spent by him in the course of his employment, and finally damages equivalent to the salary and commission to which, but for his dismissal, the respondent would have been entitled under his contract, which was held to have been wrongfully terminated by the company.

(1) [1924] 20 Alta. L.R. 472; [1924] 2 W.W.R. 1027.

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The Appellate Division unanimously confirmed this judgment.

Of the several reasons advanced by the appellant company as a justification for dismissing the respondent, all of which were held bad by the judgment appealed from, one only was seriously pressed before this court and need now be considered. It was alleged that the respondent, without authority of any of the shareholders or directors, mortgaged and charged the entire assets of the company to the Bank of Montreal, at Drumheller.

This chattel mortgage was given to the bank with whom the company carried on its banking business. There is no room for doubt that, at the time when the respondent was appointed, the financial position of the company was somewhat desperate. This appears to be manifest by the minutes of meetings of the directors and of the shareholders held on 7th March, 1922.

The following extracts from the evidence accurately represent the situation. O'Connor, the secretary-treasurer, is speaking and he says:

The mine could not possibly open; we were in that position where we could not possibly open. We could not get funds unless we were put in some position by somebody that would immediately * * *

Q. Command confidence?

A. Yes, or put us in a position where we could get money to open the mine.

And a little further:

We could not raise five cents and we were being threatened. The directors were on a bond with the Bank of Montreal and the Merchants Bank and they were threatening certain action.

McEwen explains why he came to give the chattel mortgage:

The pressure by Mr. Prest (the bank manager) became so great that when we were getting cheques from Bowman-Thayer on Saturday mornings, on pay day, and when we would take that cheque in the morning Mr. Jones (accountant) and I had got to the point where it was questionable whether Mr. Prest was going to place that to our credit or apply it to a payment of the debt. With this hanging over me, with the possibility of having to close our mine, I felt that it was the part of wisdom and good judgment to protect the company by giving a mortgage and particularly in view of having the information after having conferred with the secretary of our company and he having conferred with * * *

Q. No, no you don't know whether he did or not. But you did have the benefit of the advice of the secretary-treasurer of the company.

A. Yes.

Q. Who incidentally is a barrister and solicitor?

A. Yes.

The fact that the respondent consulted the secretary-treasurer is confirmed by the latter, who also states that he advised him that he had the right to give the mortgage.

The evidence has failed to show that what the respondent did was detrimental to the company's interest, and, moreover, is clear that it was done only under pressure of necessity.

While, however, affording a good answer to a complaint that the respondent acted improvidently and contrary to the company's welfare, necessity alone might not be found a sufficient excuse, if the respondent in fact exceeded his authority. In this case, the rights of third parties are not in issue; the question concerns a mere matter of internal management. What is to be determined is whether the directors in fact purported to clothe the respondent with the authority which he exercised; for the company cannot be heard to assert as a ground for dismissal or to brand as misconduct the making use of the very powers which its directors professed to vest in its officer; nor can it urge here the illegality of their acts, as a ground of relief from the damages consequent upon such dismissal.

Now there was no formal resolution defining the extent of the powers of the respondent. It was moved at a directors' meeting

> that we proceed to the election of a general manager for the ensuing year;

then "that James C. Nostrant be manager" and, this motion being withdrawn, it was moved and carried "that T. M. McEwen be appointed managing director."

Leaving aside for the moment the true meaning of the resolution, which will have to be considered later, the mere appointment of a manager by directors

> will only operate as a delegation of the ordinary commercial business of the company

(Palmer's Company Law, 12th ed., pp. 45 and 272); while the authority of a managing director may be implied from the power to delegate vested in the body by which he was appointed (Buckley on the Companies' Act, 10th ed. p. 656).—By the 68th article of Table A of The Companies Ordinance (18 Ord. of N.W.T., c. 20), which was embodied in the appellant's articles of association, the directors could delegate any of their powers to "committees consisting of such member or members of their body" as they thought fit.

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It would appear that by appointing McEwen as they did, the directors intended thereby to delegate their powers to him under this article, subject of course to such direction and control as it was their duty to exercise (*Montreal Public Service Co.* v. *Champagne* (1). But, on this point, the record affords much more conclusive evidence of the intention of the meeting. We may look (Lindley on Companies, 6th ed. p. 433) at the answer given on the examination for discovery by James K. Vallance,

selected by the (appellant) company, for the purposes of making admissions to be used against the company at the trial.

609. Q. Well it was understood by everybody at the meeting that he was to have full authority and control of everything during his office? A. Yes.

Now, generally speaking, unless otherwise provided by the Act under which the company was incorporated, by the articles of association or by the by-laws and regulations, the directors possess authority to exercise all the powers of the company (*Hovey* v. *Whiting* (2); and Art. 55 of Table A says so in explicit terms. Strong J., later Chief Justice, delivering the judgment of this court in *Bickford* v. *Grand Junction Railway Co.* (3), said at p. 730:

No enabling power is requisite to confer the authority to mortgage, but *prima facie* every corporation must be taken to possess it;

and he cites abundant authority in support of his proposition.

This power is not limited to the object of securing a loan, in which case " the sanction of a resolution of the company must be previously given in general meeting" (Companies' Ordinance, c. 20, Ords. of N.W.T. 1901, s. 98); but it may be exercised for other purposes, such as securing a debt which is an outstanding valid liability of the company, and for that the confirmatory vote of the shareholders is not required. *Barthels* v. *Winnipeg Cigar Company* (4).

In the case of *The Corporation of the Town of St. Jérôme* v. *The Commercial Rubber Company Limited* (5), the town had voted a bonus to the company and granted it exemption from taxation on condition that the company establish a factory in the municipality and operate the same for ten years without intermittence. The company

(1) [1916] 33 D.L.R. 49.
(2) [1886] 14 Can. S.C.R. 515.
(3) [1877] 1 Can. S.C.R. 696.
(4) [1909] 2 Alta. L.R. 21.
(5) [1908] Can. Rep. A.C. 444.

gave a hypothec on its real estate as security for the fulfilment of its obligations. The town brought action to recover the bonus paid, alleging breach of the conditions, and prayed for the enforcement of the hypothec. The plea was that the deed of hypothec was illegal, null and void because the directors of the company had no power to authorize its president or any other officer to hypothecate the immovable properties without the formality of a by-law passed in due form and previously submitted to the shareholders of the company and approved by them.

The Privy Council held that the directors of a joint stock company incorporated under the Revised Statutes of Canada of 1888, c. 119, had the power under the "general powers" clause, s. 35 of the Act, to accept a conditional bonus and to hypothec the immovable property of the company to the municipality, without the approval of the shareholders.

There is no substantial difference between Art. 55 of Table A of the Companies' Ordinance and section 35 of The Companies Act of 1888, under which the case of *Town of St. Jérome* v. *Commercial Rubber* (1) was decided by the Judicial Committee. And the cases are made more similar by the circumstances that the federal Act of 1888 (s. 37), like the Companies' Ordinance (s. 98), also contained provisions requiring the approval of the shareholders for authority to borrow money with incidental authority to hypothecate or pledge the real or personal property of the company as security therefor.

It follows that the directors could have executed the chattel mortgage here in question without the sanction of the shareholders. After the board had vested the respondent with full authority and control, the least that can be said is that the company cannot urge as a valid ground of dismissal the fact that he has executed this chattel mortgage securing a past due indebtedness to the bank.

But the appellant further says that the articles of association contain no provision enabling the directors to appoint a managing director.

It is not quite clear, from the three successive resolutions of the 7th of March, to which reference has already been

(1) [1908] Can. Rep. A.C. 444.

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made, whether the directors really intended to make McEwen a managing director or whether he is so styled in the minutes merely because he happened to be a manager chosen from amongst the directors.

Although a director, McEwen could, under clause 53 of the articles of association,

> hold any other office of profit in service of the company, in conjunction with the office of director, and that on such terms as to remuneration and otherwise as the directors may arrange.

We see however no reason to disagree from the view taken by the learned trial judge that, as the directors could, under art. 68 of Table A, delegate any of their powers to committees consisting of such member or members of their body as they thought fit, "a committee of one so named is tantamount to naming one as managing director,"—especially when the Companies Ordinance (s. 94) contemplates the existence of a managing director; and it is common ground that there were managing directors in the company during the previous year, with the acquiescence of the shareholders (*Phosphate of Lime Company* v. *Green* (1); *Ashbury Railway Carriage and Iron Company* v. *Riche* (2)).

Counsel for the appellant submitted the further contention that a managing director is not a "servant" of the company and that the remuneration for his services could, by virtue of clause 51 of the articles of association, be determined only by the company in general meeting. The question then would be whether, under the present circumstances, the respondent may yet maintain a claim for loss of salary and commission.

It might perhaps be said that clause 51

> does not contemplate special payments of the character here in question, which are not made by way of remuneration for services of a director as a director, but special allowances made on some other ground.

(*Fullerton* v. *Crawford* (3)).

It might also be argued, and with great force, that the true purpose and effect of the directors' resolution was to appoint the respondent general manager at the remuneration fixed, which it was within their power to do, and to delegate to him, *qua director*, their powers, which they were also enabled to do under Art. 68 of Table A. Under

(1) [1871] L.R. 7 C.P. 43. (2) [1875] L.R. 7 H.L. 653 at p. 674.
(3) [1919] 59 Can. S.C.R. 314.

the circumstances, the name "managing director" may well have been used as a convenient and comprehensive description of the respondent's position as general manager exercising the powers of the directorate, *qua* delegated director, and the remuneration voted may not have required the sanction prescribed by clause 51 of the articles of association.

But the appellant having failed to raise any such point either in its statement of defence or in its notice of appeal, it should not be permitted to urge it for the first time before this court. If such an objection had been taken at the trial it would have been open to the respondent to show several reasons why it was not available to the appellant company. It is significant that neither in the special notice calling the shareholders together in extraordinary general meeting for the purpose of removing the respondent from office, nor in the letter notifying him of his dismissal as "manager" (sic) was this matter mentioned. The appellant appears to have treated the respondent throughout as if entitled to be paid; and, under all the circumstances of the case, it was necessary that a defence of that kind be clearly raised in the pleadings, so that the plaintiff should be squarely faced with the difficulty and given full opportunity of meeting it.

This ground of defence is therefore not open now to the appellant company and, as it has failed to make good its other grounds of appeal, our conclusion is in agreement with that reached by the courts below.

IDINGTON J.—Having given all the consideration possible to the argument of counsel as well as factum for appellant I reached the conclusion that even if the respondent exceeded his actual powers in giving the chattel mortgage complained of to the bank to secure its arrears due and that under a pressing urgency, to save the appellant from possible disaster, and being advised by a member of the bar who happened to be secretary-treasurer of the company appellant there was no justification for the dismissal.

There may have been an error of judgment but no such misconduct as entitled, on the facts presented herein, the summary dismissal of respondent.

I have never forgotten the fact that it was a general manager the directors had, by formal resolution, decided to ap-

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point evidently meaning a manager of well known business capacity.

After that was unanimously carried and a director nominated in strict accordance with the term "general manager," the director so nominated withdrew for private reasons.

Someone, instead of adhering to the terms of foregoing resolution, quite accidentally, I imagine, in nominating the respondent, erred out of courtesy no doubt and failing to realize the possible distinction in law between a general manager and a managing director, it passed.

I, under all such circumstances, construe that as "a general manager" and quite believe nothing further was intended.

I have, since coming to the foregoing conclusion, received a copy of my brother Rinfret's judgment herein and in the main agree with his reasoning, and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*
Solicitors for the respondent: *McGillivray, Helman & Spankie.*

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*Mar. 2.
*Mar. 27.

J. P. E. GAGNON (DEFENDANT).....APPELLANT;

AND

A. LOUBLIER (PLAINTIFF).....RESPONDENT;

AND

E. LOUBLIER.....(MIS-EN-CAUSE).

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

Ownership—Right of accession—Possessor—Improvements—Good faith—Droit de rétention—Right of action—Trouble of eviction—Registration—Arts. 412, 415, 416, 417, 418, 419, 776, 777, 1983, 1994, 2009, 2015, 2084 C.C

E. L. having been declared bankrupt, his son, A.L., pretended that he had taken possession of a certain piece of land and had cultivated it by virtue of an authorization given by E.L., accompanied with a verbal undertaking by the latter to donate it to him. A.L. entered an action against the trustee of his father's bankrupt estate, declaring that he was abandoning the ownership of the piece of land in ques-

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

tion, but claiming from the estate the value of his improvements thereon and praying for a declaration that, until he had been paid for same, he was entitled to retain the land in his possession.

On the municipal valuation roll, the father was entered as owner and the son as lessee of the land in question. Not only had they never contested the entries thus made but the father had paid the municipal and school taxes as owner; while the son, having been sued for taxes due by him as lessee, had acquiesced and paid them. The insurance premiums were paid by the father, who, moreover, had always included the land as part of his assets in the financial statements which he handed over to his bankers. The father had granted a hypothec on the same land to one D.P.; and the land appeared in the father's name in the registry office.

In addition to that, on two successive occasions, the son had accepted hypothecary obligations from his father on the same land, thus acknowledging his father's ownership in deeds signed by him.

Held that, under the above circumstances, even if the conversation alleged to have been exchanged between the father and the son, when the latter took possession of the land, meant anything more than a vague promise or expectancy that the son would eventually become the owner of the said land (which was by no means certain), the conduct of the father and of the son was inconsistent with the idea that anything had taken place of a nature to vest in the son a "juste titre" sufficient to constitute him possessor in good faith within the meaning of art. 412 C.C.

At all events, verbal evidence of the alleged verbal gift should not be accepted to prevail in favour of the son as against the rights of the creditors of the father, and to give to his possession the character of good faith necessary to enable him to claim the benefit of the privilege granted by art. 417 C.C.

Held that a possessor, even in good faith, who has made any valuable improvements to a lot of land, cannot, under art. 417 C.C., bring a substantive action for the payment either of the value or of the cost of such improvements, nor to have his *droit de rétention* determined; but he is entitled to raise such claims only when he is troubled in his possession and an attempt is made to evict him.

Held that the rights given to the possessor by art. 417 C.C. afford merely means of defence ("moyens d'exception") and may not be asserted until the real owner endeavours to revendicate the land ("fonds").

Held that the "title" which a possessor must hold in order to be considered "in good faith," under art. 412 C.C., is not necessarily a deed or even a writing, but connotes the cause ("cause") which forms the basis of his right of possession. Moreover, it requires a title purporting to transfer ownership ("translatif de propriété"), which alone constitutes what is known as "juste titre."

Held that a possessor in good faith is not obliged to cause his "droit de rétention" to be registered in order to claim the benefit of art. 417 C.C. against the creditors of the owner.

Judgment of the Court of King's Bench (Q.R. 37 K.B. 376) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) reversing the judgment

(1) [1924] Q.R. 37 K.B. 376.

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of the Superior Court and maintaining the respondent's action.

The material facts of the case are fully stated in the judgments now reported.

Léon Faribault K.C. for the appellant.

Alleyn Taschereau K.C. for the respondent.

The judgment of the majority of the Court (Anglin C. J. C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—Ce litige s'est engagé curieusement. On peut dire qu'il n'est pas le résultat des circonstances, mais qu'il est né plutôt de l'unique volonté des parties.

L'intimé était en possession d'une terre située tant dans la ville de Beauceville que dans Saint-François de Beauce, faisant partie du lot 162 des plan et livre de renvoi officiels de ladite paroisse de St-François.

Le mis-en-cause, père de l'intimé, avait cédé ses biens et, parmi eux cette terre pour le bénéfice de ses créanciers. L'intimé allégua que l'appelant, en sa qualité de syndic autorisé, avait fait publier des avis qu'il procéderait à la vente de "tous les droits du cédant autorisé" sur la terre dont il s'agit. Il conclut

à ce qu'il soit déclaré que le demandeur a droit de percevoir par privilège et avant qu'aucune vente ne soit faite, la somme de $11,200; à ce qu'il soit déclaré que le syndic autorisé, représentant Edouard Loublier, n'a aucun droit de vendre ladite propriété avant d'avoir fait le paiement ci-dessus; à ce que le demandeur ait le droit de retenir ladite propriété jusqu'au paiement desdites améliorations; à ce qu'il soit fait défense audit J. P. E. Gagnon, syndic, de vendre, d'annoncer en vente la susdite propriété; * * *

Ce sont là les conclusions essentielles de l'action, qui n'y ajoutent que sous forme d'introduction la demande qu'il soit déclaré que l'intimé est possesseur de bonne foi et que les améliorations qu'il a faites sur la propriété étaient nécessaires.

Cette intention de vente manifestée par le syndic était donc la véritable raison d'être de l'action. Chose étrange: malgré que le syndic eût, par plaidoyer écrit, nié qu'il eût cette intention, cette question principale a été, par la suite, complètement perdue de vue. L'on n'en trouve plus aucune trace dans tout le reste des procédures; et le jugement de la Cour du Banc du Roi (qui infirme celui de la Cour Supérieure), constate que l'appelant

n'a pas fait la preuve de l'avis de vente qu'il allègue avoir été donné par le syndic à la faillite d'Edouard Loublier et ne maintient les conclusions de l'action qu'en faisant exception spéciale pour "la partie relative à la défense de vente ci-dessus mentionnée," dont il déclare qu'il "n'y a pas lieu de s'occuper".

Mais c'est que justement, s'il n'y a plus lieu de s'occuper de l'intention qu'on prêtait au syndic de vendre la propriété, l'on peut se demander s'il subsiste un intérêt quelconque dans l'action de l'intimé. Il n'est pas très facile de comprendre pourquoi l'intimé, en possession de la terre sur laquelle il déclarait avoir fait certaines constructions et des travaux de défrichement et dont il alléguait être le propriétaire en vertu d'une donation verbale de son père, a cru devoir courir au-devant de ce procès, renoncer lui-même au titre de propriétaire avant qu'on le lui contestât, et s'adresser aux tribunaux pour obtenir un jugement déclaratoire à l'effet qu'il était possesseur de bonne foi, qu'il avait fait des améliorations nécessaires et qu'il avait droit de retenir la propriété jusqu'à ce qu'il en fût indemnisé. Il est évident que la base de ces conclusions réside dans l'article 417 du code civil. Or, cet article suppose que le propriétaire a émis des prétentions aux améliorations faites par le possesseur. Il fournit au possesseur ce qui paraît être essentiellement un moyen de défense. Il ne lui confère aucun droit de se faire payer ses améliorations, tant que le propriétaire du fonds ne les réclame pas. Comme le dit Laurent (vol. 6, nº 271) en commentant l'article 555 du Code Napoléon, qui correspond à l'article 417 C.C.,

> il s'agit d'un tiers évincé, c'est-à-dire d'un tiers qui possède comme propriétaire, soit de bonne, soit de mauvaise foi, contre lequel le propriétaire revendique son fonds. Donc, quand le propriétaire agit, non en revendication, mais par une action personnelle naissant d'un lien d'obligation, nous ne sommes plus dans le texte de l'article 555. Et l'esprit de la loi n'est pas non plus applicable * * * car ce n'est pas un article de principes; il déroge, au contraire, aux principes par des considérations d'équité; c'est donc une disposition spéciale, qui, par la nature des choses, doit être renfermée dans le cas pour lequel elle a été établie.

Cela revient à dire qu'un possesseur peut, dans les hypothèses de l'article 417 C.C., opposer, à un propriétaire qui revendique l'immeuble, la valeur ou le coût des améliorations dont il a droit d'être remboursé; mais qu'il ne saurait, par une sorte d'action provocatoire, déclarer qu'il en abandonne la propriété et forcer son propriétaire à entrer dans

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un débat judiciaire pour établir le montant que ce propriétaire sera obligé de payer pour les améliorations, lorsqu'il jugera à propos de les revendiquer.

Ce débat est d'autant plus inutile, que le code pourvoit à toute une série d'options en faveur du propriétaire dont l'une est qu'il peut

forcer le tiers à retenir le terrain en en payant la valeur suivant estimation

(418 C.C.) et qu'il est évidemment oiseux de s'enquérir, à la demande du possesseur, du montant qu'aurait à lui payer le propriétaire, lorsqu'il appartient exclusivement à ce dernier de décider d'abord s'il revendiquera son terrain. Il est clair que s'il ne le fait pas, le possesseur n'aura droit de rien réclamer et que ce dernier, dans les circonstances spéciales auxquelles pourvoit l'article 417 C.C., n'a pas d'action directe pour le coût de ses améliorations. En l'absence de toutes prétentions de la part du propriétaire du fonds, le possesseur reste en possession et tout est dit.

C'est l'effet de l'arrêt *re Montgomery* v. *McKenzie* (1). Ce jugement dit:—

And considering further that if plaintiff has as a person in good faith made any valuable improvements to said lot of land, he is entitled, when any attempt is made to evict him, to a *droit de rétention* thereof until paid for the same, but cannot, until troubled in the possession thereof, bring, as he has done by his alternative conclusions, a substantive action to have such right determined, doth dismiss plaintiff's action with costs *distraits*, * * * reserving to plaintiff any rights he may have for any useful and valuable improvements he may have made on said lot over and above the value of the rents, issues and profits thereof since his occupation of said lot.

Le juge-en-chef Johnson, parlant pour la Cour de Revision, qui a confirmé ce jugement de première instance, dit à la page 477:

* * * it is enough to make him possessor in good faith, and give him a right to his betterments, when proceedings are taken to evict him, for he has possession, and will have a right of retention till they are paid.

Voir aussi *Reed* v. *Belavance* (2).

Dépouillé de son motif déterminant: l'annonce d'une vente par le syndic, cette action manquait donc véritablement de fondement légal. Mais le syndic a, quand même, engagé la discussion sur les prétentions de l'intimé. Il a contesté le caractère de sa possession et la nature de ses améliorations; il lui a nié son droit de rétention et il a

(1) M.L.R. 6 S.C. 469 at p. 472. (2) Q.R. 19 K.B. 369.

demandé le rejet pur et simple de l'action, sans toutefois, dans son plaidoyer, opter pour aucune des alternatives que les articles 417 et 418 C.C. laissent à son choix.

Cette manière de procéder de part et d'autre aurait certainement donné lieu à une foule de difficultés si nous avions cru devoir concourir avec le jugement rendu par la majorité de la Cour du Banc du Roi, qui consiste à dire que l'intimé a droit d'être payé d'une somme de $4,700 et que, pour garantir le paiement de cette somme, il a droit de retenir la possession de l'immeuble du mis-en-cause.

Comme il s'agit seulement d'améliorations utiles, mais non nécessaires; comme, par ailleurs, la preuve démontre surabondamment que ces améliorations excèdent de beaucoup la valeur du fonds; qu'elles sont, en proportion, tellement considérables et dispendieuses que le syndic pourrait bien n'avoir aucun désir de les rembourser, mais, au contraire, décider qu'il est de l'intérêt des créanciers de forcer l'intimé à retenir le terrain en en payant la valeur, nous n'aurions pu, comme l'a fait la Cour du Banc du Roi, juger que l'intimé avait droit d'être payé de $4,700 et l'autoriser à rester en possession jusqu'à ce qu'il fût ainsi indemnisé; il nous eût fallu assurer à l'appelant le choix que la loi elle-même lui accorde.

Mais notre étude du dossier nous conduit plutôt à adopter les vues de la Court Supérieure, auxquelles se sont ralliés deux des juges du tribunal d'appel. Dans les circonstances, suivant la suggestion du juge-en-chef de la province de Québec, il vaut mieux sans doute envisager les procédures comme

moyens de faire statuer, avec la faillite comme contradicteur, sur ses droits contre elle relativement aux améliorations et aux constructions

de l'intimé, afin d'éviter autant que possible aux parties l'inutilité d'un procès long et dispendieux.

Nous devions cependant indiquer que les droits du possesseur en vertu de l'article 417 C.C. sont des moyens d'exception à l'encontre de l'action en revendication du propriétaire du fonds, et que, n'ayant pas fait la preuve que le syndic annonçait la vente de l'immeuble et des constructions et améliorations, l'intimé, en l'espèce, se trouvait sans motif pour continuer ses procédures.

Le juge de première instance a été d'avis

que la possession du demandeur n'a pas le caractère et ne réunit pas les

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conditions prescrites par la loi pour donner ouverture aux droits qu'il réclame; (qu'il) s'est établi sur cette propriété avec la permission de son père, et qu'il ne l'a jamais possédé pour lui, *animo domini*, mais pour son père et à titre de locataire; * * * que le demandeur n'a invoqué, ni produit aucun titre qui lui confère la possession ou propriété dudit immeuble ou qui peut le justifier de croire qu'il le possédait pour lui et qu'il n'a jamais eu ni titre réel, ni titre putatif.

Pour ces raisons et parce que, en outre, elle a trouvé que l'intimé n'avait pas réussi à prouver que les constructions, améliorations et impenses avaient été faites par lui, la Cour Supérieure l'a débouté des conclusions de son action. Deux juges de la Cour du Banc du Roi, en appel, ont partagé sa façon de voir, sans toutefois se prononcer sur la propriété des impenses, améliorations et constructions. La majorité de cette cour cependant a déclaré que l'intimé était un possesseur de bonne foi, que les constructions et le défrichement avaient été faits par lui, qu'ils représentaient une plus-value de $4,700, que l'intimé avait droit d'en être payé et que, pour garantir ce remboursement, il avait droit de retenir la possession de l'immeuble.

Il paraît donc y avoir deux points à décider: par qui ont été faites les améliorations? Quelle est la position juridique de l'intimé relativement à ces améliorations?

Avec la Cour du Banc du Roi, nous pensons que la maison, la grange et la bergerie mentionnées dans la déclaration ont été construites par l'intimé de ses deniers. Il est vrai que son père a pu requérir les services de certains ouvriers et payer certaines dépenses, mais ces dernières furent chargées à l'intimé dans un compte tenu à cet effet et qui se soldait par une balance en faveur de l'intimé.

Nous ne voyons pas non plus d'objection sérieuse à adopter les chiffres de la Cour du Banc du Roi pour en fixer le montant. Il est vrai que la preuve sur laquelle ils sont basés ne parle que de la valeur actuelle et que le syndic, s'il veut les retenir, a le choix de ne payer que ce qu'elles ont coûté. Il est peu probable toutefois que ces constructions aient augmenté de valeur. La supposition contraire est même plus plausible, car l'augmentation dans le coût des matériaux doit être compensée par la détérioration et la dépréciation des constructions elles-mêmes. En outre, le syndic a eu l'opportunité nécessaire pour offrir lui-même une preuve contraire à celle de l'intimé; et l'un des moyens de faire valoir ses prétentions était d'établir le coût des

constructions par opposition à la preuve de leur valeur actuelle.

Dans les circonstances, nous ne voyons pas quel intérêt les parties auraient à réouvrir le débat quant à cette estimation; et, suivant le désir exprimé plus haut de permettre à l'appelant et à l'intimé de tirer parti, autant que possible, du procès qu'ils ont engagé, nous croyons devoir arrêter l'estimation des constructions aux chiffres énumérés dans les notes du juge Rivard: la maison à $2,500; la grange à $600; la bergerie à $50; total, $3,150. Ces sommes devront être prises comme base dans les négociations ultérieures entre les parties.

Quant aux travaux de défrichement et de culture, l'intimé a clairement prouvé que seuls lui-même ou ses employés y avaient pris part. Mais nous ne trouvons rien dans la preuve pour fixer d'une façon satisfaisante la plus-value qu'ils ont donnée à l'immeuble.

Ces travaux de défrichement sont d'ailleurs d'une nature différente des constructions. Voir l'étude très complète de cette question et les notes à la suite, dans la cause des *Mathieu* v. *Berthiaume* (1).

Les articles 415 et 416 du Code Civil emploient les expressions " constructions, plantations et ouvrages ", tandis que l'article 417 C.C. se sert du mot " améliorations ".

Dès l'apparition du code, on s'est demandé s'il fallait faire une distinction entre ces expressions. Les constructions ne sont pas, à proprement parler, des améliorations, mais des additions; elles ne s'identifient pas, ni ne s'incorporent au fonds comme des réparations ou des travaux de défrichement ou de culture. On peut enlever des constructions; mais on ne conçoit pas qu'on puisse enlever des réparations ou des améliorations. (Laurent, vol. 6, p. 351).

A cause de cela, nous nous contentons de décider que c'est l'intimé qui a fait les travaux de défrichement et de culture, mais nous ne pouvons fixer la plus-value qu'ils ont donnée au terrain; et la meilleure solution nous paraît être celle qui est suggérée par le juge Dorion: les droits respectifs des parties pourront être établis comme ceux de tout autre créancier sur réclamation produite par l'intimé dans la faillite.

(1) 14 R.L.N.S. 506.

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Il reste à définir la position juridique de l'intimé relativement aux constructions et au défrichement qu'il a faits, ou, en d'autres termes, à décider s'il était un possesseur de bonne ou de mauvaise foi.

Il s'agit ici, bien entendu, de la bonne foi légale, c'est-à-dire de la bonne foi telle qu'elle est définie par la loi; et

il faut laisser de côté la notion ordinaire de la bonne foi, qui pourrait varier beaucoup d'après les sentiments et les idées, pour s'en tenir à la définition du code. Aubry & Rau, t. II, p. 268 et note 5.

(Laurent, vol. 6, p. 278).

Les améliorations faites par l'intimé, tout le monde s'accorde à le dire, n'étaient pas nécessaires, mais simplement utiles, et il importe absolument, en conséquence, de rechercher si, lorsqu'il les a faites, il était de bonne ou de mauvaise foi, puisque, suivant le cas, sa situation légale sera différente et il aura ou n'aura pas le droit de rétention.

L'appelant soulève bien le point préliminaire que l'intimé n'a fait enregistrer aucun privilège et il invoque l'article 2015 C.C.:

Entre les créanciers, les privilèges ne produisent d'effet à l'égard des immeubles qu'autant qu'ils sont publics, en la manière déterminée et sauf les exceptions contenues au titre de l'enregistrement des droits réels.

On peut ajouter que le droit que réclame maintenant l'intimé n'est pas mentionné parmi ceux qui "sont exempts des formalités de l'enregistrement" dans l'article 2084 C.C.

D'autre part, si le droit de rétention peut sans doute correspondre à la définition du privilège telle qu'on la trouve à l'article 1983 C.C., il est reconnu comme privilège sur les biens meubles (1994 C.C.) mais il ne figure pas dans l'énumération des créances privilégiées sur les immeubles donnée par l'article 2009 C.C.

Nous sommes d'ailleurs d'avis que, par sa nature même, le droit de rétention du possesseur de bonne foi peut, sans enregistrement, être invoqué à l'encontre des créanciers du propriétaire. Le texte même des articles 417 et 419 C.C. implique que l'enregistrement n'a pas été prévu. Il suppose que le possesseur se croyait propriétaire. On ne conçoit pas un propriétaire qui fait enregistrer un privilège ou un droit de rétention sur son propre terrain.

L'appelant nous réfère à un arrêt de cette cour (*Great Eastern Railway* v. *Lambe* (1)) et, dans cette cause, à cer-

(1) 21 Can. S.C.R. 431.

tains passages du jugement de l'honorable juge Taschereau (pp. 442 et 444) parlant au nom de la cour. Il s'agissait là d'un contrat de nantissement (*"lien or pledge"*) que l'on a refusé de faire prévaloir contre les droits de créanciers antérieurs, qui invoquaient le défaut d'enregistrement. Le cas est tout à fait différent de celui qui nous occupe et, comme par hasard, un des aspects de la distinction est souligné par l'honorable juge Taschereau lui-même, à la page 444:

Here also, it must be remarked, it is not the disbursements incidental to their possession that the appellants claim, but the very debt for which the pledge has been given to them

Le titre sur lequel un possesseur se fonde pour établir sa bonne foi et son droit de rétention pour le paiement de ses impenses n'est pas soumis à la formalité de l'enregistrement. (Dalloz, Rép. vo. Propriété, n° 440.—*Chinic Hardware Co.* v. *Dame Laurent* (1). Nous ne voyons pas en quoi le droit de rétention du possesseur de bonne foi diffère, sur cette question d'enregistrement, de celui du mandataire pour la créance résultant de ses déboursés. Or, la Cour du Banc du Roi, dans la cause de *Eddy* v. *Eddy* (2) a décidé que

ce droit de rétention ne l'autorise pas à faire enregistrer, contre l'immeuble qu'il détient, un avis dénonçant au public ce privilège qui n'est pas sujet à enregistrement et dont le montant n'a pas été établi contradictoirement.

Et cet arrêt a été confirmé par le Conseil Privé (3).

Le possesseur de bonne foi peut donc, sans qu'il l'ait fait enregistrer, invoquer son droit de rétention, même à l'encontre des créanciers du mis-en-cause qui sont ici représentés par le syndic.

Passons donc à la question du caractère de la possession de l'intimé.

L'on est d'accord pour dire que la bonne foi dont parle l'article 417 C.C. est celle qui est définie à l'article 412 C.C.:

Le possesseur est de bonne foi lorsqu'il possède en vertu d'un titre dont il ignore les vices.

Si le mot " titre " voulait dire un acte ou un écrit, il ne serait pas nécessaire de pousser plus loin l'investigation, car l'intimé n'a ni acte, ni écrit. Mais, avec le juge Rivard, qui s'appuie sur Baudry-Lacantinerie (Des Biens, n° 294), nous sommes d'avis que

(1) 1 Rev. de Jur. 278. (2) Q.R. 7 K.B. 300.
(3) [1900] A.C. 299.

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le mot titre ne désigne pas un écrit, mais bien la cause en vertu de laquelle le possesseur détient la chose.

C'est aussi le sens du jugement de cette cour dans la cause de *St. Lawrence Terminal Company* v. *Halle* (1) et de celui du Conseil Privé dans la cause de *Price* v. *Neault* (2).

Même en entendant " titre " dans le sens qui précède, la loi exige toutefois un titre translatif de propriété, sans quoi " il ne peut servir de base à la bonne foi " (Mignault, vol. 2, pp. 484 et 485).

C'est précisément l'existence de ce que les auteurs appellent ce " juste titre " qui nous paraît ici faire défaut. Le juge du procès et deux juges de la Cour du Banc du Roi ont été d'avis que l'intimé n'était pas un possesseur de bonne foi. Nous nous rangeons de leur côté.

Un titre translatif de propriété est une vente, un legs, une donation, etc. C'est ce dernier titre que l'intimé invoque dans sa déclaration:

Le mis-en-cause Edouard Loubier, le père du demandeur, *donna verbalement* * * *

L'intimé se heurte d'abord à l'article 776 du code:

Les actes portant donations entrevifs doivent être notariés et porter minute, à peine de nullité. L'acceptation doit avoir lieu en la même forme.

L'intimé voudrait donc appuyer la bonne foi de sa possession sur un titre absolument nul. C'est précisément dans cette cause de *Montgomery* v. *McKenzie* (3) que le juge-en-chef Johnson dit à la page 477:

A promise to give land such as I hold was made here, though all the judges do not even go the length that I do upon the facts, is one to which no legal effect can be given. Our art. 776 C.C., is decisive upon the point. Our law and the law of France have both departed from the rule of the Roman law, which allowed donations *scriptis vel non scriptis*. The article of the French code analogous to our art. 776 is 931 C.N. Upon this article I would refer to Demolombe, Donations, vol. 3, nos. 8, 9 and 10.

Admettons cependant que l'article 412 C.C. soit assez large pour couvrir même un vice résultant d'une nullité absolue, encore est-il

de l'essence de la donation faite pour avoir effet entrevifs, que le donateur se dessaisse actuellement de son droit de propriété à la chose donnée (art. 177 C.C.).

Or, il nous serait impossible de donner cet effet aux paroles échangées entre le père et le fils, lorsque ce dernier est venu demeurer sur la propriété, à supposer même que la preuve

(1) 39 Can. S.C.R. 47, at p. 70. (2) 12 App. Cas. 110.
(3) M.L.R. 6 C.S. 469.

testimoniale de ce fait essentiellement juridique soit admissible (Laurent, vol. 6, p. 333). Nous mentionnons la chose parce que le juge du procès n'a permis cette preuve que sous réserve.

Sans doute, le père corrobore son fils, bien que les paroles prononcées, qui sont rapportées à plusieurs endroits de la preuve, varient chaque fois qu'il y est référé. Mais ces paroles, qui seraient des admissions dans la bouche du père, s'il était défendeur, ne sont plus qu'une déclaration intéressée lorsqu'il se trouve en balance entre son fils et ses créanciers. Or, comme le fait remarquer le juge Dorion,

> c'est une situation très fréquente que celle d'un fils occupant un immeuble de son père, sans rémunération.

Il ne faut pas trop voir, ici, dans la possession du fils une circonstance qui rende vraisemblable l'existence d'une donation.

Si toutefois cette preuve testimoniale pouvait être admise à la faveur d'un commencement de preuve par écrit, que nous hésitons à y trouver, nous répétons que, comme le juge de première instance et comme les juges dissidents en appel, nous ne pouvons voir dans les paroles plutôt vagues que le père et le fils prétendent avoir échangées, rien autre chose qu'une expectative, un espoir que, plus tard, probablement à la mort du père, la propriété finirait par échoir au fils. En certains endroits, les déclarations que l'on prête au père sont plus précises; mais c'est l'idée générale qui se dégage des différentes versions qu'on en a données.

Au surplus, l'interprétation que l'intimé veut maintenant donner à ces paroles, même si l'on en admet la preuve, nous paraît décidément incompatible avec la conduite du père et du fils après que ce dernier fût devenu occupant de la terre, et nous ne voyons pas comment il peut être permis à l'intimé et au mis-en-cause d'opposer leur prétention actuelle à l'encontre de leurs actes constants.

Sur le rôle d'évaluation municipale, à la connaissance du fils, le père était porté comme propriétaire et le fils comme locataire; et cela depuis 1916 jusqu'à la date de l'institution de l'action. Non seulement ils n'ont jamais contesté le rôle, mais le père payait les taxes municipales et scolaires comme propriétaire, et le fils, ayant été poursuivi pour les siennes à titre de locataire, acquiesça et paya. Les primes d'assurance étaient payées par le père. Ce dernier mentionnait

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cette propriété comme lui appartenant dans l'état financier qu'il remettait aux banques. Il a consenti sur cette même propriété une hypothèque à un nommé David Poulin; et elle apparaissait en son nom au bureau d'enregistrement.

Enfin, nous en arrivons au point où l'intimé se trouve en contradiction avec ses propres écrits. Le 19 février 1917, il a signé un acte où son père lui consentait une hypothèque sur la propriété en question et où il reconnaissait par là que son père était propriétaire. La même chose s'est répétée le 13 octobre 1921. Enfin, il admet avoir fait dans la faillite une " réclamation pour du salaire ", pour son " travail sur la terre ". Véritablement, il a toujours agi comme un détenteur précaire, qui reconnaissait le droit supérieur de son père; et il ne saurait lui être permis de prendre après coup une position diamétralement opposée, surtout au détriment des créanciers de son père.

Si " la bonne foi est la croyance qu'a le possesseur qu'il est réellement propriétaire ", il nous est impossible, en l'espèce, de concilier cette croyance avec la conduite et les écrits de l'intimé et du mis-en-cause. Nous regrettons seulement d'avoir dû nous en expliquer aussi longuement.

Il en résulte que nous sommes d'accord avec le juge de première instance et deux des juges de la Cour du Banc du Roi. Comme eux, nous croyons que l'intimé n'est pas un possesseur de bonne foi au sens de l'article 417 C.C. et qu'il ne peut par conséquent réclamer le droit de rétention. Les conclusions de son action étaient prises dans le but de faire déclarer qu'il était possesseur de bonne foi, que les améliorations faites par lui étaient nécessaires, qu'il avait le droit de retenir la propriété jusqu'au paiement de ces améliorations et d'obtenir de la cour un ordre défendant au syndic autorisé de vendre la propriété avant d'avoir fait ce paiement. Aucune de ces conclusions ne pouvait être maintenue; et c'est donc avec raison que la Cour Supérieure a débouté l'intimé des fins de son action.

Cependant, anxieux de donner aux parties tout le bénéfice qu'il est possible de tirer du litige, nous croyons pouvoir traiter l'action du demandeur *pro tanto* comme une réclamation produite par l'intimé entre les mains du syndic autorisé, et nous déclarons que la maison, la grange et la bergerie, que nous estimons à $3,150, ont été construites par

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l'intimé, de même que les travaux de défrichement ont été faits par lui. Cette déclaration fera partie du jugement de la cour et sera de nature à aider, dans une certaine mesure, au règlement de la réclamation de l'intimé. Comme l'enquête en Cour Supérieure se trouve par là avoir été utile aux parties, nous croyons légitime que chaque partie en paie sa part respective.

En conséquence, nous maintenons l'appel; et, sauf les déclarations ci-dessus qui devront être insérées dans la décision de la cour, nous rétablissons le jugement de première instance avec dépens contre l'intimé dans toutes les cours, sauf que chacun paiera ses frais d'enquête en Cour Supérieure, et sans préjudice aux droits respectifs de l'appelant ès-qualité et de l'intimé, tel qu'il est plus haut expliqué.

IDINGTON J. (dissenting).—For the respective reasons severally assigned by the Honourable Chief Justice Lafontaine and Justices Rivard and Howard, in their support of the judgment now appealed from with which I agree I would dismiss this appeal with costs, but varying the formal judgment below so as to except from the operation thereof the house of the respondent's sister, evidently included by error.

Appeal allowed with costs.

Solicitor for the appellant: *Louis Morin.*
Solicitor for the respondent: *Alleyn Taschereau.*

WILLIAM M. PETRIE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE R. RIDEOUT AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

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*Nov. 13.

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*Feb. 3.

ON APPEAL FROM A JUDGE OF THE SUPREME COURT OF NOVA SCOTIA

Replevin—Recovery of goods—Subsequent dismissal of action—Return of goods not ordered. Action on bond—Right to order for return or damages.

P. brought a replevin action to regain possession of goods seized under process of law. He succeeded at the trial and the goods were delivered

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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to him. The judgment in his favour was reversed by the full court but return of the goods or damages for their detention was neither demanded nor adjudged. In an action on the replevin bond.

Held, that as the obligees could, in the replevin action, have claimed and obtained an order for return of the goods or for damages they cannot claim it in this action.

APPEAL *per saltum* from a decision of a judge of the Supreme Court of Nova Scotia in favour of the respondent.

The appellant W. M. Petrie imported beer into Sydney, N.S., which was seized by respondent Rideout, inspector, under the N.S. Temperance Act and Petrie was convicted by respondent Muggah, stipendiary magistrate, of a violation of the Act. The beer was ordered to be destroyed but appellant brought action to replevy it and obtaining judgment at the trial regained its possession. This judgment was reversed on appeal to the Supreme Court *en banc* but no order was made for a return of the beer or damages for its detention nor was such order asked for. An action was then brought against appellants on the replevin bond claiming a return of the beer or damages and at the trial before Mr. Justice Rogers judgment was given for respondents for $3,000 the beer having been sold or otherwise disposed of. By consent of parties an appeal was taken from this judgment directly to the Supreme Court of Canada.

C. B. Smith K.C. for the appellants. The defendant has satisfied the judgment against him and is no further liable. See *The Queen* v. *Cameron* (1); *Wright* v. *Reeves* (2); and *Bauld* v. *Velcoff* (3).

W. F. O'Connor K.C. for the respondents.

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The respondents (plaintiffs) recovered judgment in the Supreme Court of Nova Scotia against the appellants (defendants) for $3,000 damages for breach of the condition of a replevin bond, given in an action brought against them in the same court by the appellant, William M. Petrie, wherein he had caused to be replevied a quantity of light beer of the value of $3,000, as stated in his affidavit, which was made to lead the replevin order.

(1) 12 N.S. Rep. 55. (2) 12 N.S. Rep. 563.
(3) 54 N.S. Rep. 446.

By the obligation of the bond the appellants are bound jointly and severally to George B. Ingraham, Sheriff of the county of Cape Breton, in the penal sum of $6,000. There is a recital that the appellant, William M. Petrie, had obtained an order for replevin against the respondents to obtain possession of 137 barrels of beer, which he asserts to be his property, and the condition is expressed in the following terms:

> Now the condition of this obligation is such that if the said William M. Petrie shall prosecute his suit in which the said order was made, with effect and without delay, or if the suit is carried on and continued between the said William M. Petrie and Fred G. Muggah and George R. Rideout touching the said goods, and the court shall adjudge that the goods shall be restored to the Fred G. Muggah and George R. Rideout, with damages for detaining the same, then if the said William M. Petrie shall restore the said goods and pay and satisfy any judgment that may be obtained against him, as well as any other costs which the said George B. Ingraham may incur by virtue or on account of this suit, or of the said replevin, then this bond shall be void otherwise to remain in full force and virtue

The respondents by their statement of claim alleged that although the appellant, William M. Petrie, succeeded at the trial of the action of replevin, the judgment was reversed on appeal and the action dismissed by the Supreme Court *en banc;* moreover that the last mentioned judgment dismissing the action was affirmed on appeal by the Supreme Court of Canada; the respondents alleged as breaches of the bond that:

> The defendants have not restored the said goods to the plaintiffs nor any part thereof, as adjudged by the said decisions, nor paid, nor satisfied the plaintiff for damages for detaining the same.

Then it was further alleged by the statement of claim that the sheriff had assigned the bond to the plaintiffs, who had served notice of assignment upon the defendants, but that

> the defendants have refused and neglected to restore the said goods, or to satisfy the judgment obtained against the said defendant, William M. Petrie,

and the plaintiffs claimed

> return of the said goods set out in the statement of claim; damages for detention of same; payment of the value of the said goods, namely, $3,000;

other relief as the court might order, and costs of the action.

At the trial it was admitted that the defendant, William M. Petrie, imported a car of beer containing 137 barrels which was marked "Ale and Porter" and that the car arrived at Sydney 30th April, 1921; that the plaintiff, Ride-

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out, was inspector under the Nova Scotia Temperance Act for the city of Sydney at the time, but had since left the city, and was at the time of the trial residing at Moncton; that the defendant, Muggah, was Stipendary Magistrate for the city of Sydney; that the plaintiff, Rideout, secured a search warrant and seized the 137 barrels of beer which he placed in the city warehouse, and laid information against the defendant, William M. Petrie, for importing the liquor contrary to the provisions of the Dominion Act, c. 19 of 1916; that the hearing of the prosecution began on 12th May and continued with several adjournments until 13th June, and that on 26th June, 1921, the magistrate convicted the defendant, William M. Petrie, and ordered that the beer should be destroyed; that the defendant, William M. Petrie, in the meantime, on 14th June, brought his action for replevin, gave the bond in question and caused the 137 barrels of beer to be replevied; that the action was not brought to trial until the June term of 1922, and that in the interval the County Court judge quashed the conviction against the defendant, William M. Petrie; that the trial judge decided the action in favour of the plaintiff, and that the appeal from his decision was heard in November, 1922, and allowed; that the costs of the action and of the appeals were paid by the defendant, William M. Petrie, prior to the commencement of the action upon the bond, but that he did not return the goods nor pay the value of them.

The appellant, William M. Petrie, testified that he had received from the sheriff in the replevin action 137 barrels of beer; that he had stored it pending the trial of the action; that while in storage about half of the quantity was frozen; that five or six barrels were stolen; that, after the judgment which he recovered at the trial, he had sold the remainder at retail or wholesale, the price at the former rate being 20 cents per bottle, and at the latter rate $20 per barrel, and that thus all the beer was disposed of in 1922 or in 1923; he says moreover that the beer being of a light variety would not keep indefinitely, but would turn sour. He estimates that the saleable quantity, upon which he realized, was 55 or 60 barrels.

In the replevin action the defendants did not claim return of the goods or damages, but they justified the taking, Ride-

out, as Inspector under the Nova Scotia Temperance Act for the city of Sydney, and Muggah, as the Stipendiary Magistrate for the same place, and they alleged that the beer was lawfully in their custody, in their respective capacities, as officers of the law. The case is reported upon appeal to the Supreme Court of Nova Scotia *en banc* under the name of *Petrie* v. *Rideout* (1). The judgment of the court was pronounced by Chisholm J., who came to the conclusion to allow the appeal and dismiss the plaintiffs' action for reasons which are stated as follows:—

> The beer having been properly brought before the magistrate—as I think it was, the rule laid down in *Lavie* v. *Hill* (2), and *The Mayflower Bottling Co.* v. *McCormick* (3), that the magistrate should have a reasonable time within which to deal with the charge in the information has, I think, application. There is nothing in the case to shew that there was any undue delay on the part of the magistrate. When the action was commenced and the order to replevy was issued, the beer was in the custody of the court. The plaintiff was not entitled to possession of it, and the action was not maintainable. When he commenced his action he had, in short, no cause of action. The claim must be tried with reference to the state of things as they then existed, and not as they developed later. The action should be dismissed with costs to be paid to the defendants by both plaintiffs, and the defendants should have judgment for said costs when taxed. This decision does not in any way affect the judgment of the learned county court judge so far as the latter quashes the conviction. His decision is final as regards the conviction.

From this judgment the plaintiff, William M. Petrie, appealed to the Supreme Court of Canada, and upon the appeal it was adjudged that the judgment of the Supreme Court of Nova Scotia *en banc* should be affirmed, and that the appeal should be dismissed.

There was thus in the replevin action no judgment either for return of the goods or for damages for their detention; but there was upon the appeal an affirmation of the finality of the judgment of the county court quashing the conviction.

The action of replevin in the province of Nova Scotia was formerly regulated by c. 94 of the Revised Statutes, 4th series, respecting pleadings and practice in the Supreme Court, ss. 329 to 345, and it was provided by s. 2 of this chapter that the practice and proceedings of the court should conform as nearly as might be to the practice and proceedings of the superior courts of common law in force

(1) 56 N.S. Rep. 82. (2) [1918] 52 N.S. Rep. 215.
(3) [1920] 53 N.S. Rep. 384.

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previous to the first year of the reign of King William IV, and that in all cases where the proceedings and practice of the superior courts of common law in England differ from each other those of the Court of Queen's Bench should prevail. Afterwards when the Judicature Act was enacted, followed by the adoption of the English Rules of 1883, which, with modifications, were brought into force in Nova Scotia on 1st October, 1884, the former statutory provisions with regard to replevin were embodied in these rules as Order XLV, comprising nine rules corresponding *mutatis mutandis* to ss. 331 to 336 inclusive, and 343 of the Practice, as enacted by c. 94 of the Revised Statutes, 4th series; and it was provided by s. 44 of the Judicature Act that, save as by that Act, or the Rules of Court, otherwise provided, the forms and methods of procedure which, immediately preceding 1st October, 1884, were in force, and not inconsistent with the Judicature Act, or any Rules of Court, should, as nearly as might be, continue to be used and practised in the Supreme Court in such and the like cases, and for such and the like purposes, as would have been applicable in the Supreme Court prior to that date. Thus the former practice respecting replevin, in so far as it is adapted to the general policy of the new rules of procedure, remains in force, and therefore the practice should now conform to the rules as adopted in 1884, and, in matters not therein provided for, to the former practice, so far as not inconsistent with the new rules.

It is provided by Rule 4 of Order XLV, which corresponds to section 333 (in part) of the former practice, that the sheriff shall not serve the order for delivery until he shall have replevied the property; and, by the next following rule, which is also derived from s. 333, that before replevying he shall take a bond in double the value of the property to be replevied as stated in the order, and that "the bond may be in Form No. 51 in Appendix 'K,' with such variations as circumstances require." This form is reproduced as follows:

> Whereas, the said A. B., has obtained an order for replevin against C. D. to obtain possession of certain cattle (or goods) to wit . . . . . which the said A. B. asserts to be his property.
>
> Now, the condition of this obligation is such, that if the said A. B. shall not prosecute his suit in which the said order was made, with effect and without delay, or, if suit is carried on and continued between the said

A. B. and C. D. touching the property of the said cattle (or goods), and the court shall adjudge that the said cattle (or goods) shall be restored to the said C. D. with damages for detaining the same, then if the said A. B. shall restore the said cattle (or goods) and pay and satisfy any judgment that may be obtained against him, this bond shall become void.

There is no express requirement in the body of the statute or rules as to what the condition of the bond shall be, except the clause quoted from Rule 5 that the bond may be in that form, with such variations as circumstances require; but it will be observed that the form set out in the appendix contemplates that the court may adjudge not only a return of the goods to the defendant, but also damages for detaining the same.

The form does not in anywise contradict any enactment of the statute or of the rules; it is as much a part of them as any other part, *Attorney General* v. *Lamplough* (1), and it clearly evidences an intention to adhere to the former practice under which a successful defendant in replevin was generally entitled not only to a return of the goods, but also to recover damages for their detention. It is laid down in Tidd's Practice, 9th ed. 993, that upon a judgment in replevin for defendant the execution at common law is for a return of the goods; to which damages are superadded by the statutes of 7 Henry VIII, c. 4, s. 3, and 21 Henry VIII, c. 19, s. 3, or upon the statute 17 Car. II, c. 7, for the arrearages of rent, and costs; and, at page 1038, that

when judgment is given on demurrer, for a return of the goods the avowant may immediately have a writ of *retorno habendo,* and inquiry of damages; and after verdict, or inquiry executed, he may have a *retorno habendo, and fieri facias* for the damages and costs, in the same writ.

In an anonymous case reported in 2 Mod. 199,

it was the opinion of North, Chief Justice, that in replevin both parties are actors; for the one sues for damages and the other to have the cattle.

Bacon's Abridgement, *vide tit.* Replevin and Avowry. Therefore it is well stated in Mayne on Damages, 9th ed. 414 that:

The action of replevin is an anomalous one, in this respect, that both plaintiff and defendant are actors in the suit. In fact it consists of two cross actions; in which one party claims damages for having his goods seized, while the other party claims satisfaction for some demand out of which the seizure arose. One result of this peculiarity is that either party may obtain damages.

And that this is true with regard to the action as regulated by the Nova Scotia Practice I see no reason to doubt.

(1) 3 Ex. D. 214, at p. 229.

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Comparison of the bond executed in the case with the form prescribed by the rule shews that the former contains some additions which perhaps are not material, principally a clause affording indemnity to the sheriff for any costs which he may incur on account of the suit. In *Jackson* v. *Hanson* (1), the form of the condition of a replevin bond was improperly expressed, namely, to appear at the then next county court and *then and there* to prosecute the suit with effect. Following the statute, the condition should have been to appear at the then next county court and prosecute the suit with effect and without delay, but Parke B. considered that he should nevertheless construe the condition in accordance with the statutory intention, because the object of the bond was that the question whether the goods were rightly taken should be properly litigated, in the ordinary way, but with reasonable speed, and that the condition ought to be interpreted in that sense. There is less difficulty in this case to interpret the condition of the bond in conformity with the statutory form. It is said in *Perreau* v. *Bevan* (2), following *Morgan* v. *Griffith* (3).

> that in all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any distinct parts of the condition. And it is material that this should be the case, for, though a return of the distress may have been actually made, as well as adjudged, yet the avowant may and will still be damnified, by reason of his costs of suit, where the distress so returned is not of sufficient value to pay him his costs, as well as his arrears of rent.

It has been shewn that in the present case all these material conditions have been stipulated, and also that the costs of suit, the only indemnity adjudged against the replevisor, have been paid. In *Perreau* v. *Bevan* (2) it is also said that there may be cases in which failure to prosecute the action to final success is a breach of the condition to prosecute with effect although there be no judgment for return; there is here no claim for damages for breach of that condition, and there is no authority cited, or which I have been able to discover, that, after judgment upon verdict which does not order a return of the goods or damages for their detention, the value of the goods or these damages can be recovered upon assignment of a breach of the condition to

(1) 8 M. & W. 477. (2) 8 D. & R. 72, at p. 90.
(3) 7 Mod. 380.

prosecute with effect. It is not unworthy of remark that the prosecution of the replevin action was not without effect in the sense that the plaintiff obtained by means of the replevin order the possession of the goods, and upon the final judgment dismissing his action was not ordered to return them; but as to whether or not this could be regarded as satisfying the condition to prosecute with effect, I express no opinion. The English form of condition, applicable to proceedings in the County Court, as set forth in Tidd's Forms, 571, requires that the principal obligor shall appear at the next county court and prosecute his suit with effect and without delay and make return of the goods and chattels "if a return thereof shall be adjudged"; if these conditions be complied with the obligation is to be void, or else to be and remain in full force and virtue. In the present case the condition in accordance with the form prescribed in the appendix to the rules is stated in the alternative; and it is thereby stipulated that if the said William M. Petrie shall prosecute his suit with effect and without delay, *or,* if the suit is carried on and continued between the parties, and the court shall adjudge that the goods shall be restored to the defendants with damages for detaining the same, then in the result the bond is to become void if the plaintiff restore the goods and pay and satisfy any judgment that may be obtained against him, as well as any other costs which the sheriff may incur by virtue or on account of the suit or of the replevin. Now there being no judgment for restoration of the goods, neither was there any judgment for damages for detaining them; the plaintiff's action was dismissed with costs, and the plaintiff satisfied the second or alternative condition in so far as it was capable of performance by paying and satisfying the judgment for costs which had been obtained against him. The condition expressed by the words "if the said William M. Petrie shall restore the said goods" is, I think, subject to the qualification, such as appears in the English form, "if a return thereof shall be adjudged"; and of course if the alternative condition be satisfied the obligation becomes void, even though the plaintiff did not prosecute his suit with effect. The obligor is entitled to a reasonable and beneficial interpretation of the condition which is for his

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benefit; it is said in Shepherd's Touchstone, 8th ed. 376a, that:

> The condition of an obligation, which is doubtful, is always taken most favourably for the obligor, in whose advantage it is made, and most against the obligee; yet so as an equal and reasonable construction be made according to the minds of the parties, albeit the words sound to a contrary understanding.

Cases may be imagined in which obviously there could be no order against the plaintiff for return of the goods or damages for detaining them, although the plaintiff fail to succeed; for instance if the defendant were to maintain a plea of *non cepit;* or if the defendant were to exercise the right which he has under Rule 9 to retain the possession by giving security to the sheriff for the restoration of the goods if adjudged. *Evans* v. *Ross* (1). Therefore I think that while the first part of the condition provides for the event of a successful issue of the suit, the second or alternative part is intended to provide for a termination which is not successful, and that the object of it is to insure that the goods shall be returned if they are ordered to be returned, that damages shall be paid to the defendant if damages be adjudged, and that the defendant shall receive any costs which may be adjudged to him in the cause. In the present case it appears to have been considered by the Supreme Court *en banc* that the action of replevin failed because brought prematurely. It is said that when the plaintiff commenced his action the beer was in the custody of the court; that the magistrate was entitled to a reasonable time within which to determine the complaint, and that the claim should be tried with reference to the state of things which existed at the commencement of the action, and not as it developed later; but it is expressly affirmed that the decision in no way affects the validity of the conviction, which was quashed by the county court judge, whose decision is final. Whether in these circumstances the absence from the judgment of any term relating to the return of the goods was deliberate, upon the consideration that the defendants had not claimed a return, or that they were not entitled to a return; or whether the question of return was not submitted, and therefore not considered, does not appear; but I think it was for the defendants if

(1) 3 R. & C. 50.

they desired the return of the goods or damages for their detention, to have brought those questions forward for the determination of the court in the replevin action. If because the questions of return and damages were not submitted or determined in the replevin action the plaintiff in that action has secured an advantage, which cannot in the circumstances be affirmed, it was because the defendants failed to avail themselves of the opportunity which the cause afforded, and it is too late in the present action to set up, as the respondents now seek to do, the loss of the liquor as damages to be recovered for breach of the condition of the bond.

It may be observed that the breaches assigned, and for which the respondents recovered at the trial, are that the defendants did not restore the goods nor pay damages for detaining them, also it was averred that they did not satisfy the judgment obtained against the defendant, William M. Petrie. Upon the latter allegation the respondent by the admission and the findings failed in fact; and, as to the return of the goods and damages for detention, the parties were properly convened in the replevin action, and it was competent to the court in that action to have given the relief which is now sought. If in that action a return had been claimed, and if damages had been claimed, these claims would have been successful, if a claim for compensation for not returning the goods and for damages for their detention can now be successful. *Serrao* v. *Noël*, in the Court of Appeal (1), is a distinct authority that the plaintiffs are precluded from maintaining a subsequent action for the same cause. This was an action concerning the title of shares in a Mining Company which belonged to the plaintiff, but which had been lodged by the plaintiffs' broker with the defendant as security for an advance, and the plaintiff claimed to restrain the defendant from parting with the shares or registering them in the defendant's name, and for such further or other relief as the nature of the case might require. The defendants in that action consented to an order for the delivery up of the shares to the plaintiff forthwith, and the order directed that upon the delivery register should be stayed. When the shares were

(1) 15 Q.B.D. 549.

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delivered they were sold at considerable loss, and the second action was brought to recover damages for the detention. It was held that the plaintiff was estopped. The first action had been brought in the Chancery Division and the second action was in the Queen's Bench Division. This led to some confusion at the trial, but it was explained on the appeal that the Court of Chancery no longer existed; that although there are two divisions, Queen's Bench and Chancery, they are divisions of one court which administers one law, and that the claim in the second action might therefore have been maintained in the first action. Bowen L.J. said:

I too am of opinion that the defendant is entitled to judgment. The principle is, that where there is but one cause of action, damages must be assessed once for all. The plaintiff relies upon a certain cause of action; was this cause of action capable of being litigated in the suit in the Chancery Division? If that had been an action of detinue at common law, the jury in their assessment could have included, not only damages for the original wrongful detention, but also damages for the detention until the shares should be re-delivered; damages might have been assessed once for all. The suit in the Chancery Division was an application to the High Court of Justice for all kinds of relief, in order that the rights of the parties might be adjusted. As soon as the writ was issued and the claim delivered, the court was empowered to do what was right between the parties. It may be said that the plaintiff did not claim damages in the suit in the Chancery Division. I am not sure that he did; the primary object of the action was that it should be a proceeding to obtain the re-delivery of the shares, and perhaps it did not occur to the plaintiff to make it clear that he intended to include a claim for damages; but if an application had been made, the court would have amended the claim, so as to enable the plaintiff to claim damages, and therefore damages not only could have, but also would have, been assessed at the time of the trial in the Chancery Division. In the present case there was a re-delivery of the shares made upon an arrangement arrived at in the course of the suit; the cause of action now litigated is the detention of the shares; that cause of action was litigated in the action in the Chancery Division, and therefore the two actions are in respect of the same cause.

In *Gibbs* v. *Cruikshank* (1), the plaintiff in replevin recovered as damages the amount of the expenses of the replevin bond, and, having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought this action to recover these damages, and it was held that the recovery in replevin was a bar to the action inasmuch as the special damages were recoverable in that action. Brett J. at page 463 said:

Replevin is a common law action for the taking of goods. By the course of procedure in that action the goods are returned in the course of the action. It was argued by Mr. Foard that the action was for the mere

(1) L.R. 8 C.P. 454.

purpose of recovering back the goods. I do not think that can be so, for if so, the plaintiff could never have recovered what in every action of replevin he does recover, the expenses of the bond. It seems to me that wherever, in a common law action, the plaintiff can recover damages, he must be entitled to recover all the legal damages he has sustained. Some of these damages are called common and others special damages. There is no essential difference between the two, further than that the latter must be specially mentioned in order to give notice to the defendant that they are claimed. I can find no authority that special damages cannot be recovered in replevin.

Now there can be no doubt that the return of the goods to the respondents, if they were entitled to a return, was enforceable in the replevin action and, having regard to the rules of the practice in Nova Scotia, it would seem that the damages, if any, which the defendants sustained by reason of the replevin were also recoverable, certainly if proper allegations had been made; and therefore I think upon the principle of *Gibbs* v. *Cruikshank* (1), which is an authority of high standing, the respondents (defendants in replevin) are precluded from setting up these damages in their action upon the replevin bond. It is said that an order for the return of the goods would have been of no value to the respondents because in the interval the beer had been frozen or spoiled or had been disposed of; but these are matters which would have come up for consideration upon the sheriff's return if restoration had been ordered, when, as is said in Tidd's Practice at page 1038, the defendant,

on the sheriff's return of elongata, may either have a *capias* in *withernam*, for taking other cattle and goods in lieu of them; or he may sue out a *scire facias* against the pledges, for a return, on the statute Westm. II (13 Ed. I) c. 2; or, if the distress was for rent, and the sheriff has taken a replevin bond, under the statute 11 Geo. II, c. 19, s. 23, the defendant may take an assignment of it, and bring an action thereon against the pledges, if sufficient; or if the sheriff has omitted to take a replevin bond, or the pledges were insufficient at the time of taking it, he may proceed by *scire facias*, or action on the *case* against the sheriff for neglect of duty.

This was the ancient procedure, which was, as I have shewn, certainly continued by statute in Nova Scotia down to 1st October, 1884, and is still, I should think, available by reason of section 44 of the Judicature Act. But, in any case, if the plaintiff in replevin, having failed to prosecute with effect, and having been ordered to return the goods, neglected to comply, there could be no question as to breach of the alternative conditions of the bond.

(1) L.R. 8 C.P. 454.

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The learned trial judge suggests that the condition for return of the goods is inserted in the bond for the benefit of the plaintiff in replevin, who might prefer to return the goods and pay detention damages, rather than to retain them and pay their value as at the date of the replevin, and for this he cites a Pennsylvania case, *Gibbs* v. *Bartlett* (1). But with the utmost respect I am unable to accept this view. It would seem strange that when the question of title is tried in the replevin action and found for the defendant it should be at the plaintiff's option to retain the goods by payment of their value as at the date of the action, or as fixed by the plaintiff's affidavit upon which the order was obtained. I prefer the view expressed by Brett J. that by the course of procedure in the action of replevin the goods are returned in the course of the action. Moreover, there is a considerable variety of opinion expressed in the State Reports of the United States, and it is not difficult to find cases there in which the doctrine that the judgment *retorno habendo* is intended for the benefit of the plaintiff is contradicted.

The Massachusetts' decisions were always regarded in Nova Scotia as sources of wisdom, although not, of course, as possessed of judicial authority; there was a case decided in the Supreme Judicial Court of that State, *Whitwell* v. *Wells* (2), in which it was held in substance that judgment for return of goods replevied did not follow *ex debito justitiae* upon dismissal of the action; that the order for return was discretionary; that the jurisdiction ought to be exercised as the ends of justice might require, and that a party should not be allowed to acquire a better title by unsuccessful proceedings in replevin than he had before; that it might happen that the facts upon which the pleadings were founded ceased to exist before the final judgment, and that in such case the court should receive evidence of the intervening facts and render judgment according to the justice of the case at the time,

> As, if the defendant had a special property in the chattels and a right to possession of them which terminated before final judgment, the court would render judgment for the defendant for costs, but not for a return, because at the time of rendering judgment he had no right to the possession . . . . The law would not do so vain an act as to cause a

(1) 2 W. & S. 29, at p. 34.

(2) 24 Pick. 25.

return to the officer who would have been bound immediately to restore them (the goods) to the plaintiffs.

This appears to be a more reasonable view, and I cite the case because it appears to be founded on principles which are inconsistent with the view expressed in the Pennsylvania case, that the judgment for return by an unsuccessful plaintiff judicially depends in anywise upon his election.

I am disposed therefore to conclude that although the appellant, William M. Petrie, may have failed to prosecute the replevin action with effect, he did nevertheless, seeing that there was no judgment for return or for damages, satisfy the alternative condition of the bond by paying and satisfying the judgment which was obtained against him.

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

IDINGTON J.—This appeal arises out of an action upon a replevin bond given the sheriff in an action of replevin. And as that action was dismissed said bond was assigned by him to respondents who sued thereon and were given judgment not for the penalty of $6,000 and damages assessed as usual in such like actions on a penal bond.

The condition of said bond is as follows:—

"Now the condition of this obligation is such that if the said William M. Petrie shall prosecute his suit in which the said order was made, with effect and without delay, or if the suit is carried on and continued between the said William M. Petrie and Fred G. Muggah and George R. Rideout touching the said goods, and the court shall adjudge that the goods shall be restored to the Fred G. Muggah and George R. Rideout, with damages for detaining the same, then if the said William M. Petrie shall restore the said goods and pay and satisfy any judgment that may be obtained against him, as well as any other costs which the said George B. Ingraham may incur by virtue or on account of this suit, or of the said replevin, then this bond shall be void otherwise to remain in full force and virtue."

The question upon which I think this appeal should turn is the true construction of said condition.

The appellants contend that there are clearly two alternatives in the said condition, the first one of which is that William M. Petrie, the plaintiff, shall prosecute his suit "with effect and without delay."

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The second alternative is the remaining part of the said condition.

And appellant contends that the second is all that is involved herein for there never was any judgment ordering the return of the goods, or judgment for damages and inas much as all the judgment provided for was the costs, and that all said costs have been paid, which is not disputed.

I am not inclined to think there is so much importance to be attached to the use of " or " instead of " and " as some of the arguments addressed to us implied; but appellants are clearly entitled to such advantage as there is in its being taken literally.

With great respect I cannot think there is any room for the reading which the learned trial judge suggests of substituting " and " for " or."

The purview of the entire condition is such as contemplates a judgment shall be expressed by the court relative to all that may happen to be involved in the questions arising in the trial of the case.

I need not enlarge on that topic and point out how many divers things may occur in the course of a trial in a replevin action.

In this particular instance I fail to see what right the respondents had to the goods, which was a cargo of 1·89 per cent beer.

There was a search warrant for it and a prosecution taken as the result of such a find by respondent Rideout, before respondent Muggah, a magistrate who heard the case and convicted the appellant W. M. Petrie, and ordered the goods to be destroyed.

On appeal from that conviction it was quashed. On such a state of facts how can damages be assessed?

Of course the respondents had no property in the goods and may well rejoice that one half of them got frozen as might be expected of such a quality.

But even if such neglect led to half of the goods being destroyed, I fail to see why, under proceedings in a replevin suit ending as this did, the court should assess the full value of the goods.

Indeed to my mind there never was any room for such an award to respondents. Accidentally, or otherwise, the active appellant was sufficiently punished already.

I think, inasmuch as the courts dealing with the action did not see fit to make any assessment of damages, no other court can do so on a bond conditioned as this bond is.

In a penal action on a bond it is quite usual to give judgment for the penalty, and then assess the damages ensuing the breach.

I could conceive of that way of rectifying any legal wrong in other cases, but here, where he suing had nothing to suffer but costs, and they are paid, it seems to me the matter should have been allowed to rest, but if, instead of that, he brought such an action, it should have been dismissed.

I think this appeal should, therefore, be allowed with costs throughout, and the action dismissed.

I may be wrong in the foregoing view as to the dismissal of the action entirely (for which perhaps there is no direct authority, indeed there is no direct authority to meet the remarkable case that the respondents presented in bringing this action) but the English law may be found in Chitty's Archibald's Practice, 14th Ed. 1885, vol. 2, pages 1260 and following, and including 1264.

I cannot find any authority for Nova Scotia decisions differing from the line of cases set forth in said pages.

And if we turn to the work of Cobbey on Replevin which deals almost entirely with American decisions, there seems to be authority found in many States as to the consequences following an unsuccessful replevin action. These cases indicate that the practice is followed of having a replevin action accompanied with a replevin bond and, I would infer from references given us, that practically the same law as prevails in England and in many English provinces is, in its basic principles, identically the same, subject, however, to departure from the ancient English law as to the mode of dealing with a replevin bond.

The principles of replevin action and replevin bonds seem to be the same as the English law except the actual disposition of the assessment of damages, arising and recoverable under the bond in the case of a replevin plaintiff failing in his action.

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Of the many cases that I have referred to, the following seem instructive.

Little v. Bliss, 55 Kansas Reports, page 94; 39 Pacific Reports, page 1025; *Crabbs* v. *Koontz* et al, 13 Atlantic Reporter, page 591; 69 Maryland Reports, page 59; *Stockwell* v. *Byrne,* 22 Indiana Reports, page 6; *Jones* v. *Smith et al.,* 79 Maine Reports, page 452; 10 Atlantic Reporter, page 256.

The last mentioned case perhaps is the most in point of any herein. It decides the question in that jurisdiction as to the right to recover damages where the defendant in replevin has no title, yet was held entitled to bring an action on the bond, but could not recover damages, except nominal ones.

The respondents herein have, I repeat, no title and never had any title to these goods, except the bare possession. In the *Jones* v. *Smith* case only nominal damages were allowed.

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*Dec. 9.

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*Feb. 3.

ISABELLA ORPEN (PLAINTIFF).....APPELLANT;

AND

HERBERT C. ROBERTS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Amount in controversy—Loss as the effect of judgment—Municipal Institutions Act, R.S.O. [1914] c. 192, s. 406 (10)—Municipal by-law—Street declared residential—Distance from street line for buildings—Frontage—Landowner affected by building—Right of action.

The amount in controversy necessary to give the Supreme Court of Canada jurisdiction to entertain an appeal may be determined by the pecuniary loss that would be suffered as a result of the judgment appealed from.

Sec. 406 (10) of The Municipal Institutions Act (R.S.O. [1914] c. 192) authorizes the council of a city or town to pass a by-law declaring any highway or part of a highway to be a residential street and prescribing the distance from the street line in front at which buildings can be erected. No common law right of action is given to a person prejudicially affected by the erection of a building in contravention of such a by-law and sec. 501 provides that in case of contravention it may be restrained by action at the instance of the corporation. The city of Toronto passed such a by-law in respect of lands front-

PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

ing on the north side of Carlton street between Sherbourne and Homewood Av. R. proposed to erect an apartment house on the corner of Carlton street and Homewood Av. at a less distance from the street line than that prescribed by the by-law and fronting on Homewood Av. and a landowner on the north side of Carlton street who would be prejudicially affected by its erection and claimed that it would be a contravention of the by-law brought action for an injunction to restrain R. from building it.

Held, affirming the judgment of the Appellate Division (26 Ont. W.N. 401) that the action could not be maintained; it was no part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; remedies were provided by the Act but none under the general law; and the aggrieved landowner can only resort to those so provided.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial (2) which dismissed the appellant's action.

The facts of the case are sufficiently stated in the above head-note.

A motion was made to affirm the jurisdiction of the court to entertain the appeal which was maintained for the following reasons.

THE REGISTRAR.—This is a motion to affirm jurisdiction heard by me in Toronto some weeks ago. The facts as disclosed by the material filed are as follows:

An action was brought by the plaintiff, Orpen, to restrain the defendant, Roberts, from proceeding with the erection of an apartment house on Lot 84, Plan D, 30 Homewood avenue, in the city of Toronto, within less than 25 feet of the northern limit of Carlton street and to prohibit the city of Toronto from issuing any permit to Roberts authorizing him to proceed with the erection of said building. The motion for injunction was by consent of all parties turned into a motion for judgment on the affidavits filed and judgment was pronounced by Mr. Justice Lennox refusing the motion and dismissing the action and his judgment was affirmed by the Appellate Division. The plaintiff has launched an appeal to the Supreme Court of Canada, deposited the necessary security and now moves to affirm the jurisdiction of the court.

The basis of the action is a by-law of the city of Toronto No. 7197, which provides as follows:

(1) 26 Ont. W.N. 401. (2) 26 Ont. W.N. 367.

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The Registrar

No building shall hereafter be built or erected on the lands fronting on the north side of Carlton street, between Sherbourne street and Homewood avenue, at a point closer to the line of the street than the distance of 25 feet.

This by-law was based upon section 406, paragraph 10, Revised Statutes of Ontario, c. 192, which provides as follows:

By-laws may be passed by the councils of cities and towns * * * for declaring any highway or part of a highway to be a residential street and for prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed.

The land in question is a corner lot at the junction of Homewood avenue and Carlton street and the plaintiff's house is also a corner lot at the junction of Carlton and Sherbourne streets. The proceedings were amended by insertion of the words, after the plaintiff's name:

Suing upon her own behalf and on behalf of all other interested land owners.

The first answer to the plaintiff's action is that it was not intended to have the front entrance of the proposed building on Carlton street but Homewood avenue and therefore he is not precluded from building within the 25 ft. area and the jurisprudence of the Ontario courts supports this contention. *In re Dinnick and McCallum* (1).

The second answer is that a private person cannot maintain an action for the violation of a municipal ordinance such as this. *MacKenzie* v. *Toronto* (2).

These decisions, however, do not in any way preclude the plaintiff from appealing from the present judgment to the Supreme Court of Canada. The only question involved on the motion before me is: Do the facts of this case entitle the plaintiff to an appeal under the Supreme Court Act? The judgment is a final one and is a judgment of the highest court of final resort in the province. But does the amount or value of the matter in controversy in the appeal exceed the sum of $2,000 as required by the new section 39? The defendant's counsel naturally relies strongly upon a line of decisions of this court from *Toussignant* v. *Nicolet* (3), onward. But all these cases preceded the amendment of the Supreme Court Act made by 3-4 Geo. V, c. 51, which provides by sec. 49a:

(1) 28 Ont. L.R. 52. (2) 7 Ont. W.N. 820.
(3) 32 Can. S.C.R. 353

Where the right to appeal depends upon the amount or value of the matter in controversy and no specific sum is claimed, the amount or value of the matter in controversy may be proved by affidavit or affidavits.

That section although repealed in the amendment of 10-11 Geo. V, c. 32 was replaced by a similar sec. (40) and the provision is in force to-day. I am disposed to hold that in all cases of this character where no specific amount is claimed the principle applied by Mr. Justice Idington in *Chamberlain Metal Weather Strip Co.* v. *Peace* (1), June 8, 1905, is applicable and that the damages which the appellant would suffer by the granting or refusing of the injunction, although such damage at the time had not yet been sustained, can be proved by affidavit and if so established the court has jurisdiction.

The order made by me, however, will not prejudice the defendant as the court will still have the power to quash the appeal for want of jurisdiction when the case comes on to be heard on the merits, if of the opinion that there is no jurisdiction.

In short I would hold that in all *quia timet* actions relief can be given in this court, although the damages have not yet been incurred, if in consequence of the judgment in appeal they would amount to more than $2,000.

An appeal taken from the order made by the registrar was dismissed. The court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.

H. J. Scott K.C. for the appellant.

Robertson K.C. and *Barlow* for the respondent Roberts.

W. G. Angus for the other respondents.

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—In March, 1924, the respondent applied to the municipality of Toronto for a permit for the erection of an apartment house on lots owned by him situated on Home-

(1) Cam. Prac. [1924] 518.

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wood avenue at the corner of Carlton street, the *situs* of the building to be erected being in part upon a strip between the northern boundary of Carlton St. and a building line, twenty-five feet north of that, laid down by a by-law enacted under the authority of sec. 406 (10) of the Municipal Institutions Act, R.S.O. [1914] c. 192. The appellant, Mrs. Orpen, owns a dwelling house on the north side of Carlton street, a short distance from the site of the apartment house, which has since been erected; and while the application of the respondent was before the municipality she applied for an injunction to restrain him from proceeding with his building, and the municipality from granting a permit. The motion was by consent turned into a motion for judgment, and Lennox J., who heard it, dismissed the action. An appeal from his judgment was in turn dismissed by the Appellate Division of the Supreme Court of Ontario, and the appellant now appeals from the judgment of that court.

The enactment under the authority of which the by-law was passed (c. 192, R.S.O. [1914], sec. 406 (10), now 12-13 Geo. V, c. 72), is thus expressed:

> 406. By-laws may be passed by the councils of cities and towns.
>
> 10. For declaring any highway or part of a highway to be a residential street, and for prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed.
>
> (*a*) It shall not be necessary that the distance shall be the same on all parts of the same street.
>
> (*b*) The by-law shall not be passed except by a vote of two-thirds of all the members of the council.

And the by-law itself is in these words:

> No building shall hereafter be built or erected on the lands fronting on the north side of Carlton street, between Sherbourne street and Homewood avenue, at a point closer to the line of the street than the distance of twenty-five feet.

The Appellate Division, we are informed, dismissed the appellant's action on the ground that she had no status to complain of the respondent's infraction of the by-law. The learned trial judge held that the by-law must be construed by reference to the statutory enactment under the authority of which it was passed, and that, so construed, the respondent's building as he proposed to place, and ultimately did place it, was not obnoxious to its provisions.

The respondent's building, it appears, is situated upon lots which would be commonly described as "fronting"

on Homewood avenue, and the principal entrance of the building is on that street, and in the opinion of the learned trial judge he was bound by the decision of the Appellate Division in *Dinnick* v. *McCallum* (1), to hold that the proposed building would not "front" on Carlton street and would not be erected on lands "fronting" on that street. and consequently that no infringement of the by-law was contemplated.

Since the view upon which, as we are informed, the Appellate Division proceeded in this case can be supported upon sound and satisfactory grounds, it is unnecessary to consider the decision of the Appellate Division in *Dinnick* v. *McCallum* (1) and no opinion is expressed concerning that decision. For the purposes of this judgment it will be assumed that there was an infraction of the by-law. It is not disputed that the existence of the respondent's apartment house, situated as it is upon the twenty-five foot strip bordering on Carlton street, does prejudicially affect the appellant in respect of the amenities and the value of her property; and the question to be determined, therefore, is whether, being so specially damnified, she has a title to judicial relief.

As a general rule, where something is done to the general damage of the public in respect of which an indictment will lie, a private individual who, in consequence, suffers special damage has a right of action; though it appears that, even where the duty violated is a duty arising under the common law, if it is one existing in the interest of a class of the public only an action will not lie if the person specially damnified is outside that class. *Bromley* v. *Mercer* (2). Where the offence consists in the non-performance of a duty imposed by statute or the non-observance of a prohibition created by statute, then the rule, based upon the Statute of Westminster, 13 Edw. V, c. 50, is, as stated in Comyn's Digest ("Action upon Statute" (F)):

> In every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law.

Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the bene-

(1) 28 Ont. L.R. 52.

(2) [1922] 2 K.B. 126.

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fit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered that, to quote Lord Selborne in *Brain* v. *Thomas* (1):

> Where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other.

But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty. *Atkinson* v. *Newcastle Waterworks Company* (2).

In substance, the proposition advanced by the appellant is that any proprietor, whose property might suffer in value by reason of the failure of some other proprietor to observe the building restrictions established by a by-law promulgated under the authority of this enactment, has a right to invoke the jurisdiction of the courts to prevent by injunction the obnoxious act and to recover damages in respect of any loss actually suffered in consequence of it if wholly or partly completed. In effect, if this contention be sound, such a by-law creates in favour of any proprietor who may be prejudicially affected in his property by an infringement of any of the prohibitions of such a by-law, a negative easement (enforceable in the same manner as a restrictive covenant) over the property within the area where the by-law operates.

It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith C.J. said, in *Tomkins* v. *The Brockville Rink Company* (3), when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity

(1) 50 L.J. Q.B. 662.

(2) 2 Ex. D. 441, at pages 446 and 447.

(3) [1899] 31 O.R. 124.

of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather

> startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it;

and it seems highly unlikely, as Farwell J., said in *Mullis* v. *Hubbard* (1), that the legislature contemplated as the result of this legislation that "the numerous individuals" in the vicinity of a residential area, should be entitled to

> bring their private actions against a man who had built a few feet in front of the line allowed,

even though the municipal authorities themselves should not consider it a proper case for interference.

The question to be decided might possibly have presented greater difficulties had it not been for the history of the enactment and the course of decision upon it and upon analogous provisions of the Act. The statute which was the parent of the legislation now under discussion was first passed in the year 1904; but before examining the language of the enactment of that year, it will be advantageous first to consider the decision in *Tompkins Case* (2) already referred to, and the judgment of Meredith C.J. which was delivered in the year 1899. The action was brought by a ratepayer, who complained that the defendant company, in violation of a fire limits by-law, was erecting a wooden building in the vicinity of his own property, alleging that, in consequence of this breach of the by-law, the premiums payable for the insurance of his own buildings would be increased, and the value of his property diminished. The action was brought to restrain the defendant from proceeding with its building, and for damages. In a judgment which contains an elaborate review of the pertinent decisions, Meredith C.J. held that the authority conferred upon municipalities to establish fire limits and to regulate the construction of buildings within those limits was an authority given in the interests of the public generally, and that the sole remedy in respect of any infraction of a by-law passed under it lay in proceedings for the enforcement of the penalties prescribed by the by-law under the authority of the statute, including, if the by-law so ordained, the liability to have the building removed.

(1) [1903] 2 Ch. 431. (2) 31 O.R. 124.

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It was, as already mentioned, in 1904 that the legislature, in chapter 22 of the statutes of that year (by sec. 19) first dealt with the subject of establishing residential areas and regulating the construction of buildings in those areas. By the same statute, sec. 20, the legislature dealt also with the subject that had been discussed in *Tompkins' Case* (1) and, in cases of infringement of prohibitions of the kind considered in that case, it was provided that either the municipal corporation or any ratepayer might bring an action, and jurisdiction was conferred upon the High Court to grant an injunction in such a proceeding. It is not immaterial to notice this section, because it seems to indicate that the legislature was legislating with a view to the state of the law ascertained by *Tompkins' Case* (1) as touching the effect of fire limits by-laws.

Section 19 was in these words:

19. The Consolidated Municipal Act, 1903, is amended by inserting therein the following as section 541a:—

541a. The councils of cities and towns are authorized and empowered by a vote of two-thirds of the whole council to pass and enforce such by-law as they may deem expedient;

(*a*) To regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street.

(*b*) And in the case of cities only, to prevent, regulate and control the location, erection and use of buildings for laundries, butcher shops, stores and manufactories.

The location, erection, construction or use of any buildings in contravention of any such by-law may, in addition to any other remedy provided by law, be restrained by action at the instance of the municipality passing such by-law;

Provided that this section shall not apply to any buildings now erected or used for any of the purposes aforesaid so long as they continue to be used as at present.

In the consolidation of 1913, subsection (*a*) of this section appears in altered form, as quoted above, as subsection (10) of sec. 406, ch. 43, which confers a variety of powers on the councils of cities and towns; while that part of the section which gave a right of action, at the instance of the municipality, for restraining breaches of by-laws passed under the authority of it, is replaced by sec. 501, which is in these words:

501. Where a building is erected or used, or land is used in contravention of a by-law passed under the authority of this Act in addition to any

(1) 31 O.R. 124.

other remedy provided by this Act and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of the corporation.

Section 20 of the Act of 1904, which, as already mentioned, gave a special right of action in respect of the contravention of fire limits by-laws to the corporation and to any ratepayer, was not reproduced in the consolidation of 1913 and, indeed, was expressly repealed. The result, therefore, of the changes effected by the consolidation of 1913 was that by virtue of section 501, which appears in Part 22 of the statute under the heading of " Penalties and Enforcements of By-laws," contraventions of by-laws regulating the erection or the use of buildings or land might be restrained by action at the suit of the corporation, while the right of action given by sec. 20 of the Act of 1904 to a ratepayer in respect of violations of the particular class of by-laws with which it dealt (fire limits by-laws) was abrogated.

Section 501, it will have been observed, carefully preserves any other remedy provided by the Act and the liability to any penalty imposed by the by-law. But there is no mention of remedies under the general law; and it seems to proceed upon the assumption that in respect of such contraventions there could be no remedy except such as is given or authorized by the Act. This view is fortified by the inference to be drawn from the contrast between the language of sec. 501 and that of sec. 19 of the Act of 1904, which explicitly preserved " any other remedy provided by law." The change in language is striking, and appears to be most readily explained on the theory that in 1913 the legislature accepted and proceeded upon the opinion to which Meredith C.J. had given effect in *Tompkins' Case* (1), namely, that, according to the scheme of the Act, as regards by-laws of the character to which sec. 501 applies, the remedial measures available to persons affected by a breach of them are those provided or authorized by the Act, and those alone.

This view of the section seems to have commended itself to Middleton J., when giving judgment in *Mackenzie* v. *City of Toronto* (2), although, as a decision on the point was not strictly required, he expressed no decided opinion

(1) 31 O.R. 124.

(2) [1915] 7 Ont. W.N. 820.

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concerning it; and to Orde J. in *Preston* v. *Hilton* (1). It was after these judgments had been delivered and published that the Municipal Institutions Act of Ontario was again consolidated in 1922 as chapter 72 of the statutes of that year, and sec. 501 was re-enacted without change.

Although by sec. 20 of the Interpretation Act, R.S.O. [1914], the legislature is not to be presumed by reason merely of having re-enacted a statutory provision without changing its language to have adopted a previous judicial construction of that language, nevertheless, the history of the legislation, when read in light of the course of judicial decision and opinion touching the effect of it, may, independently of the intrinsic weight of such decisions and opinions, afford convincing evidence of the intention of the legislature. There appears to be little room for doubt that in this instance the Appellate Division has accurately interpreted that intention.

The appeal should accordingly be dismissed with costs.

IDINGTON J.—This appeal arises out of an action brought by the appellant, as owner of a dwelling house fronting upon the north side of that part of Carlton street in Toronto lying between Sherbourne street and Homewood avenue complaining that the respondent Roberts, owning a block of land on the northeast corner of said Carlton street and Homewood avenue (in breach of the by-law of said city which I am about to present), proposed erecting an apartment house on said corner which would extend to a line ten feet from, instead of twenty-five feet from, Carlton street, as provided by said by-law, and thus would be detrimental to the appellant and her said dwelling house, and seeking an injunction restraining said respondent Roberts from so building in breach of said by-law and the city architect from granting a permit therefor.

The said by-law was passed in November, 1914, and provides as follows:—

Whereas by The Municipal Act, the councils of cities are authorized and empowered to pass by-laws for prescribing the distance from the line of the street in front of it at which no building on residential streets may be erected or placed;

Therefore the Council of the Corporation of the city of Toronto, by a vote of two-thirds of all the members of the council enact as follows:

(1) [1920] 48 Ont. L.R. 172 at p. 176.

I

The north side of Carlton street, between Sherbourne street and Homewood avenue, is hereby declared to be a residential street.

II

No building shall hereafter be built or erected on the lands fronting on the north side of Carlton street, between Sherbourne street and Homewood avenlue, at a point closer to the line of the street than the distance of 25 feet.

III

Any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs), the sum of $50 for each offence.

The council of the said city had (under the Municipal Act of R.S.O. [1914], section 406 (10)) power to pass said by-law and no question is raised herein as to that, though much has been said as to the meaning of it in relation to respondents' property with which I cannot agree.

The sole question that has troubled me much is whether or not the appellant has in law the right to claim an injunction forbidding a breach of the by-law.

The penalty imposed therefor is only fifty dollars which, as regards the parties hereto, seems so trifling that I am unable to see therein any effective restraint.

Section 501 of said Municipal Act, however, provides as follows:—

501. Where a building is erected or used or land is used in contravention of a by-law passed under the authority of this Act, in addition to any other remedy provided by this Act, and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of the corporation.

There are many actions which have been successfully maintained though founded, in the last analysis, upon what were merely by-laws provided for by statute and well founded thereon, but few, if any, upon our Municipal Acts.

This is one of the many cases in which I have had to turn to the judgment of Lord Cairns in the case of *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1), where he indicated that the right to a remedy, claimed to be founded upon a statute, must to a great extent depend on the purview of the legislature.

Applying that to the legislation herein in question, the said section I have just quoted seems to me to render it

(1) 2 Ex. D. 441, at page 448.

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impossible to properly hold that the legislature ever intended that the appellant should have the right of action she claims herein.

If that conclusion, coupled with the apparent refusal herein of the city to assist appellant in maintaining its by-law, renders the enactment of such a by-law rather farcical I cannot help it.

There are so many cases in which private individuals have unsuccessfully tried to found, upon mere municipal by-laws, actions seeking the like relief the appellant asks herein, that I do not propose to review them here; for the benefit of those seeking their law bearing upon the question raised, I may refer to the following, and the cases respectively referred to in the several judgments appearing therein. See *Tompkins* v. *Brockville Rink Co.* (1); *Preston* v. *Hilton* (2); *Johnston* v. *Consumers Gas Co.* (3); *McKenzie* v. *City of Toronto* (4); *Mullis* v. *Hubbard* (5).

For the foregoing reasons I am of the opinion that this appeal should be dismissed with costs to the respondent Roberts. I do not think the other respondents, under such circumstances, entitled to costs for if the city intended to abandon the by-law it should, I respectfully submit, have said so at the outset.

Appeal dismissed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*
Solicitors for the respondent Roberts: *Jones & Barlow.*
Solicitor for other respondents: *William Johnston.*

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(1) 31 O.R. 124.
(2) 48 Ont. L.R. 172.
(3) [1898] A.C. 447.
(4) 7 Ont. W.N. 820.
(5) [1903] 2 Ch. 431.

W. J. CROTHERS COMPANY (DEFENDANT) ..... } APPELLANT;

AND

WILLIAMSON CANDY COMPANY (PLAINTIFF) ..... } RESPONDENT.

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*Mar. 6, 9.
*Mar. 27.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Registration in United States—Advertising in Canada—Same mark and purpose—Action to expunge—"Person aggrieved"—R.S.C. [1906] c. 71, s. 42.

The W.C. Co., manufacturers of confectionery in the United States had the words "Oh Henry" registered in the Patent Office at Washington as a trade-mark for chocolate bars and advertised it extensively in American papers and magazines having a substantial circulation in Canada but made no use of it there. The C. Co. in the same business in Kingston, Ont., registered these words in Canada as its own trade mark for the same goods.

Held, affirming the judgment of the Exchequer Court ([1924] Ex. C.R. 183) Idington J. dissenting, that the W.C. Co., while the Canadian registration stands, is prevented from making any use of said words in Canada in connection with the sale of their product, and is deprived of the benefit here of their extensive advertising; it is, therefore, "a person aggrieved" within the meaning of sec. 42 of The Trade Mark and Design Act and entitled to bring an action to have them expunged from the Canadian registry.

Held also, that the trade-mark of the C. Co. was "calculated to deceive and mislead the public" and should be expunged from the Canadian registry.

APPEAL from the judgment of the Exchequer Court of Canada (1) ordering the appellant's trade-mark to be expunged from the registry.

The facts of this case are sufficiently stated in the above head-note.

Geo. F. Henderson K.C. for the appellant. Prior user is not a condition precedent to registration. *Spilling Bros* v. *Ryall* (2); *In re Hudson's Trade-Mark* (3) per Cotton L.J.

The appellant is proprietor of the mark if no one else in Canada has a better title. Prior user out of Canada does not affect his position. *In re Meeus Application* (4); *Smith* v. *Fair* (5).

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 183.
(2) 8 Ex. C.R. 195.
(3) 3 Cut. P.C. 155.
(4) [1891] 1 Ch. 41.
(5) 14 O.R. 729.

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There can be no protection where no goods have been sold. *Maxwell* v. *Hogg* (1) at page 314; *Batt & Co.* v. *Dunnett* (2).

As to appellant's registration being calculated to deceive or mislead see *In re Imperial Tobacco Company's Trade-Mark* (3) at page 45.

Smart for the respondent. The appellant had not used the trade-mark prior to registration nor did he adopt it in good faith. Consequently he was not the proprietor. See *Wellcome* v. *Thompson* (4); *Bayer* v. *American Druggists' Syn.* (5); *Gorham Mfg. Co.* v. *Weintraub* (6) at page 961.

The rights in a trade-mark are universal. See *J. P. Bush Mfg. Co.* v. *Hanson* (7); *In re Munch's Application* (8) at page 13.

The Canadian registration was calculated to deceive. Though the respondent did not use it in this country its extensive advertising may be considered an equivalent. *In re European Blair Camera Co.* (9); *In re Poiret* (10).

The judgment of the majority of the court (the Chief Justice and Mignault, Newcombe and Rinfret JJ.) was delivered by

THE CHIEF JUSTICE.—This action is brought for the expunging of the trade-mark "Oh! Henry" registered by the defendant appellant.

Jurisdiction is conferred on the Exchequer Court by s. 42 of the Trade-Mark and Designs Act (R.S.C., c. 71) "at the suit of any person aggrieved * * * by any entry made without sufficient cause" in the register of trade-marks to "make such order for * * * expunging or varying any entry in such register as the court thinks fit." Section 23 of the Exchequer Court Act (R.S.C., c. 140) imports the like jurisdiction.

The plaintiff company are large manufacturers of confectionery. In 1921 they applied for, and, in 1922, were granted registration in the United States Patent Office of the words "Oh! Henry" as a trade-mark for chocolate bars which they produced. This trade-mark they adver-

(1) 2 Ch. App. 307.
(2) 16 Cut. P.C. 411.
(3) [1915] 2 Ch. 27.
(4) [1904] 1 Ch. 736.
(5) [1924] S.C.R. 558.
(6) 196 Fed. R. 957.
(7) 2 Ex. C.R. 557.
(8) 50 L.T. 12.
(9) 13 Cut. P.C. 600.
(10) 37 Cut. P.C. 177.

tised extensively in magazines and newspapers having a substantial circulation in Canada as well as in the United States.

In May, 1922, an officer of the defendant, a manufacturing confectioner at Kingston in Canada, attended a confectioners' convention in Chicago. He then learned of the plaintiff's trade-mark and of its great vogue and success. The defendant promptly applied for registration of the words "Oh! Henry" as a specific trade-mark in Canada for chocolate bars and biscuits made by it, and its application was granted on the 15th of June, 1922. In making the application there was filed a declaration of one of the defendant company's officers, in the form prescribed by s. 13 of the statute, that the trade-mark, registration of which was applied for,

> was not in use to his knowledge by any person other than himself at the time of his adoption thereof.

The existence of the plaintiff's United States trade-mark and its user by them appears not to have been disclosed. A subsequent application by the plaintiffs for registration in Canada was refused.

Section 11 of the statute provides:

> 11. The Minister may refuse to register any trade-mark,—
>
> (*a*) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark;
>
> (*b*) if it appears that the trade-mark is calculated to deceive or mislead the public;

Although it may be that the failure of the plaintiffs to apply for registration in Canada within the time provided for by s. 49 of the statute (13-14 Geo. V, c. 28) and the defendant's adoption and user of the words "Oh! Henry" as its trade-mark will prove an obstacle to the plaintiffs' obtaining registration for themselves of those words as a trade-mark even if the defendant's registration should be expunged, that registration, while it stands, prevents the plaintiffs making any use of these words in Canada in connection with the sale of their product and deprives them of the benefit in this country of their extensive advertising. In our opinion it is obvious that they are persons whose legal rights would or might be limited by the appellant's trade-mark remaining on the register and they are, accordingly, "persons aggrieved" within s. 42 of the Trade-Mark and Design Act and have a status to maintain this action

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The Chief Justice.

In re Powell (1); *In re Apollinaris Co.* (2); *De Kuyper* v. *Van Dulken* (3); *In re Vulcan Trade-Mark* (4).

The learned President of the Exchequer Court regards the exercise of the discretion given the Minister by s. 11 of the Act as subject to review by the Exchequer Court for the purpose of the jurisdiction conferred by s. 42 of the Trade-Mark and Designs Act. In this view we agree. *In re Vulcan Trade-Mark* (4).

The learned President has held that the defendant's trade-mark as registered " is calculated to deceive and mislead the public." That finding has not been successfully impeached. The evidence warrants it. It in turn fully supports the order made by the Exchequer Court that the defendant's trade-mark should be expunged as a trade-mark which the Minister in the exercise of his discretion could properly have refused to register.

We find it unnecessary to express any opinion on the further grounds on which the learned President rested his order, viz., that the defendant was not " the first to use the mark to his knowledge " within the meaning of s. 13 of the statute, and that it was not the proprietor of the trade-mark of which it obtained registration.

It follows that the appeal fails and should be dismissed with costs.

IDINGTON J. (dissenting).—The respondent carried on the business of manufacturing and distributing confections and candy in Chicago, Illinois, and, in connection therewith, adopted and used the trade-mark " Oh! Henry." On the 6th July, 1921, it applied for, and, on the 28th of February, 1922, was granted registration of said trade-mark in the United States Patent Office, but never at any time carried on said business in Canada.

The appellant carried on business in Kingston, Ontario, as candy manufacturers and sellers thereof and of other confections, and obtained, on the 15th of June, 1922, the following certificate of registration of a specific trade-mark:—

CANADA

This is to certify that this trade-mark (specific) to be applied to the sale of Chocolate Bars and Biscuits, and which consists of the words " Oh

(1) [1894] A.C. 8; [1893] 2 Ch. 388.
(2) [1891] 2 Ch. 186, 224.
(3) [1895] 24 Can. S.C.R. 114, 133.
(4) [1915] 51 Can. S.C.R. 411, 413-4.

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Henry!" as per the annexed pattern and application, has been registered in The Trade-Mark Register No. 137, Folio 31320, in accordance with "The Trade-Mark and Design Act" by

The W. J. Crothers Company, Limited, of the city of Kingston, province of Ontario, on the 15th day of June, A.D. 1922.

Patent and Copyright Office (Copyright and Trade-Mark Branch). Ottawa, Canada, this 15th day of June, A.D. 1922.

GEO. F. O'HALLORAN,
Commissioner of Patents.

The respondent instituted this action against appellant in the Exchequer Court of Canada by a statement of claim filed on the 1st day of September, 1923, and alleged many things denied by appellant as defendant, and not proven, seeking to have the appellant restrained from using said trade-mark, and to have said trade-mark "Oh! Henry" registered by it (the respondent) in Canada.

The contention throughout has been that the respondent never did carry on any business in Canada, and never attempted to do so, or to register the said trade-mark until long after the appellant's registration thereof.

I am unable to understand how it can claim any right to bring this action even if the grounds upon which the learned President of the said court proceeds in his judgment, now appealed from, might have (if the action had been brought by way of information by the Attorney General of Canada) led to expunging the appellant's registration, and, therefore, I confine anything I have to say to that single issue.

I submit that the Trade-Mark and Design Act never was intended to be for the benefit of any one who never carried on business in Canada, as respondent never clearly did, unless by advertising in American newspapers and magazines—the circulation of which was certainly not (unless we make a travesty of words) a carrying on of business in Canada.

Its course of business as indicated thereby would seem to have been to the disturbance instead of benefit of Canada.

The amendments to the said Trade-Mark and Design Act by 13-14 George V, chapter 28, assented to 13th June, 1923, demonstrate, I most respectfully submit, that Parliament had an entirely different conception of the then existing state of the law from that upon which the learned trial judge proceeded herein: else why, especially, were the fol-

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lowing sections, by the third section of said amending Act, added?

49. An application for the registration of a trade-mark or industrial design filed in this country by any person who has, previously, regularly filed an application for the registration of the same trade-mark or industrial design in a foreign country which by treaty, convention or law affords similar privilege to citizens of Canada, shall have the same force and effect as the same application would have if filed in this country on the date on which the application for the registration of the same trade-mark or industrial design was first filed in such foreign country; provided the application in this country is filed within four months from the earliest date on which any such foreign application was filed.

50. Any trade-mark the proprietor of which is an association, the existence of which is not contrary to the law of the country to which such association belongs, even if such association does not possess an industrial or commercial establishment, may be registered under this Act upon compliance with the requirements thereof, and on such particular conditions as may be established by regulations to be made by the Minister with the approval of the Governor in Council.

Surely the imperative assumption or implication of these recent amendments is that the foreigner not carrying on in Canada any branch of its business had, until said amendments, no rights to registration in Canada and only can acquire them under such conditions as defined thereby, and by pursuing the method therein described.

Whether or not such relations exist between Canada and the United States, as the fundamental requirements of said conditions specify, I know not. But evidently the time for respondent exercising the rights thus offered such as similarly situated, had expired before enactment and it is hereby excluded.

I imagine from the reasoning of the learned trial judge in regard to the justice of some such recognition by reason of neighbourhood and intimate business relations without referring to said legislative amendments to the Act, that his attention had not been called to said amendments and the limitations defining the conditions upon which, and the consequent methods by which, such rights might be asserted had been overlooked.

These amendments had been enacted a year before his delivery of judgment herein.

Of the numerous authorities cited by counsel in relation to the rights of non-resident foreigners acquired by this carrying on business abroad and using there their personal trade-marks, I may refer to the following cases as demon-

strating that they had not acquired rights to register either in England or Canada by reason of such like facts.

In re Munch's Application (1), held that foreign user alone could not entitle the applicant to registration in England.

In the case of *Jackson, etc.* v. *Napper* (2), Sterling J. says:—

It is said and I think rightly that in order to entitle you to register, there being a similar mark already on the register, you must make out that there was a user of the mark in England before that date.

In re Meeus' Application (3), it was held that the whole trade-mark as used must be that upon which application must rest and that its use for importation and for transportation purposes only, is not a sufficient user to acquire a title in England.

See cases cited, besides these, in Kerly (5th ed.) on Trade-Marks, at page 238, and note thereto.

See also Smart on Trade-Marks and Designs, page 42, where the author expresses the opinion " that the weight of opinion supports the view that the statute refers to use in Canada."

See also as to persons aggrieved the case of *In re Riviere and Company's Trade-Mark* (4).

These are dicta of a converse nature, as to the possibilities under the English Act but no case I have seen expressly decides the point that way.

I respectfully submit that the amendments I have quoted to our Act, enacted before this action brought, put the question beyond doubt and prevent the respondent from claiming any right of action herein as a party aggrieved in law.

Sentimental grievances many people have, or suppose they have, which furnish no foundation for an action at law.

For example, the use of a pen name such as "Oh! Henry" may have been offensive to the personal representatives of the late writer, who assumed the name "O. Henry" for his short stories.

It looks to me as if the gentlemen contending herein may both have been offenders against good taste.

(1) [1884] 50 L.T. 12.
(2) 4 Cut. P.C. 45.
(3) [1891] 1 Ch. D. 41.
(4) [1883] 53 L.J. Ch. 455.

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I would allow the appeal herein with costs but if necessary without prejudice to the right of the Attorney General to take such action, if any, as he may be advised.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson & Herridge.*

Solicitors for the respondent: *Featherstonhaugh & Co.*

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*Feb. 26.
*May 5.

CANADIAN NATIONAL RAILWAY COMPANY (GARNISHEE) ..... APPELLANT;

AND

J. J. CROTEAU (PLAINTIFF) ..... RESPONDENT.

AND

W. CLICHE (DEFENDANT).

Constitutional law—Practice and procedure—Canadian National Railways—Garnishment—Proceeding—Fiat—Special leave of appeal—Provincial appellate courts—Jurisdiction—Discretion—Canadian National Railways Act (1919) 9-10 Geo. V, c. 13, s. 15—Supreme Court Act, 10-11 Geo. V, c. 32, s. 41.

The discretion conferred on the provincial courts of appeal by section 41 of the Supreme Court Act under which special leave to appeal to this court may be granted is untrammelled and free from restriction save such as is implied in the term "special leave."

A writ of garnishment attaching moneys owed by the Canadian National Railway Corporation to a judgment debtor in its employment is a "proceeding" within the provisions of s. 15 of the *Canadian National Railways Act* and may therefore issue "without a fiat" from the Crown. (Idington J. dissenting).

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining a seizure by garnishment of defendant's wages in the hands of the appellant.

The material facts of the case are fully stated in the judgments now reported.

Gravel K.C. for the appellant.

R. Langlais K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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DUFF J.—This appeal raises a question that chiefly turns upon the scope and effect of s. 15 of 9-10 Geo. V, c. 13, which is in the following words:—

(1) Actions, suits or other proceedings by or against the company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto. Any defence available to the respective corporations (including His Majesty) in respect of whose undertaking the cause of action arose shall be available to the company, and any expense incurred in connection with any action taken or judgment rendered against the company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose. Nothing in this Act shall affect any pending litigation.

(2) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the company, be a court of competent jurisdiction under the provisions of this section.

Cliche was a person employed in the operation of the *Canadian Government Railways,* as defined by s. 10 of this Act, and certain moneys were owing to him as wages earned in his employment when the respondent, having recovered a judgment against him for $310.80, proceeded to take out a writ of garnishment attaching these moneys, in the Superior Court of Quebec.

The appellant company objected that the proceeding was not competent, inasmuch as it was an attempt to garnish the wages of an employee of the Crown, and that s. 15 did not authorize such a proceeding. The issue thus raised was decided in favour of the respondent by the unanimous judgments of the Quebec courts.

The Court of King's Bench, exercising the authority conferred by s. 41 of the *Supreme Court Act,* gave leave to appeal to this court. It may be observed in passing that the learned judges of the Court of King's Bench appear to have been under an impression that their jurisdiction under that section was limited by certain rules supposed to be laid down in this court touching the exercise of that jurisdiction. This court has no authority, and, of course, never pretended to exercise any authority, to lay down rules restricting the scope of the jurisdiction or governing

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the exercise of the jurisdiction conferred by s. 41 upon provincial courts of appeal. The statute gives a discretion to such courts, and, where a statutory discretion is conferred upon a court, it is not within the authority of any other court to give directions as to the manner in which the discretion is to be exercised. *Attorney General* v. *Emerson* (1). On the other hand, one of the learned judges of the Court of King's Bench would have refused leave to appeal because this case did not, in his opinion, fall within any of the sub-clauses, (*a*) to (*f*), of the proviso to s. 41 of the *Supreme Court Act*. That proviso, with its several subclauses, has to do only with the granting of special leave to appeal by this court where it has been refused by the provincial court of appeal, and in nowise affects the discretion conferred on the provincial court by s. 41. That discretion is untrammelled and free from restriction, save such as is implied in the term " special leave."

The general object of the Act of 1919 is stated in the preamble, which, after reciting that His Majesty, on behalf of the Dominion of Canada, has acquired control of the Canadian Northern Railway Company and the various constituent and subsidiary companies comprising the Canadian Northern System, proceeds to declare it to be expedient

to provide for the incorporation of a company under which the railways, works and undertakings of the companies comprised in the Canadian Northern System may be consolidated and, together with the Canadian Government Railways, operated as a national railway system.

In order to effectuate this purpose, the Governor in Council is authorized to nominate directors, not fewer than five and not more than fifteen, with such remuneration as may be determined by the Governor in Council, who, together with their successors, shall constitute the corporation known as the Canadian National Railway Company. Directors are removable for cause by the Governor in Council, by whom also vacancies are to be filled. The Governor in Council is authorized also to declare that the company shall have a capital stock, with or without shares, such stock being, unless otherwise ordered, vested in the Minister of Finance, on behalf of His Majesty.

The Act also provides that no director of the company shall be under any personal responsibility to any share-

(1) [1889] 24 Q.B.D. 56, at pp. 58, 59.

holder, director, officer or employee of the company, or to any other person, or, except with the approval of the Governor in Council, subject to any pecuniary penalty under the provisions of any statute, in respect of his office or any act done or omitted to be done by him in the execution thereof. By s. 11 the Governor in Council is authorized to entrust to the company

> the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein, and any powers, rights or privileges, over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any order in council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to termination or variation from time to time in whole or in part by the Governor in Council.

Powers are also given to the company, with the approval of the Governor in Council, to construct and operate railway lines, branches and extensions, and to issue bonds, debentures and debenture stock. By s. 13, the provisions of the *Railway Act,* with certain exceptions not material, are made applicable to the company and its undertaking; and by s. 14 it is declared that the provisions of the *Railway Act* respecting the operation of a railway shall apply to any of the Canadian Government Railways, the operation and management of which may be entrusted to the company, and by s. 9, where any consent or approval by shareholders of a company is required by the *Railway Act,* such consent or approval may be given by the Governor in Council.

Prima facie, by force of the provisions of the *Interpretation Act,* the incorporation of the company itself invests it with the capacity to sue and to be sued in its own name. Section 15 appears to proceed upon the assumption that the company, when acting within the scope of its powers, is responsible for the acts of its employees within the scope of their authority. The section, on any hypothesis, cannot be regarded as very happily framed, but there does not appear to be any satisfactory reason for limiting the scope of the word "proceedings" in the first sentence of it in such a way as to exclude the process of attachment.

It seems difficult to make good any distinction between moneys payable by the company "in respect of its undertaking" and moneys payable

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in respect of the operation or management of the Canadian Government Railways.

Section 15 recognizes the enforceability of the obligation in both cases alike. True, by s. 16 wages of the employees of the Canadian Government Railways are payable out of moneys which are furnished either directly out of the Consolidated Revenue Fund, or from the "revenues and receipts" of the Government Railways, and the surplus of these, after providing for the expenses incident to the operation and management of such railways, belongs to the Consolidated Fund; nevertheless, s. 15 does recognize, as already stated, an obligation on the company to pay. Payment of such debts is one of the purposes for which the fund provided for by s. 16 is put into the company's hands.

The real difficulty in attaching moneys payable by the Crown to a third person lies in the inability of the courts to make an order against the Crown. Generally speaking, moneys payable by the Crown are subject to equitable execution, the appointment of a receiver operating as an injunction prohibiting the judgment debtor from receiving the fund attached. The process involves no order against the Crown. Only by leave of the court and, of course, after fiat granted, can the judgment creditor proceed to enforce the judgment debtor's claim by petition of right. The position may be illustrated by reference to sequestration. Sequestration will lie to attach moneys payable by the Crown, subject to this, that no order against the Crown can be made. *Willcock* v. *Terrell* (1). Here, again, the process operates only indirectly, by precluding the judgment debtor from receiving payment.

Now s. 15, whatever its limitations, does contemplate judgments against the company for the payment of money in actions arising out of the operation and management of the Government Railways, as well as in other cases. Moreover, the use of the word "suits" in addition to "actions" indicates that equitable proceedings—proceedings of that class which normally culminate in a judgment *in personam* —are contemplated by the section. The necessary effect of s. 15 would, therefore, appear to be that it removes the impediment which normally prevents the attachment of public moneys owing to a judgment debtor; and it would there-

(1) [1878] 3 Ex. D. 323.

fore appear to be in harmony with the principle and policy of the section to attribute to the word "proceedings" a scope which would bring within the ambit of the section the kind of proceeding that is in question here.

As opposed to this view, an argument is based upon the presence in s. 15 of the words "without a fiat." It is suggested that these words point to an intention to limit the operation of the section to proceedings of a like character with those which, according to the usual practice, would be competent to a suppliant, as against the Crown, on a fiat being granted. Now the phrase "without a fiat" grammatically applies to proceedings by the company as well as to proceedings against the company. As applied to the former, it seems, in this context, to be almost, if not quite, meaningless. Even as applied to proceedings against the company, it is not a very apt expression. The more probable inference seems to be that it was introduced *ex majori cautela* to quiet the apprehensions of some not very highly instructed person—a not uncommon thing, as Lord Herschell observes in *Commissioners of Income Tax* v. *Pemsel* (1).

If the intention was to limit the scope of the section, as suggested, it seems strange that the meaning of the section should be left to be gathered by doubtful inference; and, on the whole, the better view seems to be that such was not the intention.

It has not been argued, it should be added, that by any rule of public policy the wages attached were inalienable, and no opinion is expressed upon any such question.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant is a company incorporated by virtue of c. 13 of 9-10 Geo. V of the Dominion Parliament as an instrument of the Dominion Government to aid it in discharging duties devolving upon the said Government in relation to the management and operation of certain specified railways.

The respondent Croteau claims that Cliche, the abovenamed defendant in the Superior Court of Quebec, owes him and that he is entitled to garnishee the appellant in respect of wages due by the Intercolonial Railway, a Gov-

(1) [1891] A.C. 531, at p. 574.

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ernment-owned railway. The appellant objects to recognizing any such mode of execution against it.

By s. 18 of c. 35 of the Revised Statutes of Canada, 1906, which reads as follows

18. Moneys in the hands of an officer, employees or servant of the Minister, as an officer or servant of His Majesty, due or payable by His Majesty to any person, or out of which any payment on behalf of His Majesty is to be made, and given to or being in the possession of such officer, employee or servant for the purpose of making such payment, shall not be subject to any execution, attachment or garnishee process.

2. If any such officer, employee or servant is served with any execution, attachment or garnishee process in regard to such moneys, the same may be set aside, with costs, by any court of competent jurisdiction,

it would seem clear that such a proceeding is expressly prohibited.

The respondent points to s. 15 of said Act, c. 13 of 9-10 Geo. V, which reads as follows:

15. (1) Actions, suits or other proceedings by or against the company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto. Any defence available to the respective corporations (including His Majesty) in respect of whose undertakings the cause of action arose shall be available to the company, and any expense incurred in connection with any action taken or judgment rendered against the company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose. Nothing in this Act shall affect any pending litigation.

(2) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the company, be a court of competent jurisdicton under the provisions of this section.

I cannot see that this section ever was intended to repeal the said s. 18, or touch upon such questions as therein referred to, or in any way to justify such a proceeding as the garnishee in question.

There was no fiat recognizing this proceeding and the local legislature of a province cannot give any power to its courts to interfere with the rights of the Crown on behalf of any work done under or by virtue of Dominion legislation beyond what that expressly empowers it to do as in and under, for example, such as above quoted, and which, as already stated, is not wide enough.

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Nor do I think the s. 14 of the said Act of 9-10 Geo. V, c. 13, helps respondent.

I would therefore allow this appeal with costs throughout and dismiss said garnishee.

Appeal dismissed with costs.

Solicitors for the appellant: *Pentland, Gravel, Thompson & Hearn.*

Solicitors for the respondent: *Langlais, Langlais & Godbout.*

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*Feb. 18, 19.
*Feb. 26.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY OF EDINBURGH (DEFENDANT) ..... APPELLANT;

AND

W. WARREN LORD AND OTHERS (PLAINTIFFS) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Appeal—Final judgment—Demurrers to pleadings—Issues of fact—Verdict for plaintiffs—Non-suit or new trial refused—Demurrers undisposed of.

In an action on an insurance policy the defendant demurred to counts in the declaration and the plaintiff to some of the pleas. Pursuant to an order in chambers the issues of fact were first tried. A general verdict for the plaintiff was rendered after nonsuit had been refused. On appeal to the court *en banc* a motion for nonsuit, for which leave was reserved at the trial, or for a new trial was refused and the defendant obtained special leave to appeal to the Supreme Court of Canada. Before this appeal came on argument was heard on the demurrers but judgment was not rendered.

Held, that as long as the issues of law are undetermined the judgment on the issues of fact does not decide, in whole or in part, any substantive right of any of the parties and is not a final judgment.

Sec. 36 (*b*) of the Supreme Court Act provides that an appeal shall lie from "a judgment upon a motion for a nonsuit."

Held, that the judgment of the court *en banc* refusing a nonsuit was right; that there can be no judgment of nonsuit when the issues of law are not before the court.

Judgment appealed from ([1924] 4 D.L.R. 259) stands.

APPEAL from a decision of the Supreme Court of Prince Edward Island (1) maintaining the verdict at the trial in favour of the plaintiffs.

*PRESENT:—Idington, Mignault, Newcombe and Rinfret JJ. and Maclean J. *ad hoc*.

(1) [1924] 4 D.L.R. 259.

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The only question decided on this appeal was that of jurisdiction of the court to entertain it. The conditions under which it came before the court are set out in the above head-note.

F. R. Taylor K.C. and *J. D. Stewart K.C.* for the appellant.

Johnson K.C. and *Bentley K.C.* for the respondents.

The judgment of the majority of the court (Mignault, Newcombe, Rinfret and Maclean JJ.) was delivered by

NEWCOMBE J.—The respondents (plaintiffs) in the Supreme Court of Prince Edward Island declared in two counts upon a contract of fire insurance against the appellant company (defendant). The appellant pleaded thirty-five pleas, twenty-six to the first count and nine to the second. The appellant also demurred to the first count of the declaration and the respondents demurred to four of the pleas which were pleaded to that count. By order of Arsenault J. of 8th January, 1924, it was directed that the issues of fact should be tried first, and a jury was summoned to try them and to inquire of and assess the damages. The issues of fact were accordingly tried before the Chief Justice and a jury on 15th, 16 and 17th January. The defendant at the trial moved for non-suit; the motion was refused with leave to move the full court; the jury found generally for the plaintiffs for $1,011.33; the defendant gave notice of motion, dated 26th January, to set aside the verdict as contrary to the evidence, against the weight of evidence and contrary to law, and for a direction that a non-suit should be entered, or that a new trial should be granted. This application was heard before the full court, consisting of Haszard and Arsenault JJ., in May, and on 14th July the court pronounced judgment refusing either a non-suit or a new trial. The appellant, on 29th July, obtained special leave from the Supreme Court of the province to appeal from this judgment to the Supreme Court of Canada; notice of appeal was given on 2nd August, and on 29th October the appellant deposited the requisite security and obtained an order of the Chief Justice of the provincial court allowing the security. There is a note in the record to the effect that on 29th July the court set down the demurrers for hearing at the ensuing Michaelmas term;

that the demurrers were argued before the court *en banc,* consisting of the Chief Justice and Arsenault J., on 18th November, when the court reserved judgment, and that judgment had not been rendered.

When the appeal came on for hearing in this court, counsel for the respondents moved to dismiss it on the ground that the court was without jurisdiction, because the judgment is neither a final judgment, nor a judgment upon a motion for a non-suit or directing a new trial, within the meaning of section 36 of the Supreme Court Act. The court then expressed grave doubts as to the right of appeal, and suggested to counsel the advisability of considering further steps in the court below to fortify the appeal so as to bring up the whole case upon final judgment, and thus to avoid the question of the court's jurisdiction to entertain an appeal at the present stage of the proceedings; but counsel preferred to proceed with the argument upon the case as it stands; and, as the situation had not been made perfectly clear by the preliminary discussion, the court permitted the argument upon all points, reserving the question of its jurisdiction.

The final judgment from which it is provided that an appeal shall lie is declared to mean

> any judgment, rule, order or decision which determines in whole or in part any substantive right of any party in controversy in any judicial proceeding.

The effect of the order under appeal is to deny the appellant's application in every particular—for non-suit, or to set aside the findings implied in the general verdict for the plaintiffs upon the issues of fact, or to grant a new trial. The order determines nothing upon the issues of law which involve the question of liability as between the parties, and which are not before the court upon the appeal, but remain outstanding. It would appear indeed that, so long as the issues of law remain undetermined, the findings of fact are not decisive in whole or in part of any substantive right, and therefore it cannot be maintained that there is a final judgment. There is certainly no judgment directing a new trial; the court has refused to direct that the issues of fact shall be retried. Therefore upon neither of these grounds is the judgment appealable.

But it is said that there was at least a motion for a non-suit, and that an appeal has been asserted from the judg-

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ment which was pronounced upon that motion. The judgment of non-suit was in common practice and well understood before the introduction of the rules of procedure under the Judicature Act. These rules have not been adopted in Prince Edward Island, and so, in that province, a plaintiff retains his privilege of becoming non-suit, and the court the authority which it formerly possessed to direct a non-suit, if it be clear in point of law that the action will not lie, or to allow the plaintiff to take a verdict with liberty to the defendant to enter a non-suit if the court above should be of opinion that the action will not lie. In this case the latter course was adopted; but, although the jury found under the directions of the learned Chief Justice a general verdict, which must be interpreted as a finding of the jury in the terms of the issues referred to them, it must be realized that if the appellant's demurrer were allowed, the verdict, being general, could not stand in any particular, and if the respondents were to succeed upon the demurrers, seeing that the court was of opinion not to disturb the verdict, they would be entitled to move for final judgment in the case; but, inasmuch as a judgment of non-suit disposes of the action, and according to the general rule a non-suit for part is a non-suit for the whole (Bacon's Abridgment, tit. "Nonsuit") it is obvious that there can be no non-suit at the trial of the facts when the issues of law are by order of the court excluded, and therefore I think that, in view of the state of the cause, the court was right in rejecting the motion. Non-suit involves considerations of law having regard to the facts as they appear; the questions of law were not before the learned Chief Justice at the trial, and a judgment of non-suit was not in the somewhat unusual proceedings either appropriate or available.

I would therefore dismiss the appeal with costs throughout.

IDINGTON J.—This appeal arises out of the following circumstances. The respondents, W. Warren Lord and J. Herbert Lord, carried on business at Cape Traverse in Prince Edward Island as general merchants and, in course thereof were insured in respect of their stock in trade there by appellant and others. One of the policies held by said partnership was later dropped, but another for $2,000, said to

have been by its terms made payable to the Royal Bank at Summerside in said Island, as collateral security, was continued in force for many years. For carrying out that collateral purpose it seems to have been handed to said bank, but the bank was paid off, and the manager, having no further interest in the policy, seems to have forgotten it, when asked years afterwards, on an occasion when for carrying out the changes I am about to refer to, it was deemed necessary to formally transfer it. The partnership, named Lords Company, moved part of their goods to another shop at Carleton, a mile or so away, and in course of time moved the entire stock into that shop and proceeded to have the partnership along with other subscribers formed into a joint stock company, under the name of "Lords Limited," and explained to one Brow, an insurance agent at Charlottetown, that it had done so; and it was, of course, desirable to have that change made in the policy.

Brow was the local agent of the appellant for Prince Edward Island and, when the policy could not be found in the bank, it occurred to him that possibly he had it at his office in Charlottetown, and he made search there, but failed to find it.

Brow was the agent through whom the yearly premiums were paid for renewals of said policy, and, in meeting one of the said Lords Company, he undertook to see that it was made all right, or words to that effect, and the said firm, known as the Lords Company, and registered as such, accepted his assurance and continued to pay through him the annual premiums.

This arrangement was testified to by one of said Lords Company, and set forth by Brow in a letter to appellant's St. John, New Brunswick, agents.

The said firm, on the 10th January, 1921, became incorporated under the name of Lords Limited, soon after opening up business in said Carleton shop. The said incorporated company included a considerable number of other shareholders than the said Lords, respondents herein; the latter, however, were the largest shareholders.

The entire assets of the said partnership including said policy of insurance, then passed to the incorporated company, whom it became operative. The renewal receipts were not only passed through the hands of the said Brow

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but in later years, from and including that of 1918, had, generally, the name of "E. R. Brow, Agent, Charlottetown" stamped thereon.

The last of these which is dated as of 24th January, 1923, reads as follows:—

SCOTTISH UNION & NATIONAL
Insurance Company
of Edinburgh, Scotland.

Head Office for North America,
Hartford, Conn.

RENEWAL RECEIPT No. 734451.

Agency at St. John, N.B.

Policy No. 4,821,280 issued to Messrs. Lords Co. for two thousand dollars ($2,000.00).

In consideration of the stipulations named in said policy and of a Premium of forty-two and 00/100————————dollars ($42.00) is hereby renewed and continued in full force and effect for one year from 13th February, 1923 to (at noon) 13th February, 1924, subject to all the conditions therein stated

Not valid unless countersigned by authorized agent at St. John, N.B.

Sgd. J. H. VREELAND,
Manager.

Countersigned 24th day of January, 1923

Sgd. C. R. BROW.

Sgd. J. M. & C. W. HOPE GRANT,
Agent.

On the night of the 19th of February, 1923, a fire took place which burnt up the whole shop and stock and led to the company passing into bankruptcy.

On the 23rd of February, Lords Limited made an assignment in bankruptcy, under the provisions of the Bankruptcy Act, to The Canadian Creditmen's Trust Association, Limited, an authorized trustee under The Bankruptcy Act, and under the provisions of The Bankruptcy Act, the assets of Lords Limited became vested in the Canadian Creditmen's Trust Association, Limited, as

the trustee of the property of Lords Limited, Authorized Assignor, for the general benefit of the creditors of Lords Limited.

And at that time there was written (by pen) across said receipt above quoted, the following:—

February 23,/23, assigned to Canadian Credit Men's Association.

E. W. MANSON,
Trustee Lords Limited.
W. W. Lord.

The appellants were notified of said fire loss and, as I hold, proofs of loss were clearly made out.

There were seven other policies on the goods in question besides that of appellant, and the goods in the shop were

found by the adjuster to be reduced in value so much from what had been there that in fact the share of liability as fixed by the adjuster was about half of the insurance.

Hence the claim on this $2,000 was fixed by him at $1,011.23.

Each of the other seven insurance companies concerned paid its respective share of the loss to the said respondent, the Assignee in Bankruptcy, but the agents of the appellant, at St. John, N.B., seemed inclined to pursue a devious course from the outset, and finally referred the claim to some superior, and appellant declined to pay anything.

Hence this action, which seems to me to have been fairly tried by the learned Chief Justice of Prince Edward Island, with a jury. No objection was taken to his charge to the jury by counsel on either side.

Counsel for the appellant moved for a non-suit and that was overruled, but leave reserved to move before the court *en banc.*

The jury found for the respondents for the said sum of $1,011.33.

The appellant availed itself of the leave to move for a non-suit and at same time asked for a new trial, but it is asserted in respondents' factum that no exception was then taken to the admission or rejection of evidence or the learned trial judge's charge. And that seems amply borne out by reading the notice of motion which takes no such objection, though objections from (*a*) to (*h*) were taken at which I am surprised to see in (*i*) that it is objected no proof of the incorporation of the company and yet I find the certified copy of the original patent therefore amongst the exhibits and, in the evidence of Mr. Lord, a statement as to who were appointed the officers, in way of organization thereunder.

I need not be surprised therefore that when dealing with such notice of motion it took five days to hear it.

It seems the trial took three days.

The appellant seems to have had ample scope given it to present its case. Yet it presented no evidence, though Brow was present under a *subpœna duces tecum,* issued by and served on him for the plaintiffs.

I am sorry to find that for want of a stenographer we have not a sentence of the learned judge's charge, but must

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assume that he dealt properly with the mass of written evidence, as well as the oral evidence, and that the jury were given to understand its import in law if found by them true in fact.

If they were, then certainly there was ample evidence which the learned trial judge was bound in law to submit to the jury for its consideration to find upon and hence he could not properly have either ruled upon the motion for a non-suit, or directed the jury to find for the defendant as if in law no case made out.

The appellant pretends before us that its New Brunswick office never knew of the transfer of stock insured, from Cape Traverse to the Carleton shop, previously to the fire or of responsibility in respect of such loss.

I submit that the correspondence on file amongst the exhibits herein demonstrates that this is quite unfounded.

Its local agent, Brow, having been notified immediately after the fire of what had occurred, sent the appellant's agent at St. John, New Brunswick, a telegram on the 20th February, 1923, and immediately after, on same date the following letter of same date:—

Charlottetown, P.E.I.,
February 20, 1923.

The Scottish Union & National Insurance Company, St. John, N.B.

Gentlemen:

Re 4821280 Lords Co.

I beg to advise that a loss occurred about 11.30 last night under above policy, from cause unknown.

It appears that there was an open rink near the premises, and the assured allowed the skaters to take off their skates in his office, and while he was in the basement the fire originated in his office.

I am sorry to report that it is considered a total loss.

Yours truly,

E. R. BROW.

And another of same date enclosing copy of the said telegram, and got in reply the following:—

St. John, N.B.
20th February, 1923.

E. R. BROW,
Charlottetown, P.E.I.

Dear Sir,—Your two wires of this idem to hand, contents noted. Loss Policy No. 4821280 (Lords Co.). As Mr. Beer is adjusting for all the other companies, we will be glad to have his services for the "Scottish." We presume, of course, that Mr. Beer will make a thorough investigation of the financial condition of the assured, as Dun's Reports lately have shown several judgments recorded.

Loss Policy No. 4824424 (Pomeroy). We presume that Mr. Beer will attend to this claim also. Our records shew an endorsement of additional insurance of $1,000, on the Household Furniture.

Any information in connection with the above-mentioned claims that you can favour us with, as to origin of fires, etc., please do so by an early mail. And oblige,

Yours very truly,
J. M. & C. W. HOPE GRANT.

And of same date the following telegram:—

St. John, N.B. 109P Feb. 20, 1923.

E. R. Brow,
Insurance,
Charlottetown, P.E.I

Wire day letter companies interested and amounts Lords when known what adjusters act.

J. M. & C. W. Hope Grant.
113P

And that was followed on the 23rd February, 1923, by the following:—

St. John, N.B.
23rd February, 1923.

E. R. BROW, ESQ.,
Charlottetown, P.E. Island.

Dear Sir,—On receipt of your favour of 20th inst., advising origin of fire, we considered it advisable to wire you as follows, which we confirm:—

"Letter received. Notify Beer not to compromise company, Lords Loss." We are of the opinion that the origin of fire and occupancy of premises should be first fully placed before the Head Office of interested companies.

Re Pomeroy Loss:

We will be glad to receive particulars in connection with this claim. Is it the same loss in which an aged widow was burned to death?

Yours very truly,
J. M. & C. W. HOPE GRANT.
Per J.M.G.

On the 1st of March, 1923, Mr. Brow, the local agent, wrote the St. John, New Brunswick agents the following letter:—

Charlottetown, P.E.I.,
March 1, 1923.

Messrs. J. M. & C. W. Hope Grant,
St. John, N.B.
Gentlemen,—

Re Lord & Company Loss.

I have your wire stating "notify Beer not to compromise company Lord loss." Am I to understand that the company repudiates the liability, owing to the office being used that night by the skaters for changing their boots? Or would you mind telling me what is the objection held by the company? At the same time I would be very much obliged if you would

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kindly give me Mr. Beer's instructions in the matter, as no doubt this week matters will be adjusted one way or the other.

Yours truly,

E. R. BROW.

And their reply thereto contains, in the first paragraph thereof, the following:—

> Your esteemed favour 1st inst. to hand, contents noted. Our wire to you conveyed no advice as to the company repudiating liability, but simply asked you to advise Mr. Beer not to compromise the company. The custom among adjusters is when a case of a similar nature such as change in occupancy takes place, is to send his report to the head offices, giving full particulars of the occupancy of the building at the time of fire, origin of fire; then the Loss Departments go into the situation.

and after explaining further, ends by saying they are practically ignorant of the particulars of the loss.

I submit that the foregoing correspondence in which New Brunswick people were so prompt in responding and giving directions relative to the course to be pursued by Brow the local agent of the appellant, and Beer the adjuster, sheds some light upon the pretence that these New Brunswick agents should have known, but did not, that the stock had been moved to Carleton and a new business started there intended to be covered by appellant's policy herein in question. No inquiry made in course thereof as to what it meant that there had been a change in occupancy, though the expression in the quotation above, to my mind, conclusively demonstrated that the writer was quite conversant with the fact of change of occupancy itself.

I have read all the remaining correspondence in evidence herein, including numerous letters, and find nothing inconsistent with my drawing the conclusion that I have just suggested; and I, therefore, am confirmed therein.

I am, however, left in doubt as to what respective fields of authority the agents at St. John, New Brunswick, and Mr. Brow at Charlottetown, possessed.

We have no direct evidence bearing upon the point although Mr. Brow was in court during the trial and could easily have been called by appellant to explain definitely all relating thereto.

Hence we are driven by reason of the objections taken herein to consider the circumstances which are in evidence.

The entire business of the appellant in Prince Edward Island, except the issuing of the policy of insurance and of

receipts for premiums of renewals thereof, would seem in fact to have been entrusted to Brow, the local agent.

And the sworn statement required by the provisions of the "Companies Taxing Act, 1915, of the province of Prince Edward Island" the appellant's manager at Hartford shews that its head office, without the province, then was in Edinburgh, Scotland, and its chief office, within the province, at Charlottetown.

The provisions of said Act are continued in the Taxation Act of 1920, to which we have our attention called.

It continues, I think, the provisions of the Taxation Act of Prince Edward Island for 1915.

Brow, according to the testimony of Mr. Newberry, the Assistant Provincial Secretary-Treasurer, was named in some letter he refers to, or seems to have referred to, when in the witness stand, as the agent of appellant.

Then we have the provisions of the provincial Act, 11 Geo. V, assented to 27th April, 1921, which seem to render it imperative that a general agent must be appointed for the province for each of such companies, as of the appellant's class, to carry on business therein. Indeed it is so inconceivable that either Brow or his superiors could venture to do so and incur the penalties for its non-observance, that it must be presumed the law was observed, and that Brow was appellant's general agent for Prince Edward Island.

I am of the opinion that the evidence in this case on behalf of the respondents at the trial (including the written as well as oral evidence) presents such a case of holding out by appellant of Mr. Brow as the general agent for Prince Edward Island, ever since 1915, that his acts bind appellant, and that view is greatly strengthened by these enactments for the times over which they were in force.

It is to be observed that all that legislation was in force at the time in question when the respondents Lords and Lords Limited had to apply to Brow as appellant's agent in respect of the transfer of the policy in question from them to the Lords Limited, and failed to find it, but got the assurance above referred to.

Since so writing of it I have found in the correspondence filed herein, the following letter from Brow to the New Brunswick agents:—

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March 10, 1923.

Messrs. J. M. & C. W. Hope Grant,
St. John, N.B.

Gentlemen,—

Re 4821280—Lords Co.

You will notice by the wording of above policy that the stock insured was located at Cape Traverse, while the fire was at Carleton, about a mile farther north. I called on Messrs. Lords in September last, and I have a memoranda made that day on a piece of wrapping paper on which I put the number of company "Lords Co. to Lords Ltd., transfer to Carleton," meaning that this policy was to be transferred from Lords Co. to Lords Ltd., and transfer covering the policy to Carleton instead of Cape Traverse as formerly.

I am enclosing a copy of a letter written to Lords Ltd., on my return home, dated 27th September, in which I stated that the policy might be in the Royal Bank as they could not find it for me on Saturday. This policy is still made payable to the Royal Bank and its location at Cape Traverse, but I presume the inference would be that the risk would be covered at Carleton, because as soon as the policy could be delivered to us the endorsement would be made.

I may say that nothing further has been done in the matter of adjustment of claim, as Lords Ltd. made an assignment some days ago, and the meeting of the creditors is to be held next Wednesday. I have been served with attaching orders, and I am enclosing same herewith.

As soon as anything definite is arrived at, I will inform you.

Yours truly,

Sgd. E. R. BROW.

The reply of the New Brunswick office thereto was as follows:—

St. John, N.B.,
13th March, 1923.

E. R. Brow, Esq.,
Charlottetown, P.E. Island.

Re Policy No. 4821280 Lords Co.

Dear Sir,—We are in receipt of your favour under date 10th inst., with enclosures as noted. We hardly think it necessary to remind you not to in any way, under existing conditions, compromise the company.

We wrote you on the 7th inst., asking for Mr. Beer's report on the situation and assume that it will come to hand at an early date.

Yours very truly,

(Sgd). J. M. & C. W. HOPE GRANT.

P.S.—Please return Pomeroy loss payment receipts mailed you 3rd inst., for stamp affixment and oblige.

J. M. & C. W. Hope Grant.

It is to be observed there is not a word of repudiation of Brow's authority to act, as he tells them what had transpired.

These gentlemen seem to have been inclined to hide everything lest the appellant company would be compromised, for they had tried the same expedient in a variety

of ways with Beer, the adjuster, who, notwithstanding, in his report as such, refers thus to the matter:—

In the meantime it transpired that a policy for $2,000, issued by the Scottish Union and National Insurance Company had not been properly endorsed to transfer the covering from Lords Company's store in Cape Traverse, where they formerly did business, to their store in Carleton, where the entire business had been removed some year or more ago. This endorsement had been asked for by Lords Limited of Mr. E. R. Brow, the Agent of the Scottish Union and National, and he had made a memorandum and agreed to the transfer, verbally, and asked Mr. Lord to send him the policy for endorsement, it being distinctly understood between Mr. Brow, the Agent, and Mr. Lord, the Manager, that the transfer had been made. Owing to the inability of Mr. Lord to find the policy, which apparently had been in the hands of the bank, the endorsement was never made, but the agent here claims that he considers the company was on the risk at Carleton and not at Cape Traverse, where the Lords Company had ceased to do business and had no goods.

Following this, on the 13th day of February, this policy was renewed by a renewal receipt duly sent to the Lords Company which would shew that the company were still on the risk and as this was the only store and stock which Lords Limited owned the intention was to cover same notwithstanding the fact that the policy read Cape Traverse instead of Carleton.

Upon presentation of the facts to Messrs. J. M. & C. W. Hope Grant, the General Agents of the Scottish Union and National, at St. John, N.B., and for whom Mr. Brow is a sub-agent, they after consideration declined to admit any liability under the policy. As Adjuster and after going into the matter carefully and thoroughly with Mr. Lord, the Manager, and Mr. Brow, the Agent of the company, I am convinced that the Scottish Union and National should be liable for their proportion of the loss, but they refuse to have claim papers completed including them in the adjustment.

At the meeting yesterday between the Trustee, Inspectors, Mr. Lord and the Adjuster the facts regarding this policy were explained and the Trustee and his Advisers suggested that inasmuch as the Scottish Union and National consider themselves not liable that the other insuring companies should contribute the total amount of the loss. As Adjuster I objected that this did not seem fair to the other issuing companies and I refused to make out claim papers on that basis and now wish to submit the matter to you and ask for instructions.

This from any one engaged, as he testified he had been, in the insurance business since 1890, and as adjuster since 1917 or 1918, should have been considered by appellant.

In connection with this I may as well advert to the evidence of Mr. Beer, where he says, incidentally, that the rate for Cape Traverse is lower than for Carleton; that the rate at the former seems to have been $35 on this policy and later moved up to $42.

For the foregoing reasons I am of the opinion that the first two grounds of this appeal, as to error of the court below, as stated in appellant's factum, are as follows:—

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(1) In failing to hold that the defendant did not insure the goods in the store at Carleton (unless the same was effected by an oral policy, which was not within the authority of the local agent).

(2) In holding that there had been a waiver of conditions 3, 5 and 11a of the original policy.

(3) In failing to hold that there was misjoinder of the parties plaintiff,

and have been fully answered.

And as to the third ground there is I submit, nothing involved but a question of procedure regarding which this court has uniformly refused to interfere, unless there has been some grave question of natural justice sure to be done to the appellant, which clearly is not this case.

Indeed we have many times had to send cases back for a new trial because all the parties concerned had not been brought before the court.

The appeal should be dismissed with costs thereof and of the motion made to quash the appeal.

I cannot imagine it ever was intended by the subsection (*b*) of the now section 36, to extend the operation of the Supreme Court Act to deal with such a record as this was at the date when the leave to appeal was given with two demurrers then still undisposed of.

The purview of the Act has always been held to be, and, I submit, still has to be, that the final decision of the last court of resort in the province has been reached before coming here. To allow an appeal with outstanding and undisposed of demurrers in the case is not desirable, and was never intended.

I may be permitted to add that a motion to quash this appeal was fully argued at the opening of this case before us which I, at the close thereof, very firmly announced my opinion that the appeal should be quashed, but, as I seemed to stand alone in that view, I suggested, as has often been done in such like cases, that the hearing of the appeal be gone on with and both the motion to quash and the merits of the appeal be considered together, and the appeal was then argued fully by counsel for each side respectively.

It seemed to me then unlikely that the motion to quash would prevail and hence I fully examined the case on its merits, with the foregoing result, written prior to our final conference.

At our conference thereafter to finally consider the case I discovered that the majority had reconsidered their atti-

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tude to the motion to quash, and hence the result that will appear in the respective notes of judgment herein.

When motions to quash and hearing of them and the appeal are left to be considered together, it has frequently happened heretofore that some members of the court adopt one ground and others another for disposing of the case.

Appeal dismissed with costs.

Solicitor for the appellant: *J. D. Stewart.*
Solicitor for the respondents: *J. A. Bentley.*

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*Mar. 4, 5.
*May 5.

CECIL R. SMITH.....APPELLANT;

AND

THE MINISTER OF FINANCE.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment and taxes—Federal income tax—"Income"—Profits from illegal business—Income War Tax Act, 1917, s. 3 (1).

Profits made in an unlawful or prohibited business, in this case the illegal purchase and sale of liquor in Ontario, are not "income" as that term is defined in sec. 3 (1) of the Income War Tax Act, 1917, and are not taxable under that Act.

Judgment of the Exchequer Court ([1924] Ex. C.R. 193) reversed.

APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the respondent on a stated case.

The question to be decided is whether or not the appellant can be taxed under the Income War Tax Act, 1917, and amendments in respect to profits made by trafficking in liquor in violation of the Ontario Temperance Act. The Exchequer Court held that he can.

McEwen for the appellant. To disobey an Act of a provincial legislature is made an indictable offence by sec. 164 of the Criminal Code.

There is a well defined distinction between transactions illegal only in the sense that contracts made in connection therewith are not enforceable and those positively prohibited. See *Salt Lake City* v. *Hollister* (2); *Inland Revenue Commissioners* v. *Von Glehn* (3).

Profits from crime cannot be taxed. *Inland Revenue Commissioners* v. *Von Glehn* (3).

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 193. (2) 118 U.S.R. 256.
(3) [1920] 2 K.B. 553.

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Harold Fisher K.C. and *C. F. Elliott* for the respondent. A tax may be imposed upon some specific thing but an "income tax" is imposed upon the person. *Lethbridge* v. *Thurlow* (1) per Sir John Romilly; *Caron* v. *The King* (2) per Lord Philimore.

In *Peck* v. *Lowe* (3) the greater part of the income was derived from exports and the constitution prohibits any tax on duty "on articles exported from any state." The income tax was held valid.

Parliament can impose a tax on income derived from any source lawful or unlawful. *Partridge* v. *Mallandaine* (4); *Salt Lake City* v. *Hollister* (5).

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

MIGNAULT J.—This is an appeal from a judgment of Mr. Justice Audette in the Exchequer Court on a stated case which he directed the parties to submit on "the questions of law arising upon the facts as stated in the pleadings." The appellant, describing himself as a garage proprietor carrying on business in the city of Windsor, Ontario, had appealed to the Exchequer Court from an assessment under the Income War Tax Act, 1917, and amendments, in the sum of $28,632.23, on his income for the year 1920 amounting to $92,020. On this appeal the learned judge ordered the filing of formal pleadings. The appellant's statement of claim, so called, alleged as grounds of his appeal that, in addition to his usual occupation, he had carried on the business of trafficking in liquor within Ontario, contrary to the provisions of the Ontario Temperance Act, and that profits so made by him were not taxable income within the proper interpretation of the Income War Tax Act. The respondent's statement of defence, also so-called, in substance denied that these profits were not taxable income under the Act. Upon these pleadings the learned judge ordered the preparation, under rule 161 of the Exchequer Court, of the stated case above referred to. Both the appellant and the respondent have concurred in this case which is in the following terms:—

(1) 15 Beav. 334 at p. 339.
(2) [1924] A.C. 999.
(3) 247 U.S.R. 165.
(4) 2 Tax Cas. 179 at p. 181.
(5) 118 U.S.R. 256.

The following case is stated for the opinion of the court under an order of the Honourable Mr. Justice Audette, dated the 15th day of April, 1924, made pursuant to Rule 161 of the Rules and Orders of the Exchequer Court of Canada.

The appellant during the year 1920 gained certain profits within the province of Ontario by operations in the illicit traffic of liquor contrary to the existing provincial legislation in that respect. Upon the said profits the appellant has been assessed for Income Tax pursuant to the provisions of the Income War Tax Act, 1917, and amendments thereto. The validity of the assessment, in so far as it includes the said profit as a basis for computing the tax as assessed, is in dispute.

The question for the opinion of the court is:

(1) Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing provincial legislation in that respect, "income" as defined by section 3, subsection 1 of the Income War Tax, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act.

Dated this 15th day of May, A.D. 1924.

GEO. D. MCEWEN,
Appellant's Solicitor.
C. F. ELLIOTT,
Solicitor for the Minister of Finance.

The learned judge, having answered the question submitted by the stated case in the affirmative, dismissed the appeal of the appellant. The latter now appeals to this court.

This appeal must be decided upon the case stated by the parties, in which both of them have concurred. The point therefore to be determined is whether the profits in question are "income" within the meaning of the Income War Tax Act.

The Act defines "income" as follows:—

3. (1) For the purposes of this Act "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Canada or elsewhere, and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source; including the income from but not the value of property acquired by gift, bequest, devise or descent; and including the income from but not the proceeds of life insurance policies paid upon the death of the person insured, or payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract, and in-

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cluding the salaries, indemnities or other remuneration of members of the Senate and House of Commons of Canada and officers thereof, members of provincial legislative councils and assemblies and municipal councils, commissions or boards of management, any judge of any Dominion or provincial court appointed after the passing of this Act, and of all persons whatsoever whether the said salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in respect of his Government of Canada, or of any province thereof, or by any person, except as provided in section five of this Act, with the following exemptions and deductions.

It is argued that the language of this definition is wide enough to include income derived from a business the carrying on of which is expressly prohibited by law. So would it be wide enough to comprise gains resulting from the commission of crimes, such as burglary or highway robbery, if such crimes, as often happens, be resorted to habitually as a means of making a gain or profit.

The real question however is whether we should place on the statute a construction which implies that Parliament intended to levy this income tax on the proceeds of crime or on the gain derived from a business which cannot be carried on without violating the law. Such a business should be strictly suppressed, and it would be strange indeed if under the general terms of the statute the Crown in right of the Dominion could levy a tax on the proceeds of a business which a provincial legislature, in the exercise of its constitutional powers, has prohibited within the province.

Moreover what may be called the machinery clauses of the Act (sections 7 *et seq.*) clearly shew that it never was contemplated that an income tax would be levied on the gains derived from illicit businesses or from the commission of crime. Thus every person liable to taxation must make to the Minister, on or before April 30, in each year, a return of his total income during the last preceding year. If the Minister, in order to be able to make an assessment or for any other purpose, desires any information or additional information, he may demand it by registered letter and the taxpayer is obliged to furnish this information within thirty days. The Minister may also require the production of any letters, accounts, invoices, statements, books or other documents, or he may have an inquiry made by an officer thereunto authorized by him, and if the taxpayer fails or refuses to keep adequate books or accounts for income tax pur-

poses, the Minister may require him to keep such records and accounts as he may prescribe. Any information thus obtained is treated as confidential and its divulgement is prohibited.

I think the inference irresistible that the taxpayer's return of income, the additional information which may be demanded by the Minister, the books and accounts which may be inspected, and the accounts and records which the Minister may require the taxpayer to keep are all in respect of businesses which may be legally carried on. It is difficult to conceive of the Minister requiring criminals to furnish information as to profits derived from the commission of crime, or demanding from them the keeping of books or records of their illicit and criminal operations. Furthermore if the gains derived from crime are within the contemplation of the statute, then the expenses incurred in making these gains, e.g. in the employment of criminal agents, would be chargeable as deductions against these gains, and, as to all information furnished by the wrongdoer, there would be a promise of secrecy for his protection. It is impossible to believe that anything like this was contemplated by Parliament.

On the interpretation of this statute—and no question arises as to the power of Parliament to impose income tax on the avails of crime—I would therefore conclude that income tax is not imposed by it on such a business as that described in the stated case.

The learned trial judge relied on the case of *Partridge* v. *Mallandaine* (1), where it was held that persons receiving profits from betting systematically carried on by them throughout the year, are chargeable with income tax on such profits in respect of a "vocation" under 5 & 6 Vict., ch. 35 (the Imperial Income Tax Act), Sched. D. See also *Graham* v. *Green* (2).

At page 278 of the report in 18 Q.B.D., Denman J. said:—

> I think the word "vocation" is not limited to a lawful vocation, and that even the fact of a vocation being unlawful could not be set up against the demand for income tax.

It is to be remarked however that this statement was

(1) [1886] 18 Q.B.D. 276.

(2) [1925] 41 Times L.R. 371, at page 372.

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not necessary for the decision of the case, for the betting in question was not considered as unlawful, although of course no action would have lain to recover the bets. Indeed Hawkins J. observed that "mere betting is not illegal. It is perfectly lawful for a man to bet if he likes."

But the learned trial judge quotes the following dictum attributed to Denham J. in the report of *Partridge* v. *Mallandaine* in 2 Tax Cas. 179.

> But I go the whole length of saying that, in my opinion, if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of £2,000 a year, the Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation.

The fact that in the official reports of the Queen's Bench Division no such dictum is attributed to the learned judge, would tend to shew that, assuming he used that language, he did not wish it to remain on record as a deliberate statement of his opinion. Moreover it would clearly be *obiter*, for obviously it was not necessary for the decision of the case.

The learned trial judge also considered that the appellant should not be heard to invoke

> his own turpitude to claim indemnity from paying taxes and to be placed in a better position than if he were an honest and legal trader.

This appeal, however, must be decided solely on the case stated by the parties. Both the Minister of Finance and the appellant have equally concurred in framing, as a question of law, the question whether profits derived from the carrying on of a prohibited business are "income" within the meaning of the Act. It is not open to us to avoid answering this question on the ground that the appellant's claim, as the learned trial judge regarded it, is tainted with illegality. It is not clear, moreover, that the illegality of the profits in question was first set up by the appellant. For aught that appears it may have emerged in the imposition of the assessment.

The only question for decision is whether profits earned under the circumstances described in the stated case are "income" within the meaning of the Income War Tax Act, 1917, and amendments. This question should be answered in the negative.

The appeal must be allowed with costs and judgment directed for the appellant quashing and setting aside the

assessment with costs of the proceedings in the Exchequer Court.

IDINGTON J.—The appellant is alleged to have been engaged, in and during the year 1920 (besides his ordinary business of keeping a garage) in an illicit trafficking in intoxicating liquors, contrary to the provisions of the Ontario Temperance Act, and thereby to have obtained a very large income.

This action in the Exchequer Court would seem to have been brought as a means of testing his liability to taxation under the Dominion Income War Tax Act. The parties hereto agreed upon a stated case in which the following question was submitted for the opinion of the said court.

(1) Are the profits arising within Ontario from the *illicit traffic in liquor therein,* contrary to the provisions of the said existing provincial legislation in that respect, "income" as defined by section 3, subsection 1 of the Income War Tax Act, 1917, and Amendments thereto and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act.

The case so submitted was heard by Mr. Justice Audette of said court.

The said learned judge answered the said question in the affirmative and accordingly dismissed the action with costs. Hence this appeal therefrom.

I, with due respect, cannot, after fully considering the arguments adduced before us, and the reasons assigned by the said learned judge in support of said judgment, agree with the conclusion so reached. I cannot bring myself to believe that Parliament ever had in its serious contemplation, in enacting the said Income War Tax Act, of 1917, or any amendments thereto, the conception of taxing any profits or money raised from such a criminal source.

The assertion of such an intention or purpose would be such a novelty in the way of expressing income taxation Acts, here and elsewhere, that I should expect to find the intention or purpose expressed in such clear and unambiguous terms as the law has uniformly required all taxing Acts to be, so that there can be no doubt as to their meaning.

The rule in that regard is well stated in Hardcastle's Statute Law, at page 126, the 3rd ed. as follows:—

But for certain purposes express language in statutes is absolutely indispensable,

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and of those specified the first-named is that imposing a tax. Numerous cases are cited by the author and are easily available.

I do not intend to elaborate for the fact that this seems to be the first occasion of an attempt to place such an interpretation upon an Act which, in all the essential features in question herein, has been the same since its enactment in 1917, and the Ontario Temperance Act was first enacted a year previous to this taxing Act.

With all due respect for those promoting such legislation it was evident to thinking men that such a class as appellant ranks in would spring up.

The "Bootleggers," as the profiteers under the Ontario Temperance Act are commonly called (though anticipated as I say by thinkers), may not have reached such prominence as to attract attention within the year I refer to, but they certainly became (if common report and knowledge thereupon is any guide), very prominent before the taxing Act was for a year or so in its actual operation.

The fact that it was not attempted to be applied till the year 1920, if then, demonstrates that it had not been expressed in the way required, as I have cited authority for. Hence I cannot see how it can be pretended to have fallen within the indispensable requirements of a taxing Act.

And one curious feature about such profits being a source of taxable income, is the enactment in the Temperance Act, 6 Geo. V (Ont.) c. 50, section 57, which reads as follows:—

> 57. Any payment or compensation for liquor furnished in contravention of this Act or otherwise, in violation of the law, whether made in money or securities for money, or in labour or property of any kind, shall be held to have been received without any consideration and against justice and good conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same.

Where could the profits come from if the price paid belonged to some one else?

For the foregoing reasons I would allow the appeal with costs and answer the question put in the negative.

Appeal allowed with costs.

Solicitor for the appellant: *George D. McEwen.*
Solicitor for the respondent: *C. F. Elliott.*

THE CITY OF WINDSOR AND ANOTHER (PLAINTIFF) ..... } APPELLANT;

AND

CATHERINE C. TURNER AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*Mar. 5.
*Mar. 27.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Municipal corporation—Part of township annexed to city—School section—Moneys on hand at annexation—Public School Act [1920] c. 100, s. 27 (1).

Sec. 27 (1) of the Public School Act, 1920, provides that "where part of a township * * * is annexed to * * * an urban municipality such part shall for all school purposes be deemed to be part of the urban municipality."

In Dec. 1921, the Ontario Ry. and Mun. Board made an order directing that a part of the township of Sandwich W., comprising the whole of school section No. 11, should be annexed to the city of Windsor. The order was to take effect on Jan. 1, 1922, but by arrangement the former trustees continued to manage the affairs of the school section until April 1. At the end of 1921 the school section had a balance on hand and received in March, 1922, $4,000 from the township council on account of taxes for 1921, and in February, 1922, $200 the statutory contribution to teachers' salaries for 1921.

Held that as the school section became for all school purposes part of the urban municipality on January 1, 1922, and as the money in question was proceeds of or chargeable against the rates of 1921, the urban Board of Education was entitled to recover, the annexation operating to transfer the school to the city as a going concern.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the appellant.

The material facts are stated in the above head-note. A portion of Sandwich West comprising school section No. 11 having been annexed to the city of Windsor from Jan. 1, 1922, the trial judge held that the surplus moneys on hand representing the collection of taxes for 1921 should be paid to the City Board of Education. His judgment was reversed by the Appellate Division which ordered that moneys paid or advanced by the township council should be returned and the balance distributed among the 1921 ratepayers. The city appeals from the latter judgment.

F. D. Davis K.C. for the appellant.

John Sale for the respondent.

PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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Newcombe J

The judgment of the majority of the court (the Chief Justice and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The municipal corporation of the city of Windsor brought this action by writ of summons issued out of the Supreme Court of Ontario against the defendant Catherine C. Turner, the secretary-treasurer of school section no. 11, which formerly belonged to the township of Sandwich West, to recover the sum of $5,535.28, alleged to be money of the school section in her hands to which the plaintiff was entitled. There were no pleadings, but a consent order was made by the local judge in chambers directing the joinder of parties and the trial of an issue. The Board of Education of the city of Windsor was added as a plaintiff, and Parker Dickinson and the treasurer of the township of Sandwich West were added as defendants, Dickinson as representing the ratepayers of the school section. By this order it was directed that

> the question to be tried shall be which of the said parties is entitled to the said moneys in the hands of the defendant Turner, being taxes collected from the ratepayers of the said public school section no. 11 and in the hands of the defendant Turner as hereinbefore stated.

The issue as stated by the plaintiffs in pursuance of the order, and which was tried, is expressed as follows:

> The plaintiffs affirm and the defendants deny that the plaintiffs are entitled to the sum of $5,535.28 in the hands of the defendant Catherine C. Turner at the date of the issue of the writ in this action being moneys in her hands for school purposes of section number 11, formerly in the township of Sandwich West but now within the city of Windsor.

School section no. 11, in the township of Sandwich West, was contiguous to the city of Windsor. The Ontario Railway and Municipal Board, under section 21 of the Consolidated Municipal Act, 1922, c. 72, by order of 29th December, 1921, directed that a parcel or tract of land in the township containing 48·9 acres more or less, and being composed of part of farm lot 68 in the 1st concession of the township, which was more particularly described in the order, should be annexed to and should thereafter form part of the municipality of the city of Windsor. The area so described and annexed comprises the whole of the school section which therefore, on and after 1st January, 1922, when by the order it was declared that the annexation should take effect, became subject to section 27, subsection

1, of the Public School Act, 1920, c. 100, which provides that:

27. (1) Where part of a township becomes incorporated as or is annexed to and becomes part of an urban municipality such part shall for all school purposes be deemed to be part of the urban municipality, provided that when the part incorporated or annexed comprises or includes part only of a school section the municipalities interested, unless determined by agreement after the incorporation or annexation, shall each appoint an arbitrator who, with the judge of the county or district court, shall value and adjust in an equitable manner the rights and claims of all parties thereby affected, and shall determine by which municipality or part thereof the same shall be paid or settled.

The order of annexation according to its recitals was made upon reading the petition of a majority in number of the ratepayers resident in the portion of the township sought to be annexed and the resolution of the council of the city in favour of the annexation. By the order it is provided that the assessment of the lands annexed shall, for a period of five years, remain the same as that for 1921, also that the net cost of a lot purchased by the township for the extension of Wyandotte street is to be taken into account in the adjustment of assets and liabilities, and moreover that the question of rearrangement of the amount payable by the township under the Consolidated Essex Borders Utilities Act is a matter to be settled upon the consideration and adjustment of the accounts between the township and the city. These are the only terms or conditions fixed by the order as to the adjustment of assets and liabilities, taxation, assessment, improvements, or otherwise. The treasurer of the township states that there was an informal arrangement between him and the city that the latter would refund the amount of the debentures for local improvements payable by the township during the ensuing seventeen years. There was no other adjustment of assets and liabilities under the provisions of s. 38 of the Municipal Act or otherwise. In a case of this kind, where the municipal records and accounts are or should be available, there should be no room for dispute about the facts, nor is there any reason why a case should be presented in the unsatisfactory and confusing manner in which unfortunately this controversy is submitted. It is possible, however, to reach a conclusion. It would appear that the affairs of the school section were in a prosperous condition; at the end of 1921 it had in hand a balance of $3,235.89; although

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Newcombe J

the school section for all school purposes became part of the urban municipality on 1st January, 1922, its former trustees nevertheless continued to manage its affairs until 1st April following; there is a letter in evidence of 25th March, 1922, from the secretary-treasurer of the Board of Education of the city to the defendant Mrs. Turner, stating that it had been decided that the board would take over the school on 1st April, and that the trustees of the school section were to pay all expenses including salaries, up to that date; and so it happened that the secretary-treasurer, the respondent Turner, in the interval received the revenues which were paid for the benefit of the school section. These comprised, according to the proof, $200 received on requisition from the township on 25th February, 1922; $4,000 received on requisition from the township on 11th March, 1922, and $10 received from the county for the use of a polling booth on 8th March, 1922, amounting in all, including the balance on hand at the end of 1921, to $7,445.89. As against this are set off the expenses of conducting the school from 1st January to 1st April, 1922, $1,910.61; leaving a balance in hand, which is the amount in controversy, of $5,535.28. The amount of $200 received from the township on 25th February is thought to be the contribution of the council of the township under s. 96 of the Public Schools Act, 1920, for teachers' salary, and the $4,000, received on 11th March, is a payment or advance made by the township to the school section of or against taxes collected or to be collected for the year 1921 for the maintenance of the school. It is said that the taxes for any year were usually not collected until the beginning of the following year, and it would appear that counsel agreed, at least at an early stage of the trial, that the latter sum represented taxes for the year 1921; evidence was however subsequently given upon the subject which tends to establish the fact.

It is shewn that taxes were collected in 1922, and it would seem to be true that the moneys used by the trustees for the upkeep of the school in 1921 were the proceeds of the rates assessed in the preceding year, and that the rates assessed in 1921 would constitute the fund out of which the expenses of the school for 1922 should be paid. Mrs. Turner says in her evidence:

Q. These sums of money that you had in hand, were they part of the moneys received from the township of Sandwich West, or the treasurer of Sandwich West during 1921?

A. There was a balance of three thousand and some odd left over after running the school at the end of 1921.

Q. As shown by that statement?

A. Yes.

Q. From the moneys received in 1921?

A. Yes.

There is a requisition in the evidence dated 17th October, 1921, directed to the clerk of the township by the trustees of the school section, by which the trustees ask for a grant of $4,000 from the township for 1922, and stating that the treasurer is authorized to pay the money to the secretary of the Board of Trustees. It was in pursuance of this requisition that the $4,000 was paid on 11th March, 1922, and at the foot of the statement evidencing this payment, which is one of the plaintiffs' exhibits in the case, there is a note to the effect that at a regular meeting of the trustees held on 17th October, 1921, the trustees signed a letter asking for this grant for 1922. I think it is not an unjust inference that the money was paid by the township authorities for the school purposes of the trustees of the school section out of the proceeds of the rates of 1921, and that the intention of the trustees in making the requisition was to provide in ordinary course, at the beginning of 1922, for the charges which would come in course of payment during that year out of the appropriations provided for and raised in pursuance of the outstanding annual levy. This view is also in accordance with the finding of the learned judge at the trial because, although his findings are not very explicit, he states that if the moneys in court were paid back to them (meaning the ratepayers who contributed the school taxes for 1921), they would virtually escape taxation for school purposes for 1921. The learned judges of the Court of Appeal were of a different opinion and they decided that the sum of $4,200 should be repaid to the treasurer of the township, and that the balance should be distributed among the ratepayers of the school section which had been annexed; but, with great respect, I do not think that this view of the case can be maintained. The money in dispute was provided for and exigible for school purposes during 1921, while the section belonged to the township, and, in view of the annexation, the right to the money cannot I think

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be affected by the fact that it was actually paid later than it should have been. Even if the law granted the delay for payment which took place, there can I think be no doubt that the levy and the taxes paid were for 1921. The township clerk gives the following evidence:

Mr. Sale: What time of the year do you collect your taxes?

Answer: In the fall of the year, never finish up until springtime.

His Lordship: That is the way all municipalities do, isn't it?

Mr. Sale: They do not usually send them over until the next year.

His Lordship: I do not know how it is down here, but they all extend the time for payment up till about the first of May.

Mr. Sale: You collected at the end of the year?

Answer: The roll is out at the end of the year.

His Lordship: But the actual collection is not made.

Answer: Is not made until spring. They have to finish up before the first of May as a rule.

His Lordship: The roll is made out in December, but collections are not generally completed until—

Witness: April or May. Sometimes the first of May.

His Lordship: Until some time afterwards, anyway.

Mr. Sale: The first of March I think it calls for.

His Lordship: The levy is the levy for 1921?

Answer: Yes, my lord.

Question: You made the levy for that year?

Answer: 1921, yes, my lord.

Question: As a matter of curiosity, do you finance your township so that you levy enough at the end of that year to pay everything in the next year, or do you borrow against the levy?

Answer: The levy is made like 1921. The requisition—

Question: Never mind the school; do you have your money in advance, or do you borrow against the levy and pay the bank back?

Answer: We borrow when we have not got any money.

Question: Do you expect to have enough on hand at the first of the year to finance the year?

Answer: To finance the year.

Question: So the tax levied in 1921 is really for the estimated expenditure of 1922?

Answer: 1921.

Question: The same year?

Answer: The same year.

Question: But you are levying at the end of the year. Where do you get the money in the meantime?

Answer: Borrow it.

Question: You borrow against the levy?

Answer: Against the levy unless the township instructs money ahead.

And in another place the same witness affirms that

the school taxes which were paid to Mrs. Turner were school taxes that had been levied for the year 1921.

Nowhere does it appear that the township borrowed the money, or any part of it, to make up the $4,200, and, if it did, there should have been no difficulty to prove the fact;

moreover, if the money were borrowed, the only consequence would be that there would be an outstanding liability of the township to the amount of the borrowed money to be provided for. If the management of the school had been taken over when the district was annexed, and if the money in question had at that time been in the hands of the authorities of the school section to which it was appropriated, and for which it was levied, it would naturally pass upon the annexation to the Board of Education of the city, which became the trustee or administrator of the affairs of the school, and the destination of the money would not, I should think, be affected by the fact that the money was actually paid somewhat later; neither would it be material that the trustees of the rural school district actually carried on the school and paid its liabilities, out of moneys appropriated for the purpose, for several months after it was annexed to the city. I think that in the absence of any competent adjustment affecting the assets and liabilities the urban Board of Education becomes entitled by the declaration of s. 27 of the Public Schools Act, that the district annexed

shall for all school purposes be deemed to be part of the urban municipality;

this means that the school is taken over as a going concern. The taxes which were the source of the payments in question were devoted by the law to the maintenance of the school, and they ought not to be diverted from this purpose merely because of a change in the administrative authority.

For these reasons I would allow the appeal and restore the judgment of the learned trial judge; the appellants are entitled to their costs of both appeals.

IDINGTON J.—The school section No. 11 of the township of Sandwich West, was, by an order of the Ontario Railway and Municipal Board, dated 29th December, 1921, annexed to the city of Windsor, one of the appellants herein, to become operative from and after the 31st December, 1921.

The respondent Catherine C. Turner was then the secretary-treasurer of the said school section, and so continued till the first of April, 1922, pending arrangements with the school board of the public schools of Windsor.

At the time of the said order she had on hand as such

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secretary-treasurer a balance of $3,235.89, and received on the 25th of February, 1922, on requisition to be paid in respect of taxes for the year 1921, $200 from the treasurer of the township of Sandwich West, and, again from the same source, on the 11th March, 1922, pursuant to a requisition made in October, 1921, $4,000.

The moneys are conclusively proven to have been paid in respect of taxes for the year 1921.

The respondent township some time after set up the contention that all these moneys belonged to the said respondent; by virtue of what pretension I am quite unable to understand.

Of course if the payments had been made in respect of taxes for 1922, an entirely different legal puzzle might have arisen.

The appellant city claims that they are school funds which belonged to said school section 11, so annexed to said city, and passed thereby, as the result of said order of annexation; which would seem to be a reasonable conclusion of law and was so held by the learned trial judge, who tried an issue directed by consent of counsel for the respective parties.

Thereupon an appeal was taken to the Appellate Division of the Supreme Court of Ontario. That court overruled the judgment of the learned trial judge, and directed the said moneys to be paid to the treasurer of the respondent township, to be distributed amongst the ratepayers of the defunct school section.

Why the said respondent township by its counsel failed to claim the school buildings and the furniture as well, I cannot see, for, on their pretension, it would have been just as reasonable.

It is alleged that this judgment of the appellate court below was the result of a mistaken statement by the counsel for said township that the moneys in question, at least as to $4,200, were out of taxes due and arising out of the assessment and levy thereof for the year 1922. Hence this appeal from said reversing judgment. And said counsel reiterated same before us notwithstanding the clear evidence of those knowing the facts being pointed out to him. He pretended to claim herein that Paré, the treasurer of said township, who had paid the $4,200 to the school treas-

urer, was so ignorant that he could not understand what he was doing.

Yet he had called as witness for his clients at the trial, this same Mr. Paré and examined him in regard to the adjustment of several other matters which had arisen between appellant city and the township, but did not venture, in such examination to touch upon the vital question of whether it was for taxes arising out of 1921 assessment, as had been sworn to by several other witnesses previously called.

I cannot understand such a course of conduct on the part of counsel.

I, suspecting the possibility that there might have been debentures issued by the township for the school section, asked him if he knew whether there had been such or not, and he replied thereto that he did not know. If there had been I assume that the charge therefor would have been brought forward at the time of the other adjustments.

On the foregoing state of facts I am with great respect unable to agree with the judgment appealed from, and would allow this appeal with costs here and of the appeal below, to be paid by the said respondent township to the appellant, and the judgment of the learned trial judge should be restored.

I am surprised that counsel could not refer to any specific enactment dealing with such annexations, and the results arising therefrom, but the general purview of the legislation dealing with the consequences ensuing upon such like annexations certainly imply that the school house and all other assets of the rural school board pass in such a case to the city's school board—subject, of course, to any liabilities of said rural school board, for example, debentures, if any, or salaries.

Appeal allowed with costs.

Solicitors for the appellants: *Davis, Healey & Plant.*
Solicitor for the respondent: *John Sale.*

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*May 26, 27.
*June 18.

JOSEPH M. RIOU (PLAINTIFF).....APPELLANT;

AND

THE TOWN OF TROIS-PISTOLES (DEFENDANT).

AND

LA BANQUE NATIONALE (MISE-EN-CAUSE) ..... } RESPONDENT.

JOSEPH RIOU (PLAINTIFF).....APPELLANT;

AND

H. MARTIN AND OTHERS (DEFENDANTS)..RESPONDENTS.

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

Municipal corporation—By-law—Borrowing—Promissory note—Signature unauthorized—Validity—Debenture loan—Special object—Proceeds used for other purposes—Responsibility of municipal officers—Cities and Towns Act (Q.) 8 Geo. V, c. 60, s. 5956 (t.)

The municipal council of the town of Trois-Pistoles passed a by-law on the 26th January, 1920, authorizing the borrowing, by way of debentures, of a sum of $22,500, for the purchase of an electric lighting plant for which the town held an option expiring the 30th April, 1920. By resolution of its council the town decided to accept the option on the 6th of April, 1920. The mayor and the secretary-treasurer, as the executive officers of the municipal council, arranged with the bank for the advance of the purchase money pending the sale of the debentures and undertook that the proceeds of the sale would be deposited with the bank to be applied in re-payment of the advances. On the 30th of April, 1920, at the instance of the bank, a promissory note for $12,441.89 and a so-called interim debenture for $22,500 were signed by the mayor and the secretary-treasurer and handed to the bank. Then the town issued debentures in series of $100, $250 and $500 respectively in conformity with the by-law and deposited the proceeds to the credit of its general bank account. Instead of reimbursing the advances made by the bank as agreed, the town drew against these moneys for its general purposes. On the 30th of July, 1921, the mayor and the secretary-treasurer, without any express authority, renewed the promissory note of $12,441.89 by giving another note for $9,005.31, the balance having been paid by the town.

Held, reversing the judgment of the Court of King's Bench (Q.R. 36 K.B. 355), Malouin J. dissenting, that the giving by the mayor and the secretary-treasurer of the promissory note for $12,441.89, of the renewal note for $9,005.31 and of the interim debenture being unauthorized and therefore void, the appellant in the first action was entitled as a ratepayer to ask the courts to pronounce their nullity.

Held also, reversing the judgment of the Court of King's Bench (Q.R. 36 K.B. 78), Anglin and Malouin JJ. dissenting, that there had been

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

a diversion of the proceeds of the debenture loan within the meaning of section 5956 (t.) of the *Cities and Towns Act*, 8 Geo. V, c. 60, and the mayor and the secretary-treasurer were bound jointly and severally to pay to the town the sum of $9,005.31 in order to extinguish the balance owed by it to the bank on the purchase price of the electric plant.

Per Anglin J. (dissenting).—As the note given by the municipal officers was void, the overdraft in the general bank account of the municipality, which had been created by the advances made under the arrangement of the 6th of April, continued; and, as the proceeds of the debenture loan were subsequently deposited in that account, were applicable to such overdraft and were sufficient to cover it, there was no effective diversion of such proceeds within the meaning of sec. 5956 (t) and personal liability of the municipal officers therefor did not arise.

APPEAL from the decisions of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgments of the Superior Court and dismissing the appellant's actions.

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

St. Laurent K.C. for the appellants.

F. Roy K.C. for the respondent La Banque Nationale.

St. Jacques K.C. and *J. Langlais* for the respondents Martin and others.

RIOU *v.* MARTIN

IDINGTON J.—This is an action brought by the appellant as a ratepayer of the town of Trois-Pistoles against the respondents to recover, on behalf of said municipality, by virtue of s. 5956t of the statutes of Quebec as enacted by 8 Geo. V, c. 60, and which reads as follows:—

5956t. The moneys realized from a loan or from a bond issue made by any municipality incorporated by special act or in virtue of a general act shall be applied exclusively to the purpose for which they are intended, provided, however, that if they exceed the amount required for such purpose, the excess may be applied to other purposes specified in a subsequent by-law of the council, approved in the same manner as the by-law authorizing such loan or bond issue.

Every member of the council, who, either verbally or in writing, by his note or tacitly, authorizes the misapplication of such money, shall be personally responsible for all sums thus illegally diverted from the use for which they are intended, towards the corporation, which may recover the same by an action in law, enforceable by coercive imprisonment against the member or the members of the council in default.

(1) [1923] Q.R. 36 K.B. 355; [1923] Q.R. 36 K.B. 78.

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Such responsibility shall be joint and several, and shall apply to the secretary-treasurer or other officer who participates in such illegal diversion of such moneys, or who causes the same.

The action to recover such money may likewise be taken by any ratepayer or by the Minister of Municipal Affairs.

The action was dismissed by the learned trial judge and, upon appeal therefrom to the Court of King's Bench, said dismissal was maintained by a majority of three to two, Chief Justice Lafontaine and Mr. Justice Rivard dissenting.

The said Chief Justice has, in his opinion, dealt with the questions involved so fully and satisfactorily that I see nothing to add thereto supplemented as it is by a brief opinion of Mr. Justice Rivard.

I agree entirely with their reasoning and for said reasons I am of the opinion that the appellant should succeed herein to the extent of recovering $9,005 with costs throughout against the respondents.

RIOU *v.* TOWN OF TROIS-PISTOLES

IDINGTON J.—This is an action brought by the appellant an elector and ratepayer of the defendant, la ville de Trois-Pistoles, to have declared null and void certain so-called securities of the 30th April, 1920, given by the mayor and town treasurer of said defendant Trois-Pistoles, ostensibly on behalf of said defendant, to the respondent La Banque Nationale and a promissory note given in renewal thereof for balance of $9,005.31 on the 30th July, 1921.

The action was dismissed with costs by the learned trial judge, from which judgment the appellant took an appeal to the Court of King's Bench, which court dismissed his appeal with costs, the learned Chief Justice Lafontaine dissenting.

Hence this appeal herein.

I agree with the reasons assigned by said Chief Justice for allowing the appeal below, and for the like reasons am of the opinion that this appeal as prayed for to the extent of $9,005.31, should be allowed with costs throughout as against the respondents.

DUFF J.—I concur with Mignault J.

ANGLIN J.—In the first-named action the plaintiff, a ratepayer of the defendant municipality, seeks to have a

certain document in the form of a promissory note and a so-called interim debenture, both given in the name of the defendant municipal corporation by its mayor and secretary-treasurer to cover the amount of advances made to it by the respondent bank and applied for the purchase of an electric lighting plant, and a renewal of the note for a reduced amount declared illegal, null and void.

In the second action another plaintiff, likewise a ratepayer, demands that the defendants—the mayor, secretary-treasurer and councillors of the town of Trois-Pistoles—be penalized under s. 5956 (*t*) of the Revised Statutes of Quebec (8 Geo. V, c. 60) for having diverted part of the proceeds of a debenture loan, destined, *inter alia,* to pay the purchase price of the electric plant acquired by the town, by allowing such proceeds to be deposited in the town's general bank account and to be withdrawn from that account for its general purposes while the aforesaid note remained in the hands of the bank unpaid.

Although the respondent bank by its plea upheld the validity of the impeached securities, it is now common ground in the first-named action that the giving of those securities was wholly unauthorized, and that, as against the defendant municipal corporation, they are void. In view of the defence pleaded by the bank the plaintiff was, in my opinion, entitled as a ratepayer of the defendant municipality to judgment so declaring.

But counsel for the respondent bank maintains that, apart from the note and the so-called debenture taken by it as security, there is a liability on the part of the defendant municipality to it for the moneys advanced to and used by the latter to pay for the electric plant which it acquired under the authority of by-law no. 28, the validity of which is not challenged, and he also contends that upon such advances by way of over-draft the bank is entitled to interest. The appellant concedes the liability of the town to repay the advances actually made but contests the right of the bank to treat them as a loan or to claim interest, insisting that, apart from the note, there was no contract to pay interest on the advances and no *mise en demeure* such as might found a claim for interest as damages under art. 1077 C.C.

The advances were made on the 6th of April, 1920; the

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note was taken on, and bears date, the 30th of April, 1920; the debentures authorized by by-law no. 28 bear date and carry interest at 5½ per cent from the 1st of May, 1920; the original note provided for interest at 6 per cent and the renewal at 7 per cent. The arrangement to give the note and interim debenture so-called was made when the advances were obtained.

There can be no doubt that both the bank and the municipal officers who negotiated with it for the advances contemplated that they should bear interest and, although the note taken for them was invalid, having regard to the fact that it was given pursuant to an agreement made at the time when the moneys were advanced, I am disposed to treat it as evidence of an arrangement made at that time that the bank should receive interest at the rate stated in the note on the over-draft which resulted from the advances, which were made by the respondent bank honouring cheques drawn on the current account of the municipal corporation then devoid of funds.

The debentures intended to provide funds to pay the purchase money of the electric plant were not then available. The option held by the town was about to expire. The municipal council had determined to accept that option. It was, I think, within the implied authority of the mayor and secretary-treasurer as the executive officers of the municipal council to arrange with the bank for the advance of the purchase money pending the sale of the debentures and to agree to pay a reasonable rate of interest thereon until the proceeds of the debentures should be available and to undertake that the proceeds of the debentures when sold would be deposited with the bank to be applied in repayment of the advances. That was in fact the arrangement made. It was distinctly advantageous to the town, which was thus enabled to acquire the plant it had determined to buy and to dispose of its debentures gradually when and as the market enabled it to obtain the best prices, instead of being obliged to sell them immediately and *en bloc* for whatever price could be had for them on such a forced sale. Moreover, the municipality has had the benefit of interest at 5½ per cent on those debentures from the 1st of May, 1920.

Under the agreement made with the bank the proceeds

of the sale of the debentures were to be deposited with it to repay the advances. To that extent the debentures were practically held by the municipality in trust for and disposed of by it on account of the bank. I am of the opinion that by virtue of the agreement made at the time of the advances the bank is entitled on a contractual basis to claim interest at 6 per cent (the rate specified in the note) on the amount thereof from time to time remaining unpaid after crediting against them proceeds of the debentures deposited with it as of the respective dates when such deposits were made. The arrangement that such proceeds should be so applied and credited was definitely made, was eminently proper, and bound both the bank and the municipality. There never was any authority to depart from it. The apparent departure shewn by the bank's books is accounted for by the erroneous assumption that the note given by the municipal officers was valid and effectual to take the over-draft out of the general bank account of the municipality. It was not so. The over-draft in that account resulting from the advances remained and in my opinion it should be regarded as having been met by the deposits of the proceeds of the debentures when and as the same were made.

Under all the circumstances the judgment dismissing the first-named action should be vacated and judgment entered in lieu thereof declaring the two documents of the 30th of April, one in the form of a promissory note and the other so-called interim debenture, void; that the advances made by the bank created a valid indebtedness to it by the municipal corporation; and that so much of such indebtedness as from time to time remained unpaid carried interest at 6 per cent from the date at which the advances were made until the same were repaid by deposits of proceeds of debentures pursuant to the arrangement with the bank. If the parties cannot agree upon the amount that should be allowed for interest under this declaration an account to determine it may be taken according to the usual practice of the Superior Court in such cases.

What, if any, may be the bank's right in regard to interest on the over-draft in the municipality's current account, which will result from the application of the deposits of proceeds of debentures above indicated, is a question not before us in this litigation.

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The plaintiff is entitled to his costs throughout.

From what I have said in dealing with the action first named it is apparent that in my opinion there never was any *effective* diversion of the proceeds of the debenture loan authorized by by-law no. 28. Those proceeds were deposited in the bank account of the defendant municipality with the bank, as was agreed, and they will be applied, as they should have been under that agreement, towards repayment to the bank of the moneys advanced by it to provide the purchase price of the electric plant acquired by the town under the authority of by-law no. 28. It follows that the action to penalize the defendants cannot succeed.

The conduct of the defendants was, however, exceedingly careless, to say the least, in allowing the bank account of the municipality to continue to show an apparent application of the proceeds of the debentures issued under by-law no. 28 to purposes for which they were not intended. Had the document in the form of a promissory note given by the mayor and secretary-treasurer on the 30th of April, 1920, and its subsequent renewal been valid instruments a very strong case might have been made to support the plaintiff's action for penalties. In any event, the municipal officers were distinctly remiss in failing to see that the securities taken by the bank on the 30th of April were not cancelled or delivered up when the bank had received proceeds of debentures sufficient to satisfy the advances in respect of which they were given. While I would, for the reasons indicated, dismiss the plaintiff's appeal in the second-named action, under the circumstances the respondents are in my opinion not entitled to costs.

MIGNAULT J.—Il y a deux actions ici, et malgré la similitude des noms elles ont été intentées par deux personnes différentes. Dans la première en date, commencée le 23 août, 1921, Joseph-Magloire Riou, se donnant la qualité de cultivateur, contribuable et électeur propriétaire de la ville de Trois-Pistoles, était demandeur, la corporation de la ville de Trois-Pistoles, défenderesse, et La Banque Nationale, mise-en-cause. Dans la seconde, intentée le 26 septembre, 1921, le demandeur était Joseph Riou, qui se décrivait comme contribuable, propriétaire foncier et électeur municipal de la ville de Trois-Pistoles, et les dé-

fendeurs, Hormisdas Martin et al, étaient le maire, le secrétaire-trésorier et des conseillers municipaux de cette ville. Les deux actions ont été renvoyées tant par la cour supérieure que par la cour du Banc du Roi et les deux demandeurs en appellent à cette cour.

Comme il s'agit des même faits dans les deux actions, bien que les causes d'action soient distinctes, il vaut mieux commencer par une relation des faits aussi courte que possible.

Le conseil municipal de la ville de Trois-Pistoles adopta le 26 janvier, 1920, un règlement no 28, autorisant un emprunt par émission de débentures au montant de $22,500, dont $12,127 pour achat d'un réseau d'éclairage électrique, $2,873 pour amélioration et agrandissement de ce réseau, et $7,525 pour éteindre et consolider des emprunts temporaires. Ce règlement fut approuvé par les électeurs municipaux propriétaires et par le Lieutenant-Gouverneur en Conseil au désir de la loi.

La ville détenait alors une promesse de vente consentie par le propriétaire du réseau électrique qui expirait le 30 avril, 1920. Comme il fallait du temps pour vendre les débentures, il fut décidé d'acheter immédiatement le réseau, et une résolution du conseil de ville, en date du 6 avril, ratifia l'acte d'achat qui fut passé le même jour. Le vendeur fut payé au moyen de deux chèques signés au nom de la ville que la Banque Nationale consentit à honorer malgré que la ville n'eût pas en dépôt des fonds suffisants, l'entente entre le gérant de la banque et le secrétaire-trésorier étant que la banque serait remboursée par la vente des débentures aussitôt que cette vente pourrait s'effectuer. C'était, il semble, la coutume des administrateurs de cette ville d'emprunter pour rencontrer les dépenses courantes et à la rentrée des taxes de rembourser le prêteur, ou, comme le dit le secrétaire-trésorier, de payer les dépenses après qu'elles avaient été faites.

Le 30 avril, apparemment sur les instances du gérant de la banque, on donna à la banque un billet à demande pour $12,441.89, portant intérêt à 6 p. 100 par année. Ce billet fut signé au nom de la ville par Hormisdas Martin, maire, et Louis Riou, secrétaire-trésorier, qui prétendaient y être autorisés par le règlement du 26 janvier 1920. Ce règlement, cependant, n'autorisait pas la confection de ce

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billet et l'emprunt de la banque, et il est admis maintenant que le maire et le secrétaire-trésorier ont signé le billet sans y être autorisés soit par le règlement, soit par le conseil de ville.

En même temps que le billet, on remit à la banque, comme garantie, une prétendue débenture de la ville, signée par le maire et le secrétaire-trésorier, sans date d'échéance, qu'on appelle "débenture temporaire," au montant de $22,500, qu'on déclarait être émise en conformité du règlement no 28 du 26 janvier, 1920. Cette débenture est mentionnée au billet, mais elle est loin d'être conforme au règlement, car ce règlement permettait l'émission de débentures en trois séries de $100, $250, et $500 respectivement. Du reste, on ne pouvait émettre une débenture temporaire. Il n'est pas nécessaire d'insister, car de part et d'autre on reconnaît que cette débenture est nulle, comme on admet que le billet a été signé sans autorité.

Le billet et la débenture temporaire restèrent donc entre les mains de la banque, et nonobstant l'émission de cette débenture temporaire, les officiers de la ville émirent des débentures conformes au règlement, qu'ils mirent en vente. Le produit de la vente des débentures fut déposé au crédit du compte général de la ville à la banque, et la ville tira sur ce compte pour ses besoins ordinaires et la banque paya ses chèques, et pendant tout ce temps le billet donné pour l'achat du réseau d'éclairage électrique restait en souffrance. Le compte de banque fut vérifié et balancé de temps à autre et, tant à la banque qu'à la municipalité, on paraît avoir oublié que l'entente mentionnée plus haut était que l'avance faite par la banque pour l'achat du réseau d'éclairage électrique serait payée au fur et mesure de la vente des débentures. Au contraire, les officiers de la ville employèrent le produit de cette vente pour les besoins généraux de la ville—et ce à la connaissance et, il ne paraît pas douteux, avec le consentement du gérant de la banque—au lieu de s'en servir pour le remboursement de cette avance.

Le 30 juillet, 1921, le maire et le secrétaire-trésorier renouvelèrent, sans autorité spéciale, le billet de $12,441.89 par un autre billet de $9,005.31 portant intérêt de 7 p. 100, la différence ayant été payée à la banque à même les fonds de la ville en dépôt. A cette époque, toutes les débentures paraissent avoir été vendues, mais l'avance faite par la

banque pour l'acquisition du reseau électrique n'était pas remboursée. Le billet donné en renouvellement, qui représente la différence due sur cette avance, était encore en souffrance à la banque lorsque le gérant de la banque a été entendu comme témoin, le 16 mars, 1922.

Venons maintenant au mérite des deux actions.

Première action

L'appelant, Joseph-Magloire Riou, demande le maintien de l'injonction interlocutoire qui accompagnait son action, et il conclut en outre à ce qu'il soit déclaré que la confection, la signature et l'escompte à la Banque Nationale du billet de $12,441.89, en date du 30 avril, 1920, et le renouvellement de ce billet pour $9,005.31, en date du 30 juillet 1921, sont nuls, illégaux et *ultra vires* tant de la ville que du maire et du secrétaire-trésorier et à ce qu'ils soivent annulés à toutes fins que de droit.

La cour supérieure a reconnu la nullité des billets et de la débenture temporaire. L'honorable juge de première instance s'exprime ainsi:

> Il n'est pas besoin de dire que ces billets et ce simulacre de débenture étaient du papier sans aucune valeur.

Mais alors pourquoi cette cour n'a-t-elle pas déclaré cette nullité, objet de la demande, au lieu de renvoyer l'action du demandeur? Le jugement, dans un de ses considérants, dit

> qu'il n'y aurait aucun objet pratique et aucun intérêt à annuler les dits billets et l'escompte qui en a été fait.

Cependant si le billet est nul, l'escompte de ce billet ne saurait donner de droits à la banque, sauf à déterminer si celle-ci peut réclamer le remboursement de l'avance qu'elle a faite à la ville en payant les chèques de cette dernière au propriétaire du réseau électrique. Et l'action du demandeur ne contestait nullement le droit d'action qui pouvait résulter à la banque du paiement de ces chèques. L'annulation du billet et de l'escompte ayant été l'objet du débat judiciaire, et la défenderesse ayant soutenu la légalité de ce qui avait été fait, il semble évident que la cour supérieure ne devrait pas écarter cette question de nullité en disant qu'il n'y avait aucun intérêt à la trancher.

Reste la question de l'intérêt de 6 p. 100 stipulé par le premier billet et de 7 p. 100 par le billet donné en renouvellement. Si ces deux billets sont nuls comme non autorisés, cette stipulation d'un intérêt excédant l'intérêt légal est

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sans effet. D'ailleurs si la banque a un droit d'action contre la ville pour avoir payé ses deux chèques (ce qui semble probable, *Rolland* v. *Caisse d'Economie* (1), et cette créance ne dépend pas de l'escompte des billets, mais du paiement des chèques), il sera déterminé quand elle exercera ce recours si la ville lui doit de l'intérêt. Il ne s'agit ici d'aucune condamnation contre la ville en faveur de la banque, mais seulement de savoir si le demandeur était bien fondé à attaquer les billets et leur escompte.

La conclusion, c'est que l'on doit déclarer la nullité de ces billets et de la débenture temporaire y mentionnée. Mais il n'y a aucune utilité à maintenir l'injonction interlocutoire qui accompagnait l'action du demandeur, et qui a eu son effet pendant l'instance. On ne doit pas dans cette action interdire à la ville de payer la créance de la banque qui résulte du paiement par cette dernière des chèques de la ville en faveur des propriétaires du réseau d'éclairage électrique.

L'appel doit donc être maintenu avec dépens de toutes les cours en faveur de l'appelant et les deux billets, ainsi que la débenture temporaire, doivent être déclarés nuls.

Seconde action

Il s'agit ici de l'application de la loi 8 Geo. V (Qué.), c. 60, dont la section 1ère ajoute aux statuts refondus de la province de Québec la disposition suivante:—

5956t. Les deniers provenant d'un emprunt ou d'une émission d'obligations fait par toute municipalité constituée en corporation par une loi spéciale ou en vertu d'une loi générale, doivent être exclusivement appliqués aux fins auxquelles ils sont destinés, pourvu toutefois que, s'ils excèdent le montant requis pour ces fins, l'excédent puisse être appliqué à d'autres fins spécifiées dans un règlement subséquent du conseil, approuvé de la même manière que le règlement autorisant cet emprunt ou cette émission de bons. Tout membre du conseil qui, soit verbalement, soit par écrit, par son vote ou tacitement, autorise le virement de ces deniers, est personnellement responsable de toutes les sommes d'argent ainsi illégalement détournées de l'usage auquel elles étaient destinées, envers la corporation qui peut, par une poursuite en justice entraînant l'emprisonnement, les recouvrer du membre ou des membres du conseil en défaut.

Cette responsabilité est solidaire et s'applique au secrétaire-trésorier ou autre officier qui participe au virement illégal de ces deniers ou qui en devient l'auteur.

La poursuite en recouvrement de ces deniers peut être intentée également par tout contribuable ou par le ministre des affaires municipales.

La relation des faits au commencement de ce jugement

(1) 24 Can. S.C.R. 405.

démontre bien qu'il y a eu dans l'espèce virement de fonds. La partie du produit de la vente des débentures qui était destinée à payer le coût de l'acquisition du réseau d'éclairage électrique a été versée au compte général à la banque de la ville de Trois-Pistoles, et a été employée pour les besoins généraux de la ville. Le compte de banque, vérifié et balancé de temps à autre comme dit plus haut, en fait foi. Et il y a de plus un aveu de ce virement de fonds dans la lettre du secrétaire-trésorier au ministre des affaires municipales de la province en date du 14 juillet, 1921. Si l'article 5956t ne s'applique pas dans un tel état de choses, on peut très bien se demander quelle application il peut avoir. Il n'est pas nécessaire qu'il y ait eu crime ou malhonnêteté. Il suffit qu'on ait détourné les fonds empruntés de la destination que leur donnait le règlement d'emprunt. Or il n'est pas douteux que c'est ce qu'on a fait dans l'espèce.

Il importe peu que la ville ait payé le vendeur du réseau d'éclairage électrique. Elle l'a payé au moyen d'une avance faite par la banque qui a honoré ses chèques alors qu'elle n'avait pas de fonds à son crédit, et la ville n'a fait que changer de créancier. Il restait à payer sur cette avance, le 30 juillet 1921, une somme de $9,005.31.

Toutefois la condamnation à rembourser cette somme de $9,005.31 à la ville, pour qu'elle soit employée à éteindre la balance due par la ville sur cette avance, ne doit être prononcée que contre le maire Hormisdas Martin et le secrétaire-trésorier Louis Riou, mais ils devront y être condamnés solidairement. Il n'y a pas au dossier une preuve suffisante que les autres conseillers poursuivis aient participé à ce virement de fonds. Ceux-ci devront être déchargés de la condamnation demandée contre eux.

L'appel doit être accordé à l'égard de Hormisdas Martin et de Louis Riou, avec frais de toutes les cours contre eux.

MALOUIN J. (dissenting).—Je renverrais avec dépens l'appel dans ces deux causes pour les raisons données par le juge Dorion à la Cour du Banc du Roi.

Appeals allowed with costs.

Solicitor for the appellants: *S. C. Riou.*

Solicitors for the respondent La Banque Nationale: *Taschereau, Roy, Cannon, Parent & Taschereau.*

Solicitors for the respondents Martin et al: *Langlais & Côté.*

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*Mar. 9, 10.
*May 5.

HIS MAJESTY THE KING (PLAINTIFF) ... APPELLANT;

AND

EASTERN TERMINAL ELEVATOR COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional Law—Statute—Validity—Control and regulation of a trade—Canada Grain Act, 2 Geo. V, c. 27—S.s. (7) added to s. 95, 9-10 Geo. V, c. 40 s. 3.

Subsec. 7 added to sec. 95 of The Canada Grain Act, 1912, by 9-10 Geo. V, c. 40, sec. 3, is *ultra vires* of the Parliament of Canada. Anglin C.J.C. diss.

Judgment of the Exchequer Court ([1924] Ex. C.R. 176) affirmed.

The Canada Grain Act was passed in 1912 to control and regulate, through The Board of Grain Commissioners, the trade in grain. It provides that all owners and operators of elevators, warehouses and mills and certain traders in grain, shall be licensed; for supervision of the handling and storage of grain in and out of elevators, etc.; and prohibits persons operating or interested in a terminal elevator from buying or selling grain. It contains, also, provisions for inspection and grading. It was amended in 1919 by adding to sec. 95 subsec. 7 which provides that if at the end of any crop year in any terminal elevator "the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year" such surplus shall be sold for the benefit of the Board.

Held, Anglin C.J.C. dissenting, that this subsection is only a part of the scheme of the Act to control and regulate the business, local and otherwise, of terminal elevators which it is not within the competence of Parliament to enact.

Held, per Duff and Rinfret JJ., that the legislation is not warranted by the fact that three-fourths of the trade in grain is export out of Canada. If Parliament can provide for control of the local business under that condition it must have power to do so whatever may be the extent of the export trade.

Per Mignault J.—Nor can the legislation be supported as relating to agriculture (B.N.A. Act, 1867, sec. 85). The subject matter is only a product of agriculture and an article of trade. It is trade legislation and not for the support or encouragement of agriculture.

APPEAL from the judgment of the Exchequer Court of Canada (1) holding that the amendment in 1919 to the Canada Grain Act, sec. 95 (7), is *ultra vires.*

The material provisions of the Act are outlined, and the substance of the amendment set out in the above headnote and both appear at length in the reasons for judgment published herewith.

PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault and Rinfret JJ.

(1) [1924] Ex. C.R. 167.

Symington K.C. and *Varcoe* for the appellant. The legislation in question may be justified under one or more of several enumerations in sec. 91 of the B.N.A. Act and also as legislation ancillary to the objects of the whole Act. It is sufficient if it is reasonably, not necessarily absolutely, ancillary. *City of Toronto* v. *Canadian Pac. Ry. Co.* (1); *Attorney General for Canada* v. *Attorney General of Quebec* (2) at page 421.

The grain trade has achieved national dimensions and Parliament may regulate it for the good government of Canada. See *The King* v. *Manitoba Grain Co.* (3). See also *Gold Seal Co.* v. *Dominion Express Co.* (4) at page 456.

And see *Attorney General of North Dakota* v. *Farmers' Grain Co.* (5).

Hoskin K.C. for the respondent. The Parliament of Canada has no more power to enact subsec. 7 than it had in The Reciprocal Insurance Case, *Attorney General of Ontario* v. *The Reciprocal Insurers* (6).

The general power to make laws for peace, order and good government does not justify this legislation any more than in *The Insurance Case* (6); *The Board of Commerce Case* (7); or in the *City of Montreal* v. *Montreal Street Railway Co.* (8) nor does any of the provisions of sec. 91 B.N.A. Act.

THE CHIEF JUSTICE (dissenting).—I understand that a majority of the court has reached the conclusion that the judgment of the Exchequer Court holding s.s. 7 of s. 95 of the Canada Grain Act to be *ultra vires* must be affirmed. That the impugned subsection is not necessary to the project of the statute and that, taken alone, it encroaches on the provincial domain of local works and undertakings and property and civil rights (B.N.A. Act, s. 92 (10)-(13)), I conceive to be the basis of the judgment of the learned President of the Exchequer Court; and his view is shared by some members of this court. Another opinion condemns s.s. 7 as an incidental provision in a statute that does not

(1) [1908] A.C. 54.
(2) [1921] 1 A.C. 401.
(3) 32 Man. R. 52.
(4) 62 Can. S.C.R. 424.
(5) 258 U.S.R. 50.
(6) [1924] A.C. 328.
(7) [1922] 1 A.C. 191.
(8) [1912] A.C. 533.

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come under any of the heads of Dominion legislative jurisdiction enumerated in s. 91 and contains many essential features which impinge on the provincial field and are so interwoven with other provisions, possibly in themselves unobjectionable, as not to be readily severable from them. Such legislation, they maintain, cannot be supported under the general power vested in Parliament to legislate for the peace, order and good government of Canada.

No good purpose will be served by an elaborate exposition of the reasons which lead me respectfully to dissent from these views. I shall, therefore, merely outline them.

Assuming that the Canada Grain Act as a whole is *intra vires* of Parliament, s.s. 7 of s. 95 seems to me to be defensible as an incidental enactment designed to promote the attainment of the purposes of the Act. It not only provides for the obtaining of revenue from persons and corporations instrumental and beneficially interested in the carrying out of the scheme which it sanctions, and to be applied towards the cost of working it, but it furnishes, perhaps, the best possible security that one of the main operations for which the Act provides, namely, the cleaning of the grain so that it will actually conform to the grade and quality called for by the Government certificate based on its prior inspection, will be honestly and efficiently carried out. It removes the greatest inducement to fraud or carelessness in the cleaning. Moreover any property right of the respondent in the surplus grain left in its elevator is very doubtful. The subsection would also seem to be defensible as regulatory of the licensed elevator company's remuneration. I cannot regard it as confiscatory. *Toronto v. Can. Pac. Ry. Co.* (1). If Parliament has jurisdiction over the subject matter of the legislation as a whole, I am not prepared to condemn this ancillary provision as in excess of its powers.

The object of Parliament in enacting the Canada Grain Act was, in my opinion, to provide for the economical expeditious and profitable export and marketing abroad of what is to-day the most valuable product of Canada—the most important subject of its trade and commerce—its greatest source of wealth. The scheme of the Act is the

(1) [1908] A.C. 54, 58.

constitution and regulation of machinery to effectuate that purpose. It provides, as only the Dominion Parliament can, for the control and handling of the grain from the moment it leaves the hands of the grower—practically always in one of the Western Provinces—until its shipment in Ontario or one of the eastern provinces for the foreign market accompanied by a government certificate of its grade and quality, upon the acceptance of which in that market the Canadian shipper can depend. Main features of this scheme are the inspection of the grain in transit at Winnipeg by Dominion Government officials and the cleaning, storing and handling of it, subsequent to inspection, under such control and supervision that it can properly and safely be accompanied on shipment by the Government certificate of grade and quality which forms the basis of our Canadian foreign grain trade. No single province could legislate to cover this field. Concurrent legislation by all the provinces interested, if practicable (which I doubt), would be ineffectual to accomplish the purpose. Dominion legislation is required. Apart from the fact that a provicial certificate would not carry the weight and authority attaching to a certificate issued under Dominion sanction, the necessary control over transit and handling in different provinces and ultimate shipment could not be exercised under provincial legislation.

I regard the subject matter of the Canada Grain Act, therefore, as lying outside the scope of the powers entrusted to the legislatures by the sixteen heads of provincial legislative jurisdiction contained in s. 92. *Insurance reference* (1).

It is established that in legislation properly ascribable to the exercise of jurisdiction conferred by one of the enumerative heads of s. 91 of the B.N.A. Act, the Dominion Parliament is supreme. Such legislation, even in provisions properly ancillary, may deal with matters that would fall under provincial jurisdiction, if they were not appurtenant to a subject specifically assigned to the Dominion. Viscount Haldane, in the judgment cited, attributes the like right to Parliament

when the subject matter (of its legislation) lies outside all the subject matters enumeratively entrusted to the province under s. 92.

(1) [1916] 1 A.C. 588, 595.

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This view was reiterated by his Lordship in the *Lemieux Act Case* (1) when, referring to *Russell* v. *The Queen* (2), he says, at p. 410:

(1) [1925] A.C. 396. (2) [1882] 7 App. Cas. 829.

> It has been observed subsequently by this committee that it is now clear that it was on the ground that the subject matter lay outside provincial powers * * * that the Canada Temperance Act was sustained.

That Act undoubtedly deals with some matters *prima facie* within s. 92.

In alluding to the Lemieux Act judgment I feel that I should respectfully take exception to the suggestion there made, that the Board which decided *Russell* v. *The Queen* (2) must be considered to have had before their minds an emergency putting the national life of Canada in unanticipated peril (p. 416) as the occasion of the enactment by Parliament of the Canada Temperance Act, 1878. Referring to this supposed emergency his Lordship says, at p. 412:

> Their Lordships think that the decision in *Russell* v. *The Queen* (2) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen* (2), that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous.

I cannot find anything in the judgment delivered by Sir Montague E. Smith in the *Russell Case* (1) suggestive of such a view having been entertained by the Judicial Committee. On the contrary, the whole tenor of the judgment seems to me inconsistent with its having proceeded on that basis. I should indeed be surprised if a body so well informed as their Lordships had countenanced such an aspersion on the fair fame of Canada even though some hard driven advocate had ventured to insinuate it in argument.

By its concluding paragraph, s. 91 declares that

> any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The restriction of provincial legislative power, which this paragraph clearly imports, to " matters of a local or private

(1) 7 App. Cas. 829.

nature" has perhaps not always received the attention to which it is entitled when there has been question whether the subject matter of a particular statute falls within provincial or Dominion jurisdiction.

Although counsel for the appellants invoked several of the enumerated heads of Dominion legislative power—the regulation of trade and commerce, the raising of money by any mode or system of taxation, weights and measures (s. 91, s.s. 2, 3, and 17), inter- and extra-provincial transportation (s. 92 (10)), and agriculture (s. 95)—the only one of them within which, in my opinion, the Canada Grain Act as a whole might fall would be "the regulation of trade and commerce," unless, perhaps, inter- and extra-provincial transportation might also be invoked. Attempts to uphold Dominion legislation under head no. 2 of s. 91 have hitherto received little ecouragement from the Judicial Committee. *In Citizens' Ins. Co.* v. *Parsons* (1), power to regulate by legislation the contracts of a particular business such as the business of fire insurance, was held not to fall within it; but it was stated (p. 113) that it would include

> political arrangements in regard to trade with foreign governments requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern and, it may be, * * * general regulation of trade affecting the whole Dominion.

In *Montreal* v. *Montreal Street Railway Co.* (2), however, the power of Parliament when legislating under this head to make laws applicable throughout Canada in regard to matters which in each province are substantially matters of local or private interest was held to be subject to like restrictions as those which apply to its general power to legislate for the peace, order and good government of Canada in regard to subjects not enumerated in s. 91. Such legislation, as Lord Watson pointed out in the *Local Prohibition Case* (3), at p. 360,

> ought not to trench on provincial legislation in respect to any of the subjects enumerated in s. 92.

In *John Deere Plow Co.* v. *Wharton* (4), on the other hand, not only was the passage in *Citizens' Ins. Co.* v. *Parsons* (1), above referred to, approved (p. 340), but Viscount Haldane, while intimating that the head, "the regulation of

(1) [1881] 7 App. Cas. 96.
(2) [1912] A.C. 333, 344.
(3) [1896] A.C. 348.
(4) [1915] A.C. 330.

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trade and commerce," in s. 91 must receive a limited application, said that it

> at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Government can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are, therefore, of opinion that the Parliament had power to enact the sections relied on in this case.

But in the *Board of Commerce Case* (1), at p. 198, his Lordship stated that effect had been given the legislative power conferred by s.s. 2 of s. 91 in the *Wharton Case* (2) in aid of powers conferred by the general language of s. 91

> because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion possessed independently of it.

In the still later *Lemieux Act* (3) decision, at p. 409, his Lordship alludes to the *Wharton Case* (2) as illustrating "a really definite effect" given to the Dominion power over the regulation of trade and commerce

> when applied in aid of what the Dominion Government is specifically enabled to do independently of the general regulation of trade and commerce, for instance in the creation of Dominion companies with power to trade throughout the whole of Canada.

He adds, at p. 410, referring to *Attorney General for Canada* v. *Attorney General for Alberta* (4):

> It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied upon as enabling the Dominion Parliament to regulate civil rights in the provinces.

The incorporation of Dominion companies, which is held to be competent to Parliament, does not fall under any enumerative head of s. 91. It rests on the general power to make laws for the peace, order and good government of Canada in matters not entrusted to the provinces by s. 92. That power does not warrant an encroachment on the provincial domain (5). While it is held that the power to regulate trade and commerce, operating independently and as an enumerated head of Federal legislative jurisdiction, does not justify such an encroachment, the Board of Commerce case and the Lemieux Act decision are authority for the statement that it may do so in furtherance or aid

(1) [1922] 1 A.C. 191.
(2) [1915] A.C. 330.
(3) [1925] A.C. 396.
(4) [1916] A.C. 588, 596.
(5) [1896] A.C. 348 at p. 360.

of powers conferred by the general language of s. 91. With the utmost respect, I fail to appreciate the reasoning on which this view is based. If neither the power conferred by the general language of s. 91, nor the power under the enumerative head No. 2, to regulate trade and commerce, taken independently, warrants Dominion legislation which trenches on the provincial field, if both powers are subject in this respect to the like restriction (1), I find rather elusive and difficult to understand the foundation for the view that legislation authorized only by the former may be so helped out by the latter that invasion by it of the provincial domain may thus be justified. But the decisive authority of the judgments which have so determined cannot now be questioned in this court. I defer to it.

If the view be sound that the subject matter of the Canada Grain Act, because it has mainly to do with the export trade in grain and the inter-provincial handling of it, and because of the magnitude of that trade and its vital importance to the entire trade and commerce of Canada—to its very solvency as a nation—is not

> within the class of matters of a local or private nature comprised in the enumeration of classes of subjects assigned exclusively to the legislatures of the provinces.

but lies outside that field and accordingly falls within "the Dominion powers conferred by the general language of s. 91," may not "the regulation of trade and commerce," on the authority of the passages to which I have referred in the decisions of the Judicial Committee in the *Wharton Case* (2), the *Board of Commerce Case* (3) and the *Lemieux Act Case* (4) (p. 409), be invoked as "aiding Dominion powers conferred by the general language of s. 91" and "in furtherance of a general power which the Dominion Parliament possesses independently of it" to support any necessary interference by the provisions of that Dominion statute with what might otherwise be regarded as subjects of provincial legislative jurisdiction?

But for their Lordships' emphatic and reiterated allocation of "the regulation of trade and commerce" to this subordinate and wholly auxiliary function, my inclination would have been to accord to it some independent

(1) [1912] A.C. 333 at p. 344.
(2) [1915] A.C. 330.
(3) [1922] 1 A.C. 191
(4) [1925] A.C. 396.

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operation, such as was indicated in *Parsons' Case* (1), and within that sphere, however limited, to treat it as appropriating exclusively to the Dominion Parliament an enumerated subject of legislative jurisdiction with consequences similar to those which attach to the other twenty-eight enumerative heads of s. 91. It is incontrovertible and readily apprehended that the subject matter of head No. 2 must be restricted as was indicated in *Parsons' Case* (1) of which the authority has been frequently recognized in later decisions of the Judicial Committee. But that it should be denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction—that it must be excluded from the operation of the concluding paragraph of s. 91, except for the subsidiary and auxiliary purposes indicated in recent decisions,—these are propositions to which I find it difficult to accede. They seem to me, with deference, to conflict with fundamental canons of construction and with the views expressed in *Parsons' Case* (1). I am far from convinced that the regulation of Canada's export trade in grain, including all provisions properly ancillary to its efficient exercise, may not legitimately be held to come within Dominion legislative power conferred by clause no. 2 of sec. 91 operating independently as an enumerative head of federal jurisdiction. *Gold Seal, Limited* v. *Attorney General for Alberta* (2).

But apart from any assistance afforded by head No. 2 of s. 91, I would uphold the Canada Grain Act as a statute of which the

> subject matter lies outside all of the subject matters enumeratively entrusted to the provinces under s. 92,

in which case, said Lord Haldane in the *Insurance Reference* (3), "the Dominion Parliament can legislate effectively as regards a province." His Lordship cites *Russell* v. *The Queen* (4) as an instance of such a case.

In my view not only is the grain trade of Canada a matter of national concern and of such dimensions as to effect the body politic of the Dominion, but the provisions of the Canada Grain Act, with some possible exceptions, deal with matters which, as envisaged by that legislation, do not

(1) 7 App. Cas. 96.
(2) [1921] 62 Can. S.C.R. 424, 456-7.
(3) [1916] 1 A.C. 588, at p. 595.
(4) 7 App. Cas. 829.

come within that class of matters of a local or private nature * * * assigned exclusively to the legislatures of the provinces. As to most of them there is, therefore, no encroachment on the provincial domain. To enable the Dominion Government to exercise legislative control over links in the inter-provincial and extra-provincial operations of handling and transporting export grain so important as terminal elevators, I cannot think it necessary that each of them should be declared by Parliament to be a work for the general advantage of Canada, or for the advantage of two or more provinces, although such declarations might, no doubt, with propriety be made. Any sections of the Canada Grain Act which may involve undue invasion of the provincial field could probably be readily identified and severed. None such has been shewn to be vital to the scheme of the Act as a whole.

So regarded the Canada Grain Act may, I think, be supported without having recourse to the existence of abnormal conditions involving some extraordinary peril to the national life of Canada, recently indicated as a justification for the invasion by Parliament of the provincial field when legislating under the general power conferred by s. 91. But if there should be in the statute provisions essential to its effective operation for the purpose aimed at which must be regarded as trenching on the provincial domain, and if it should therefore be deemed necessary to meet this test of their validity, I know of nothing more likely to create a national emergency in Canada than a judicial determination that the Dominion Parliament lacks the power to legislate for the regulation of the export grain trade of the country. It cannot be that Parliament must defer legislative action until a national emergency with attendant disaster has developed. To protect the national interest it assuredly may anticipate and ward off such an evil. There is an emergency connected with the movement of the grain crop at the end of each season incontrovertibly greater than any which can be supposed to have existed in 1878 with regard to the liquor traffic, and it is noteworthy that this emergency is specially recognized by Parliament in the provisions of the Bank Act for relaxing the restrictions upon the issue of paper money. Regarded as legislation essential to prevent such a financial crisis as would

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be not unlikely to ensue upon the relinquishment, voluntrary or forced, of Dominion control over the grain trade, the Canada Grain Act might well withstand the test of validity suggested in the *Board of Commerce* (1), the *Fort Frances* (2) and the *Lemieux Act* (3) cases.

But, as already stated, that Act can, in my opinion, be successfully defended as a whole on the broader ground that, in the aspect in which they were viewed by Parliament, its vital provisions deal not with matters of a local or private nature properly the subject of provincial legislative jurisdiction, but rather with matters of Dominion importance and concern and, therefore, do not involve such interference with provincial jurisdiction as would prevent Parliament enacting them under its general power

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects * * * assigned exclusively to the legislatures of the provinces.

I accept the conclusion of the learned President of the Exchequer Court as to the basis on which the defendant's liability should be computed.

I would for these reasons allow this appeal and maintain the plaintiff's action for the amount to be settled as indicated in the judgment of the President of the Exchequer Court.

IDINGTON J.—I agree with the judgment of the learned President of the court below who tried this action, that the amendment to the Grain Act, upon which the action is rested, is *ultra vires,* and hence I would dismiss this appeal with costs.

DUFF J.—The Grain Act was passed in 1912. The authors of the legislation proceeded upon the view upon which the Dominion Parliament had acted in 1910 in enacting the Insurance Act, that, in exercise of the powers given by sec. 91 (2), for the regulation of trade and commerce, the Dominion Parliament could, by a system of licences and otherwise, regulate individual trades, both locally and in respect of interprovincial and external trade. The Act provides for a Board, to be known as the Board of Grain Commissioners, to be appointed by the Governor in Coun-

(1) [1922] 1 A.C. 191. (2) [1923] A.C. 695.
(3) [1925] A.C. 396.

cil, and this Board is invested with very wide powers. By sec. 20, the Board is empowered, with the consent of the Governor in Council, to make rules and regulations for the government, control and licensing of terminal and other elevators. By sec. 119, the Board shall—

(*a*) require all track-buyers and owners and operators of elevators, warehouses and mills, and all grain commission merchants and primary grain dealers to take out annual licences;

(*b*) fix the amount of bonds to be given by the different operators of elevators, mills and flat warehouses and by grain commission merchants, track-buyers and primary grain dealers;

(*c*) require the person so licensed to keep books in form approved by the Board;

(*d*) supervise the handling and storage of grain in and out of elevators, warehouses and cars;

(*e*) enforce rules and regulations made under this Act.

And by subsection (4), any person who engages in any business for which a licence is required, without obtaining such a licence, is declared guilty of an offence. Section 128 (2) specifically provides for the licensing of the owners of terminal elevators as public warehousemen. By sec. 123

no person owning, managing, operating or otherwise interested in any terminal elevator shall buy or sell grain at any point in the Eastern or Western Inspection Division,

subject to certain exceptions not material. By sec. 153 it is specifically provided that the owner or lessee of a country elevator must be licensed to receive, ship, store or handle grain. By sec. 156 the Board is specifically authorized to promulgate regulations respecting country elevators.

In addition to the power of regulation conferred upon the Board, the Act contains elaborate substantive provisions defining the duties of persons engaged in the business of operating elevators, in respect of the cleaning of grain, the grading of it, the storage of it; defines the effect of warehouse receipts, the rights of holders of them.

By secs. 210 *et seq.*, provision is made for licensing persons in the Western Division to carry on the business of selling grain on commission; and persons not so licensed are prohibited from engaging in that occupation. By secs. 218 *et seq.* there is provision for licensing track-buyers, and prohibition against engaging in the occupation of a track-buyer without such a licence. By secs. 219 (*a*) *et. seq.* there is a prohibition against carrying on the business

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of a primary grain dealer without first having obtained a licence to do so from the Board.

The Act is an attempt to regulate, directly and through the instrumentality of Grain Commissioners, the occupations mentioned. It is also an attempt to regulate generally elevators as warehouses for grain, and the business of operating them; and it seems, *ex facie*, to come within the decision of the Judicial Committee, *Attorney General for Canada* v. *Attorney General for Alberta* (1), condemning the Insurance Act of 1910 as *ultra vires*.

Mr. Symington, in a very able argument, attempted to support the Act on the ground that the trade in grain is largely an external trade (between seventy and eighty per cent, apparently, of the grain produced in the country is exported); and that the provisions of the Act are, on the whole, an attempt to regulate a branch of external trade, the provisions dealing with local matters being, as a rule, subsidiary and reasonably ancillary to the main purpose of the Act.

It is undeniable that one principal object of this Act is to protect the external trade in grain, and especially in wheat, by ensuring the integrity of certificates issued by the Grain Commission in respect of the quality of grain, and especially of wheat; and the beneficent effect and the value of the system provided by the legislation as a whole is not at all disputed by anybody. I do not think it is fairly disputable, either, that the Dominion possesses legislative powers, in respect of transport (by its authority over Dominion railways, over lines of ships connecting this country with foreign countries, over navigation and shipping); in respect of weight and measures; in respect of trade and commerce, interpreted as that phrase has been interpreted; which would enable it effectively, by properly framed legislation, to regulate this branch of external trade for the purpose of protecting it, by ensuring correctness in grading and freedom from adulteration, as well as providing for effective and reliable public guarantees as to quality. It does not follow that it is within the power of Parliament to accomplish this object by assuming, as this legislation does, the regulation in the provinces of particular occupa-

(1) [1916] 1 A.C. 588.

tions, as such, by a licensing system and otherwise, and of local works and undertakings, as such, however important and beneficial the ultimate purpose of the legislation may be. There are, no doubt, many provisions of this statute which, as they stand, can be sustained; with them we are not concerned at this moment. The particular provision which is sought to be enforced is one of a series of provisions which are designed to regulate elevators and the occupations of those who make it their business to operate elevators. The particular provision, if it stood alone, might, perhaps, be sustained as a tax, but it cannot be separated from its context; it is only one part of a scheme for the regulation of elevators. There is one way in which the Dominion may acquire authority to regulate a local work such as an elevator; and that is, by a declaration properly framed under section 92 (10) of the B.N.A. Act. See *Union Colliery Co. of B. C.* v. *Bryden* (1). This, of course, is not to say that there may not be elevators subject to Dominion control, as being, for example, adjuncts of the undertaking of a Dominion railway or of a company operating a line of steamships under Dominion jurisdiction; but the general regulation of all elevators is a different matter.

There are two lurking fallacies in the argument advanced on behalf of the Crown; first, that, because in large part the grain trade is an export trade, you can regulate it locally in order to give effect to your policy in relation to the regulation of that part of it which is export. Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy per cent of the whole, it must be equally operative when that percentage is only thirty; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried

(1) [1899] A.C. 580 at p. 585.

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on. Precisely the same thing was attempted in the Insurance Act of 1910, unsuccessfully. The other fallacy is (the two are, perhaps, different forms of the same error) that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case* (1) and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case* (2), where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

In one respect there is a close analogy between this case and the *Montreal Street Railway Case* (2). The expedient which their Lordships there pointed out as the appropriate one in order to enable the Dominion to acquire the authority it was seeking to exercise, is precisely that by which the Dominion could invest itself with the authority over such elevators as it might be considered necessary to regulate; that is to say, by resorting, as already suggested, to the power conferred by section 92 (10) to assume, through the procedure there laid down, jurisdiction in respect of "local works."

Fortunatley, however, to repeat what has been said above, the control possessed by the Dominion over the subject matters mentioned, and especially over transport (both land transport and water transport) and over external trade, would really appear to be amply sufficient to enable the Dominion, by appropriately framed legislation, effectively to secure the essential objects of this statute.

The appeal should be dismissed with costs.

MIGNAULT J.—In this case, His Majesty the King, in right of the Dominion of Canada, the appellant, claims from the respondent, the Eastern Terminal Elevator Company, Limited, operating, under a license issued by the

(1) [1922] 1 A.C. 191. (2) [1912] A.C. 333.

Board of Grain Commissioners, a public terminal elevator at Port Arthur, Ontario, the surplus of grain in excess of one-quarter of one per cent, alleged to be 1,107,330 pounds, found in its elevator at the close of the crop year ending 31st August, 1920, or the sum of $43,431.20, value of this surplus of grain. The action is based on subsection 7 of section 95 of The Canada Grain Act (2 Geo. V, (Can.) ch. 27 (1912)), which was added to the Act by 9-10 Geo. V, ch. 40, sec. 3 (1919), and further amended by 10 Geo. V, ch. 6, sec. 1 (1919, 2nd session). Subsection 7 in its present form, reads as follows:—

7. In the month of August in each year, stock shall be taken of the quantity of each grade of grain in the terminal elevators; if in any year after the crop year ending the thirty-first day of August, 1919, the total surplus of grain is found in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during the crop year, such excess surplus shall be sold annually by the Board of Grain Commissioners and the proceeds thereof paid to the said Board. Such proceeds shall be applied towards the cost of the administration of *The Canada Grain Act* in such manner as the Governor in Council may direct.

The respondent denies that there was any such surplus of grain in its elevator on August 31, 1920, and, in the alternative, alleges that the said subsection, as well as *The Canada Grain Act* itself, always were and are now *ultra vires* of the Parliament of the Dominion.

The first point involves the mode of calculation of the surplus of grain in excess of one-quarter of one per cent. It will however not be necessary to deal with this question if, on the second point, the conclusion be that subsection 7, or *The Canada Grain Act* of which it is a part, was not competently enacted by Parliament. The latter question therefore must be first considered.

Before doing so, however, it will be convenient to state how the grain trade of Canada is carried on under the authority of The Canada Grain Act, which was first enacted in 1912.

This statute divides Canada into two divisions for inspectional purposes, the Western division (by for the most important) comprising that part of the Dominion to the west of the cities of Port Arthur and Fort William, these two cities included, and the Eastern Division which lies to the east of Port Arthur.

The practice followed in the Western Division, from the time the grain leaves the farm until it reaches a terminal

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elevator and is shipped to its ultimate market, may be conveniently stated in the language of the learned trial judge.

The producing farmer usually sells, or stores, his grain to or in what is termed a country elevator, the business of which is to store grain for a charge, or to purchase the same outright. He may store on the basis of receiving the identical grain, or grain of the same grade, at a terminal elevator. He may also load his grain on a car consigned to a commission agent to sell for his account. In due course, the grain is forwarded to a terminal elevator at say Port Arthur, and in transit thereto, passes through Winnipeg, where the first inspection under the Grain Act takes place. An inspection certificate issues from the office of the chief inspector of grain of the Western Division, setting forth for whose account the grain was inspected, the number of the car, the railway station shipped from, the kind of grain, the grade, and the percentage of dockage, if any, "dockage" meaning the inspectors' estimate of unmarketable grain and foreign matter in the carload, which must be removed by the terminal elevator when cleaning the same. This non-commercial grain and foreign matter when separated from the grain at the terminal elevator are called "screenings." If the grain is considered sufficiently clean by the inspector, or is estimated not to contain more than three-fourths of one per cent of foreign or unclean matter, the carload is marked as "clean," and is stored with grain of the same kind and grade when it reaches a terminal elevator.

The inspected car then proceeds to Fort William or Port Arthur, the inspectors' certificate reaching there at the same time or earlier, and then being in the possession of an officer of the Board. The grain is subsequently weighed into an elevator, and pursuant to the Grain Act a certificate of weight is issued. This certificate shews the number of the car, the place where weighed, the date, the kind of grain and the weight of the carload of grain. Thereupon, and in conformity with the Grain Act, the receiving elevator company issues to the owner of the grain a terminal warehouse receipt to the effect that it has received and holds, subject to the order of the owner, a specified quantity of a definite kind of grain expressed in bushels of an inspected and designated grade, to be stored with grain of the same grade. The quantity is the weight of the carload, less the deduction for dockage. This grain, or grain of the same grade, is deliverable upon the return of the warehouse receipt, properly indorsed by the holder thereof, and upon payment of storage and other charges. The certificate further states that the grain will be kept stored and insured for the benefit of the person to whose order the receipt is issued, or his assignee, and in conformity with the provisions and conditions of the laws of Canada relating to the warehousing of grain. The evidence shews that Canadian grain is usually sold in international markets, on the certified grades established by the inspection under the Grain Act, and the certificate shewing the grades accompanies the shipment to the ultimate market. Grain exported from Australia, India or Argentina is usually purchased on the basis of fair average quality on arbitration.

A concrete case introduced in evidence illustrates the practice with respect to "dockage." Car No. 303,015 G.T.P. was inspected at Winnipeg and the certificate of inspection shews the grade to be Manitoba 3 Northern and

the dockage is placed at 4½ per cent. When the car reached Port Arthur, the grain was weighed in the elevator and a certificate was issued giving the contents of the car as wheat and the weight of the grain as 72,100 lbs., this weight including the dockage. A warehouse receipt was then given by the respondent to the owner of the grain acknowledging receipt from car 303,015 of

exactly 1,147 bushels 40 pounds exactly of 3 Nor. inspected grade to be stored with grain of the same grade by inspection.

The 1,147 bushels, 40 pounds, represented the 72,100 pounds of wheat, less the dockage which was also received by the terminal elevator company, but for which no warehouse receipt was given. The dockage was removed from the grain by the process of screening and left a residue termed "screenings."

The course of dealing with regard to the screenings, the admission of the parties shews, was that a return had to be made by the elevator company for the balance of the screenings after deducting one half of one per cent of the gross weight of the car for waste. The screenings were rescreened and commercial grain was recovered therefrom. This commercial grain was placed in the storage bins containing grain corresponding in grade, and the residue of the screenings was put in separate bins used exclusively for screenings. During the crop year ending the 31st of August, 1920, the respondent made a return to the owners of the grain for a balance of screenings of $33,384.17 representing 3,186,894 pounds of screenings.

It should be remarked that at terminal points like Port Arthur and Fort William there are also private elevators, said to be considerably more numerous than the public ones. The terminal elevators are operated under a licence granted by the Board of Grain Commissioners, the private elevators are not mentioned in the Grain Act except for a passing reference in subsection 5 of section 57.

The admission of the parties, after referring to the method of ascertaining the surplus of grain contended for by the appellant, states that if that method be correct, there was in the respondent's elevator, on the 31st of August, 1920, a surplus of grain (termed in the evidence "overage") in excess of one-quarter of one per cent of the gross amount of the grain received in the elevator during

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the preceding crop year, and that the value of such surplus was $49,027.07. The appellant and the Board of Grain Commissioners, the admission states, assert no claim as to this surplus, except in so far as the claim may be justified under subsection 7 of section 95 of the Grain Act, and unless this subsection was within the jurisdiction of the Parliament of Canada.

The learned trial judge, the President of the Exchequer Court, was of opinion that subsection 7 is *ultra vires*. He however, in view of a possible appeal, passed upon the different modes of calculating the surplus of grain, and gave the preference to one of the modes suggested by the respondent. The appellant's action was dismissed with costs. In view of the conclusion to which I have come on the constitutional question, it will be unnecessary to deal with these modes of calculating the surplus of grain.

Coming now to the constitutional point, the scope of the Canada Grain Act must be stated as briefly as possible. A complete analysis of the statute with its 248 sections would necessarily be very lengthy; and it has therefore seemed preferable to emphasize its main features, rather than to follow their application in minute detail to such a complex problem as the Canadian grain trade.

This problem, being largely a geographical one, the Act divides the Dominion into the two inspection divisions to which I have already referred (section 21). And as the economical transportation of the grain to its market is one of the chief objects which Parliament has in view, the statute deals with terminal elevators for the storage of the grain (sections 122 *et seq.*), the most important of which are at the head of the great lakes, at Port Arthur and Fort William in Ontario, and with country elevators along the railways and near the farms (sections 151 *et seq.*) for the receipt and storage of the grain prior to its shipment en route for the seaboard. We are told that these country elevators in Manitoba, Saskatchewan and Alberta number some 4,000. We are also informed that ninety per cent of the shipments out of the terminal elevators are made by water.

The general administration of the Grain Act is entrusted to a Board called the Board of Grain Commissioners for

Canada, consisting of three commissioners (one termed the Chief Commissioner), appointed by the Governor-in-Council, who hold office during good behaviour for a period of ten years, subject to removal by the same authority for cause (sections 3 *et seq.*). The duties of this Board are multifarious and are explained in a large number of sections to which it is impossible to refer in detail.

Two great objects are dealt with throughout the Act, the inspection of the grain and its proper grading.

For the inspection of the grain the Act provides for chief inspectors, inspectors and deputy inspectors (section 24). The two latter are granted a certificate qualifying them to act as inspectors after an examination before a board of examiners (sections 40 *et seq.*), and the chief inspector is selected among those who hold an inspector's certificate (section 44), so the qualifications of the inspecting officers are thus carefully safeguarded. The duty of the inspecting officer is to inspect the grain "when called upon to do so by the owner or possessor thereof or his authorized agent" (section 27). While this language seems to make the inspection optional in so far as the owner is concerned, and while nothing in the Act prevents any person from selling or buying grain by sample regardless of its grades (section 57), the inspection system, in practice, seems to be a necessary requirement of the great bulk of transactions in grain. All grain placed in public or terminal elevators is subject to inspection (section 90), and the certificate of inspection in all cases accompanies the grain to its destination (section 97).

The inspection determines the grade of the grain which is specified in the certificate granted by the inspecting officer. The Act contains elaborate provisions as to the grading of the different qualities of grain (sections 105 *et seq.*). All grain produced in Manitoba, Saskatchewan and Alberta and in the Northwest Territories (and much the larger part of Canadian grain is produced in these provinces and territories), passing through the Winnipeg district, is inspected at Winnipeg or a point within the district, and on grain so inspected the inspection is final (section 91). All grain of the same grade is kept together and stored in the terminal elevators only with grain of a similar grade (section 94). It is binned under the direc-

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tion, supervision and control of the inspecting officer, who has full control of all grain in terminal elevators, and no grain is shipped out of, transferred or removed from any terminal elevator without his supervision (section 95). The Act provides for the appointment of a grain survey board to which an appeal against the grading of grain may be brought by the owner or possessor of the grain (sections 101 *et seq.*). It also makes provision for the granting of warehouse receipts for the grain stored in terminal elevators (sections 127 *et seq.*).

I have mentioned several times the country and terminal elevators. The latter are often called public elevators as distinguished from private elevators. These public elevators include every elevator or warehouse which receives grain for storage from the western inspection division after it has been inspected under the Act (section 2, subsection (*w*)). There are, the evidence shows, a large number of private elevators at terminal points. I have found nothing in the Grain Act specifically dealing with them. But the Act mentions hospital and mill elevators, the names of which are sufficiently descriptive. There are also what are known as flat warehouses (sections 180 *et seq.*). The owner of a terminal elevator cannot buy or sell grain (section 123), but this prohibition is not extended to the country elevators.

The licensing system under the Act is most elaborate, and here we find compulsory features which shew that the statute really regulates the Canadian grain trade. Section 119 states that the Board of Grain Commissioners shall

> require all track buyers (these are persons who buy grain by the car load, see sections 218 *et seq.*), and owners and operators of elevators (this term is possibly wide enough to include private elevators), warehouses and mills, and all grain commission merchants and primary grain dealers to take out annual licences.

The requirement of a license is again specifically mentioned in section 122 for terminal elevators, in section 124 for hospital elevators, in sections 153 and 238 for country elevators, in section 218 for track buyers, and in section 219a for primary grain dealers. Licences granted can be revoked by the Board for cause.

The Act contains several other prohibitions and imposes penalties for various offences with which it is impossible

to deal in detail without unduly lengthening this statement of the main features of the statute. Enough, however, has been said to shew that the Grain Act is an elaborate scheme of regulation of the Canadian grain trade.

The learned trial judge restricted his decision on the constitutional question to subsection 7 of section 95 of the Canada Grain Act which he held *ultra vires* on the ground that it dealt with a subject matter, the right of ownership of the surplus of grain, falling within the provincial domain. He stated that this subsection is

> in essence legislation dealing with property and civil rights, and is not a regulation of trade and commerce within the meaning of section 91, No. 2 of the British North America Act.

He also found that it was an attempt to regulate profits or dealings which give rise to profits. The legal title to the grain surplus in question in this case was, he said, in the defendant which had extinguished every other right or title in the surplus, and no other claim or title therein was put forward, or could be put forward, except by the Board under this legislation. This was not a case, it seemed to him, where the Grain Act purported to do something coming within the powers assigned to Parliament by section 91 of the B.N.A. Act, but which incidentally and necessarily in its operation came in conflict with property and civil rights. It was not the case, he added, of an ancillary provision, encroaching upon matters assigned to the provincial legislatures, but required to prevent the scheme of such a law being defeated, nor was it the case where, in order to operate a validly enacted scheme, procedure must be adopted to make effective that law even though invading the legislative field of the legislatures in respect of property and civil rights.

Elsewhere the learned judge said:—

> It was contended before me that the export of Canadian grain was a matter of national concern, by reason of its value and volume, by itself, and in relation to the total export trade of Canada; that such grain was sold in international markets as inspected and graded under the Grain Act, much to the advantage of Canadian grain growers and exporters, and that the whole enactment should be regarded in its entirety as a legislative scheme evolved in the interest of a primary industry of great magnitude, and for high national interests, and it was urged that under head 2 sec. 91, "regulation of trade and commerce," there was legislative authority for the Grain Act, and the particular section under consideration. This view is not without force and must be seriously considered. The validity of the Grain Act as a whole is not challenged and I am not

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called upon to decide whether the more prominent features of the Act, such as the inspection, grading, and weighing of grain are within the legislative competence of Parliament by virtue of section 91 (2) or otherwise.

It appears to me that such provisions of the Grain Act as might be said to constitute its main purposes and objects might stand, while others might fall for want of jurisdiction, and without destroying the vital parts of the legislative scheme. The general scheme of the Act may be of paramount national concern and of national dimensions, and assuming its principal provisions to be within the legislative authority of the Dominion Parliament, such as inspecting, grading, weighing, cleaning, railway car facilities, etc., it does not, I think, follow that subsec. 7 of sec. 95 is a necessary factor in that scheme. That is to say the Grain Act might operate in the way of a regulation of trade and commerce, as well without this section as with it, as in fact it did for many years. If the general scheme of the Act comes within the head of "regulation of trade and commerce" or any other part of sec. 91, that might stand and function by itself, without subsec. 7 of sec. 95. That legislation, it seems to me, assumes to do something unrelated to the general scheme and purposes of the Grain Act.

If it be conceded that Parliament can deal with the regulation of the Canadian grain trade, with the licensing of those who take part in it, with the prohibition to operate terminal or country elevators without a licence, and with the operation generally of these elevators, I confess that I would have great difficulty in following the contention that Parliament cannot also deal, as was done by subsection 7, with the disposal of the surplus of grain, if any, which remains in a public terminal elevator after the latter has delivered all the grain for which it has issued warehouse receipts. It is rather because subsection 7 is a part of such a statute as I have described that I think its validity cannot be supported.

I am constrained to this conclusion by successive pronouncements of the Judicial Committee; *Attorney General for Canada* v. *Attorney General for Alberta* (1); *In re Board of Commerce Act* (2); *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (3); *Attorney General for Ontario* v. *Reciprocal Insurers* (4); culminating in its very recent decision in *Toronto Electric Commissioners* v. *Snider* (5), where all the pertinent judgments of the Board were fully discussed and applied. These judgments have settled the law. In this case all the familiar contentions were ad-

(1) [1916] 1 A.C. 588.
(2) [1922] 1 A.C. 191.
(3) [1923] A.C. 695.
(4) [1924] A.C. 323.
(5) [1925] A.C. 396.

dressed to us by the appellant's counsel in support of this legislation, but they are all finally answered by these decisions. It follows that the statute under consideration cannot be sustained on the ground that it is a regulation of trade and commerce or that it is for the general advantage of Canada. Nor can it be contended that it was designed to cope with a national emergency. In my opinion, this legislation cannot be brought under any of the heads of section 91 of the British North America Act, as they have been construed, and it would certainly, within any of the provinces, have been competent provincial legislation under section 92. This is decisive of the question at issue.

I have not overlooked the appellant's contention that the statute can be supported under section 95 of the British North America Act as being legislation concerning agriculture. It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term.

I express no opinion on the question whether the grain surplus dealt with by subsection 7 is the property of the respondent. I merely agree, for the reasons above stated, with the holding of the learned trial judge that this subsection is *ultra vires* and that the action fails.

The appeal should be dismissed with costs.

RINFRET J.—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitor for the appellant: *E. L. Taylor.*
Solicitors for the respondent: *Pitblado, Hoskin & Co.*

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*June 11.
*June 12.

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

STEVE SCHROBOUNST AND DOMINICA SCHROBOUNST (SUPPLIANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Public work—Employment—Exchequer Court Act s. 20 (c)—R.S.C. [1906] c. 140; 7-8 Geo. V, c. 23, s. 2—Statute—Construction.

By sec. 20 (c) of the Exchequer Court Act as amended in 1917 the Exchequer Court can hear and determine.

(c) Every claim against the Crown arising out of any death or injury to the person or the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any Public Work."

As this section now stands (since the amendment of 1917) it is no longer necessary, in order to create liability, that the person or property injured should be upon the public work at the time; the words "upon any public work" qualify the employment, not the physical presence of the negligent officer or servant thereon and the driver of a motor truck (employed by a government department) carrying government employees to a public work is so employed.

APPEAL from the judgments of the Exchequer Court of Canada in favour of the respondents.

The only question raised on the appeal is that of the construction of sec. 20 (c) of The Exchequer Court Act quoted in the above head-note.

O. M. Biggar K.C. and *Varcoe* for the appellant. The amendment to sec. 20 (c) does not materially affect the construction formerly placed upon it in such cases as *Piggott* v. *The King* (1). The word "upon" still has a geographical significance. See *Lowth* v. *Ibbotson* (2); *Back* v. *Kerr* (3).

Marquis K.C. and *Louis Coté* for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from the judgment of the learned President of the Exchequer Court dismissing a demurrer which the Crown pleaded to the petition of right of the suppliants.

PRESENT:—Anglin C.J.C. and Duff, Mignault and Rinfret JJ. and Magee J. *ad hoc.*

(1) 53 Can. S.C.R. 626. (2) [1899] 1 Q.B. 1003.
(3) [1906] A.C. 325.

In substance, the suppliants alleged that, on or about the 15th day of January, 1924, owing to the negligence of a servant of the Crown, to wit the driver of a motor truck, the property of the Crown and which was used at the time of the accident in transporting workmen in the employment of the Department of Railways and Canals to the public work carried on at Thorold, Ontario, the suppliant Dominica Schrobounst was struck and seriously injured by the said motor truck.

The demurrer of the Crown set forth that the petition of right did not allege or disclose any facts giving rise to any obligation or liability on the part of His Majesty to pay to the suppliants the damages claimed.

The question turns on the proper construction of subsection (*c*) of section 20 of the Exchequer Court Act, as amended in 1917. This subsection reads as follows:

> The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters, * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

We are of the opinion that the words " upon any public work " in subsection (*c*) qualify not necessarily the presence but the employment, of the negligent servant or officer of the Crown. The driver of the motor truck was employed upon the public work in question; and this is sufficient to give the suppliants the right of action they assert.

If it had been intended to restrict the application of the subsection to the case in which the person causing the injury was at the time physically present " upon any public work " these latter words would more properly have been inserted immediately after the word " while," where their significance would have been unmistakable. The construction placed on the words " on any public work " in *Piggott's Case* (1) and other cases decided on the subsection as it stood prior to 1917, proceeded upon and was necessitated by their collocation with the words " person or property."

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondents: *Marquis & Peplar.*

(1) *Piggott* v. *The King*, 53 Can. S.C.R. 626.

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LUSCAR COLLIERIES LIMITED.....APPELLANT;

AND

N. S. McDONALD AND THE CANADIAN NATIONAL RAILWAY COMPANY.....RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS

Constitutional law—Railway—Agreement—Provincial line—Constructed by a coal company—Operated by a federal railway company—Applicability of the federal Railway Act—Power of federal parliament to pass s.s. c. of s. 6 of the Railway Act, (D) 1919—B.N.A. Act, 1867, s. 92, s.s. 10, par. c.

The appellant is a colliery company and had been authorized by a statute (c. 78 of 1921) of the province of Alberta to construct a railway known as the Luscar Branch to connect with the railway of the Mountain Park Coal Company, Limited, at or near Leyland station. In April, 1923, the appellant entered into an agreement with the Mountain Park Coal Company, the Grand Trunk Pacific Branch Lines Company and the Grand Trunk Pacific Company, the two latter companies now represented by the Canadian National Railways, for the construction and operation of this railway. It also submitted its railway to the operation of certain agreements between the three other companies concerning the construction and operation of the railway of the Mountain Park Coal Company. The effect of all these agreements is that these railways were built by the Grand Trunk Pacific Branch Lines Company at the expense of the two colliery companies, the cost of construction to be reimbursed to the latter by certain rebates allowed them on the shipment of all coal over these railways, it being agreed that when the companies are fully reimbursed the railways will become the property of the Grand Trunk Pacific Branch Lines Company. The Grand Trunk Pacific Company undertook to operate the railways and to furnish such rolling stock as would be necessary. In the agreement made by it with the three other companies, the appellant consented to any necessary application of the Grand Trunk Pacific Branch Lines Company (or the Canadian National Railways) to the Board of Railway Commissioners for Canada for approval of the location of the Lusgar branch and the maintenance and operation thereof by the Grand Trunk Pacific Branch Lines Company. The respondent McDonald was the owner of Tams coal lease, Mountain Park Branch, Canadian National Railways, in the vicinity of the Luscar branch, and desired to obtain from the Board of Railway Commissioners permission to use a "Y" on the Luscar branch and also to construct from this "Y" a spur track to serve his coal lease approximately 1,000 feet in length. This application was opposed by the appellant which denied the jurisdiction of the Board to grant it. At the time of the application, the legal title to the ownership of the Luscar Branch was still in the appellant company's name.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

Held, Idington J. dissenting, that the Board of Railway Commissioners had jurisdiction to entertain and grant the application made by the respondent N. S. McDonald.

Per Anglin C.J.C. and Duff and Rinfret JJ.—The Luscar Branch is a railway within the meaning of s. 185 of the *Railway Act* and therefore comes within the operation of the *Railway Act* by force of s. 5 of this Act.

Per Newcombe J.—The Canadian National Railways, by the effect of the above agreements, acquired and exercised, subject to the terms specified, operating rights upon the Luscar Branch and it thus comes within the description of par. (*c*) of s. 6 of the *Railway Act,* as being a railway operated by a company which is wholly within the legislative authority of the Parliament of Canada, and therefore a work declared to be for the general advantage of Canada.

Per Anglin C.J.C. and Idington, Duff and Rinfret JJ.—S.s. (*c*) of s. 6 of the *Railway Act,* which provides in general terms to what railways the Act shall extend and apply and enacts that these railways shall be deemed and are thereby declared to be works for the general advantage of Canada, is not within the legislative powers of the Dominion and does not constitute an effective declaration under par. (*c*) of s.s. 10 of s. 92 of the B.N.A. Act. Mignault and Newcombe JJ. *contra.*

APPEAL by leave of a judge of this court from a decision of the Board of Railway Commissioners for Canada holding that it had jurisdiction to entertain an application by the respondent McDonald for an order of the Board granting him running rights over a spur track in use by the appellant and for an order of the Board requiring the respondent, the Canadian National Railways, to grant him permission for the construction of a spur track to serve his coal lease.

The material facts of the case are stated in the above head-note. The Board having decided that it could entertain the respondent McDonald's application, the appellant applied to a judge of this court for leave to appeal from the decision of the Board. This leave was granted and the order specified as follows the points of jurisdiction which were in question:—

(1) Whether subsection (*c*) of section 6 of the Railway Act of Canada is within the legislative powers of the Dominion of Canada.

(2) Whether assuming that Parliament has power to legislate as to the subject matter, a general declaration not specifying any particular railway or railways, as under subsection (*c*) of section 6 of the Railway Act of Canada, is a declaration complying with subsection (*c*) of subsection 10 of section 92 of the British North America Act.

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(3) Whether having regard to the provisions of chapter 78 of the Statutes of Alberta, 1921, subsection (*c*) of section 6 of the Railway Act of Canada has any application to the Luscar Collieries Limited.

(4) Whether the Board of Railway Commissioners for Canada under section 6, subsection (*c*) of the Railway Act of Canada has jurisdiction to make any order establishing connection with or giving any running rights over the railway constructed by Luscar Collieries Ltd., and if not, has the Board of Railway Commissioners for Canada otherwise any jurisdiction to make such order.

The Attorney General of Canada intervened to support the jurisdiction of the Board of Railway Commissioners. The Attorney General of Alberta, although notified of the order granting leave to appeal, did not instruct counsel to appear on his behalf at the argument, although subsequently, in answer to certain questions put by the court, a factum was filed on his behalf. The Canadian National Railways, respondents, were represented by counsel who stated that he neither asserted nor disputed the jurisdiction of the Board to make the order applied for.

S. R. Woods K. C. for appellant.—Ss. 185 and 186 of the *Railway Act* do not apply to the Luscar Branch which has not been originally constructed pursuant to s. 185 but which has been originally constructed by the appellant company with their own money on their own right of way pursuant to powers granted by the legislature of Alberta.

The power conferred upon the Parliament of Canada by par. c. of s.s. 10 of s. 92 of the B.N.A. Act has not been effectively exercised in the way it is sought to be exercised in s.s. c. of s. 6 of the *Railway Act,* so as to bring a purely provincial enterprise under the exclusive legislative control of the Parliament of Canada.

The legislative declaration in s.s. c of s. 6 of the *Railway Act* is ineffective because upon the true interpretation of the pertinent provisions of the B.N.A. Act, the declaration can competently be made only with reference to a work existing at the time or particularly specified.

O. M. Biggar K.C. and *C. P. Plaxton* for the Attorney General of Canada. Under the provisions of par. c. of s.s. 10 of s. 92 of the B.N.A. Act, the Dominion Parliament has jurisdiction to declare, in general terms, whole classes

of works to be for the general advantage of Canada and is not bound to specify individually the works to which the declaration is directed. Therefore s.s. c. of s. 6 of the *Railway Act* is *intra vires* of the Parliament of Canada.

H. Aylen K.C. and *J. A. Aylen* for the respondent N. S. McDonald.

Geo. F. Macdonnell for the respondent C.N.R.

ANGLIN C.J.C.—I concur with Mr. Justice Duff.

IDINGTON J. (dissenting).—The appellant is a company incorporated under the Companies Ordinance of Alberta, and was so incorporated with power *inter alia* to mine coal and other minerals under the provisions of certain leases upon lands situated in the Mountain Forest Reserve in said province.

It petitioned the legislature of Alberta setting forth that for the proper development of said coal fields and the marketing of its products it would be necessary that said company be given power to construct and operate a railway, and the said legislature, by c. 78 of its 1921 statutes, passed the desired Act, assented to on the 19th of April, 1921.

S. 1 thereof enabled the said company to construct the desired railway from a point in or near township 47, range 24, west of the fifth meridian, by the most feasible route, to connect it with the Mountain Park Coal Company's railways in said province, at or near Leyland station, or any other feasible point of juncture with said line.

S. 2 provided for the company entering into an agreement with certain named railways for operating appellant's road when built, and providing thereby for repayment of the cost of building out of rebates to be given by the operating company over any extended term of years of operation to be agreed upon and thus, if so agreed for the acquisition of appellant's railway.

S. 3 thereof provides that the several claims of the *Railway Act* (which I take it means the Alberta *Railway Act*) shall be incorporated with and shall be deemed part of this Act, and shall apply to the company and to the said railway except so far as the same may be inconsistent with the express enactments thereof, and the expression "this Act" when used herein shall be understood to include the

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said clauses of said *Railway Act* and for greater certainty declared that the several clauses of the said *Railway Act* referring to the construction of the branch lines and spur lines or tracks are incorporated herein; but ss. 9 to 61, and ss. 143 to 228 of the said *Railway Act* shall not apply to the said company; and where others so inconsistent, provision is made in the articles of the company in the matters dealt with in the *Railway Act,* the provisions of the said memorandum and articles shall prevail, and in the event of an operating agreement or agreements being entered into, as aforesaid, by the said company notwithstanding anything in said *Railway Act,* the said railway may, if so provided in the operating agreement, be operated under and pursuant to the provisions of any statute of Canada, applicable to any company incorporated by or under the authority of the Parliament of Canada and the purview of said *Railway Act,* so far as necessary, be superseded, but nothing herein contained shall be taken to prevent said railway being operated either by the company or other company under the provisions of said *Railway Act.*

Provided that notwithstanding anything herein contained, upon the acquisition of said railway by the Canadian National or other railway company, the provision of s. 143 of the *Railway Act* shall apply to the company so acquiring said railway.

S. 4 provided for the appellant company, or the Canadian National Railway Company, or other railway company entering into such operating agreement applying to the Board of Railway Commissioners of Canada (or other proper authority, provincial or federal) for all necessary and proper orders and authorities to provide for the operation of said railway.

S. 5 provided for the construction of said railway being commenced within one year and its completion within three years from date of the coming into force of said Act.

S. 6 provided power for the purposes of said undertaking to construct and operate an electric telephone and telegraph lines, etc.

S. 7 provided as follows:—

7. Any railway line duly constructed under legislative authority may be joined on to the said line of railway upon application to the Minister of Railways and upon such terms as the Minister may determine.

I have tried to outline the foregoing Act of incorporation in order to present the many angles therein presented looking, I submit, to becoming the very humble creation of a local legislature in preference to being considered and held to be a work for the general advantage of Canada, unless and until it had been acquired by the Canadian National Railway, or other railway, agreeing to operate it.

The appellant's railway in question is only five and a half, or five and three-quarter miles long, and evidently but a spur line enabling the appellant to have the coal recovered from its mine, transported to the Canadian National Railway, or other railway, and thereby carried to where a market may be found for its coal products.

In short it seems of no more importance than (if so much as) many switches provided by large manufacturers for transporting such goods on to the tracks over which they are destined to be carried by means of freight cars belonging to the said road.

The respondent, McDonald, having discovered, or got possession of, a coal mine near to the appellant's spur, conceived the idea of saving himself the expense of building a spur of his own connecting with another line of railway, or the line the appellant's spur is connected with, and applied to the Board of Railway Commissioners for Canada for permission to connect his proposed spur line with that of appellant.

The appellant's counsel resisted the application and pointed out that putting such a project into operation would necessitate running respondent's cars through appellant's yard and render it a rather dangerous expedient for which no provision had been made or anticipated as likely to be necessary. He said the appellant's spur had cost it from $200,000 to $220,000 and offered, if McDonald, the respondent, would pay half of that amount, that the appellant might try to overcome all these difficulties, but respondent would not listen to such a proposal.

The Board seemed doubtful of its powers but finally decided to make the order applied for and give the appellant an opportunity for testing the matter by an appeal to this court. And hence this appeal by leave of Mr. Justice Mignault under the provision of the *Railway Act* of Canada relevant to the powers and duties of said Commissioners.

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The question thus raised turns upon the interpretation and construction of, first, the item no. 10, of s. 92 of the *British North America Act,* 1867, which reads as follows:—

10. Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, or other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces;

and secondly, the interpretation and construction of s. 6, s.s. (*c*) of the *Railway Act,* 1919, enacted by the Dominion Parliament, and which reads as follows:—

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first-mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

The said item 10 of s. 92 of the *British North America Act,* in its s.s. (*c*), it was stoutly contended by counsel for appellant, contemplated a specific designation of the particular railway, or other work, that was to be

declared by the Parliament of Canada to be for the advantage of Canada

and that it was not competent for said Parliament to classify in an abstract and imaginary manner "such works" as it pleased, and declare any entire class of the kind to be "for the advantage of Canada."

I certainly was surprised to find such a classification and declaration as in the s. 6 (*c*) above quoted, for I have never had occasion to consider same until this case was presented to us, unless the early legislation providing for the cases of local railways crossing Canadian through lines.

The said assumption of authority if upheld, I respectfully submit, would leave it open to Parliament to assume control of all our highways, all our elevators, all our local hydro electric systems, now existent or hereafter to come

into existence; all our local public utilities, which have become so manifold, especially in some of our western provinces, and which would include telephone systems and, if I mistake not, telegraph systems: and all the sidings and switches I have adverted to above, built by manufacturers for their own personal service and benefit, but operated by the railway to which they gave their transportation business, and perhaps preference in cases of competition, and in such cases possibly to a Dominion railway and alternating to a local railway, by simply passing a declaratory Act as to their being for the general advantage of Canada.

I cannot follow all the possible consequences of such a holding, or of its manifold implications.

I cannot assume that any such consequences, or anything like thereto, were ever expected to ensue upon or flow from any single enactment by the Parliament of Canada pretended to have been made within the meaning of the reservation of s.s. (*c*) of item 10, of s. 92 of said *British North America Act,* and thereby to fulfil its requirements for a declaration as to any works for the general advantage of Canada.

Indeed I submit that it was in order to avoid any possibility of such like results that the said item 10 (*c*) was framed as it was, and so remains.

Subsections (*a*) and (*b*) of said item 10 deal with works which can safely be classified and are dealt with accordingly, but beyond that the framers of the *British North America Act* apparently felt they could not proceed by the classification process, and hence proceeded to deal with the residue of what could not be so properly dealt with by the classification process; by entrusting said residue by s.s. (*c*) to the Parliament of Canada, on which it cast the onus of deciding whether or not anything further could properly be declared to be a work for the general advantage of Canada.

In other words it seems to me quite clear that Parliament was entrusted with the quasi judicial duty of determining after hearing all those concerned, whether or not a specific work, either before or after its execution, could properly be declared to be for the general advantage of Canada, or of two or more of its provinces.

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Any one conversant with how matters are dealt with by parliament must recognize the vast difference in possible results (to say nothing derrogatory of that body) when considering the abstract general proposition and a specific case.

And no men ever knew that better than the framers of the *British North America Act,* and, to repeat what I have had so frequently to advert to in considering their work, I think we must consider and apply the point of view they took in any question arising upon the interpretation and construction of the *British North America Act* which was, though enacted by the British Parliament, essentially a product of the best thought of our Canadian statesmen engaged in trying to frame something for the future delimitations of the powers of Parliament and local legislatures.

The early legislation that ensued thereon in regard to anything like unto that with which we are now confronted was such as already adverted to in the case of local railways crossing Canadian through lines; and that came before this court in the case of a submission by the Railway Committee of the Canadian Privy Council to this court in *Re Portage Extension of the Red River Valley Ry. Co.,* in which this court, in a judgment prepared by the late Mr. Justice Patterson, seems to have decided that the contentions set up by the through lines were unfounded.

So far as it went that decision was in principle against the contention of the respondent herein, largely, I submit, because of want of specific basis for the declaration relied upon and merely a class of railway. See Coutlée's Digest of 1875-1903.

There does not seem to have been any other important question raised upon said earlier Dominion legislation.

These earlier Acts were all repealed in 1907, and thereafter there arose no case in principle exactly like the question now before us so far as it could arise under said earlier Acts which, by no means, ever attempted such an extension of authority as above quoted s. 6, s.s. (*c*) of the Dominion Act, 1919.

The decision of this court in the *Through Traffic Case,* so called, being *Montreal Street Railway Company* v. *The*

City of Montreal (1), upheld by the judgment of the Judicial Committee of the Privy Council (2), which was delivered by Lord Atkinson, and his remarks on page 338, as follows, are relied upon by counsel for appellant herein:—

> There is not a suggestion in the case that the "through" traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so, the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park Line.

That case presented some curious features and in light of said judgment is well worthy of consideration herein, though not exactly in point.

The case of *Re Ross and Hamilton, Grimsby and Beamsville Ry. Co.* (3), was an appeal from a decision of the Ontario Railway and Municipal Board dealing with said railway, which, it was argued by virtue of a crossing section in the Dominion legislation, brought it under Dominion authorities, and the Appellate Division held not and dismissed the appeal. On appeal to the Judicial Committee of the Privy Council, under the name of *Hamilton, Grimsby and Beamsville Ry. Co.* v. *The Attorney General of Ontario* (4), that court of last resort held that the Act relied upon had been repealed and hence that it was not necessary to decide the other points raised and accordingly dismissed the appeal.

Such being the brief record of decided cases I must turn again to the consideration of said s. 6, s.s. (*c*) and its bearing upon the actual facts herein.

The appellant entered into an agreement between the Mountain Park Coal Company, Limited, the appellant, and the Grand Trunk Pacific Branch Lines Company and the Grand Trunk Pacific Railway Company, on the 2nd of April, 1923, pursuant to the powers given it, by the Act I have outlined above and that provides for the repayment to appellant of the cost of the construction and maintenance meantime, and interest thereon, of allowance or allowances by way of a rebate on the usual tolls of freight on shipments by appellant over said spur line in question.

(1) [1909] 43 Can. S.C.R. 197.
(2) [1912] A.C. 333.
(3) [1915] 34 Ont. L.R. 599.
(4) [1916] 2 A.C. 583.

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This agreement is so connected thereby with other agreements made by one or more of the parties thereto, that it would be imposing too much upon my readers to enter into a demonstration of the interpretation and construction I have reached as to the same, as stated, that I must content myself with saying such is the conclusion I have reached.

In short the whole scheme of said agreement and those with which it connects up, is that if the appellant is repaid by said means, then this spur in question herein will in effect ultimately become the property of the Canadian National Railway Company, or one of its subsidiaries, and completely subject to the statutory powers of the Board of Railway Commissioners for Canada.

Meantime it is a local provincial work under the authority of the legislature of the province of Alberta, and the enactments of that legislature.

If these, at any time, conflict with what Parliament desires, the only way out for the latter is to declare it under item 10 (*c*) of s. 92 of the *British North America Act,* in specific terms as, I submit, the subsection requires " a work for the general advantage of Canada."

Of course it is rather like reducing the phrase " a work for the general advantage of Canada " to a point of ridicule, to bring thereunder the five miles and a half, or three-quarters of a spur line in Northeastern Alberta, serving, or originally intended only to serve, the appellant's Luscar Colliery, where collieries seem to be numerous.

But I am not to blame therefor. It is giving assent to such a proposition, as that such a pigmy thing can be declared by Parliament for the general advantage of Canada, when such phrase is used as the determining limit of the powers that are to be invoked and acted upon by Parliament alone, and not by any of its delegates.

I respectfully submit that when provincial rights which were *prima facie* sure, are to be invaded and transferred to the rule of the Dominion Parliament, something more important was contemplated by the framers of said item 10 (*c*) of the 92nd section of the *British North America Act,* than such a comparatively trifling item as this little spur railway to afford appellant transportation for its mine.

It may turn out that the mine is not worth the expendi-

ture of running an engine and cars for five miles of it; then the agreement, of necessity, will drop out of sight.

On the other hand it may be such as to find it necessary for appellant to keep entirely to itself the said spur for its own uses, until the cost of construction and interest thereon is paid by the rebates provided for by said agreement.

In such latter event the spur in question drops into and becomes part of the Canadian National Railway property.

Why anticipate and peremptorily deal with such a situation in the way the order appealed from does? It is none of our business to interfere with the administration of the powers of the Board for which I entertain great respect. I am only illustrating alternatively the varying aspects of law in which the case presents itself to my mind in this rather novel case.

I am sorry that none of the factums herein present what the powers of the Canadian National Railways are relative to agreeing to run over a spur or switch or siding to get freight to be carried perhaps thousands of miles and thereby win very substantial earnings relative to, or compared with, which the five mile spur haul would be a mere nothing.

Moreover, I infer there must have been some application to the Board, but possibly that was by some of appellant's predecessors named in the agreement.

And I am also sorry to find that Lord Atkinson's view, expressed as above quoted, or the like attitude, surely desirable in transferring a provincial railway to Dominion jurisdiction, seems to have been overlooked by all concerned in promoting the order appealed from herein.

I am surprised to find respondent, McDonald's, counsel, by their factum herein, frankly concede that Parliament has delegated any part of its functions, conferred on it by said item 10 (*c*) of the *British North America Act*, to said Board.

It submits the following on behalf of their said client:—

The Parliament of Canada deemed it proper to enact s.s. (*c*) of s. 6 of the *Railway Act* in general terms and make same applicable to railways wherever situate, coming within the classes therein stated to be for the general advantage of Canada or for the general advantage of two or more of the provinces. Such general enactment relieves Parliament of innumerable applications by way of private bills which otherwise would come before it. Parliament, in enacting this legislation, has, in the language of May, "exercised its legislative powers" and delegated to the Railway

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Commission the judicial powers of determining if the facts and circumstances bring any particular railway within the scope of the legislation in question.

I most respectfully submit that this proposition is not well founded in law for said item 10 (*c*) clearly casts the onus of any such decision upon Parliament itself and so clearly so as to destroy any pretence of foundation for delegation of its said powers by enacting in the *Railway Act*, s. 6 (*c*), such enactments as contained therein, especially that relative to future operations.

It is precisely that, which I have been attempting to demonstrate in several ways, which had been done by using a classification system to be determined by future results, and acts of others instead of specifically designating either before or after the execution of the work, what it was that Parliament intended to be declared to be for the general advantage of Canada.

The constitutional rights of the people in any single province, and of its legislature to protect them and their property, are, I respectfully submit, of too much importance to be maintained, clear of all endangering thereof by their being invaded, or set aside, by any such like legislation as said s. 6 (*c*) of the *Railway Act*.

Attempts such as made by the order herein appealed against founded upon features of said s. 6 (*c*), clearly *ultra vires*, cannot be too carefully watched and guarded against.

I, therefore, am of the opinion that this appeal should be allowed with costs and the said order set aside.

DUFF J.—The controversy as to the jurisdiction of the Board of Railway Commissioners, with which this appeal is concerned, turns upon the question whether or not a certain line of railway, which may be referred to as the Luscar Branch, is a railway within the meaning of s. 185 of the *Railway Act*, and one to which that enactment applies. This railway line runs from the Luscar Collieries Mine to the Leyland Siding, and there connects with a line referred to herein as the Mountain Park Branch, running from the Mountain Park Coal Mine, at its western terminus, to a point on the Alberta Coal Branch of the Grand Trunk Pacific Railway, known as Coal Spur, the Alberta Coal Branch having been constructed by the Grand Trunk Pacific Branch Lines Company, apparently under the

authority of its charter as amended in 1911 ([1911] Dominion Statutes, c. 83, s. 1 (37)). The Alberta Coal Branch, about fifty-eight miles in length, connects by a switch at Bickerdike with the main line of the Grand Trunk Pacific Railway, constructed under the authority of c. 161, Dominion Statutes, 1903. The Mountain Park Branch was constructed by the Mountain Park Coal Company, pursuant to an agreement dated the 23rd of January, 1912, under which the coal company was to construct the line, the Grand Trunk Pacific Railway company was to operate it, and the cost of construction was to be reimbursed to the coal company by allowances in respect of freight shipped from the coal company's mine and specifically dealt with in paragraph four of the agreement. Thereupon, the title to the railway line, the right-of-way, stations, station grounds and other buildings and erections connected therewith, water stations, telegraph and telephone lines, and all other property of the Coal Company, was to pass to the Grand Trunk Pacific Branch Lines Company. By an agreement of the 10th of May, 1921, this agreement of 1912 was varied, by providing conditionally for the construction of the Luscar Branch and repayment of the cost of construction on similar terms to those affecting the obligation to repay the cost of the Mountain Park Branch; and further, that the obligation to operate the branch should cease upon the failure of the coal company to ship in any year 150,000 tons of coal on the Mountain Park Branch, or 75,000 tons per annum on the Luscar Branch.

On the 2nd of April, 1923, a further agreement was entered into by which the Luscar Collieries became party to the two preceding agreements already mentioned. The two coal companies were authorized to enter these agreements by provincial statutes, c. 42, Statutes of Alberta, 1912; and c. 78, Statutes of Alberta, 1921, respectively.

By the interpretation section of the *Railway Act,* c. 122 of 1903, it is declared (s. 12) that the main line of railway and branches authorized,

> together with such other branch lines and any extension of the said main line of railway as are hereafter constructed or acquired by the company shall constitute the line of railway to be called The Grand Trunk Pacific Railway.

By c. 99 of the Dominion Statutes of 1906, the Grand Trunk Pacific Branch Lines Company was incorporated

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with authority to construct certain named lines of railway, with authority (s. 28) to enter into arrangements with the Grand Trunk Pacific Railway Company for the sale and purchase of any of these lines, or for the operation of them. In 1911, by the statute already referred to, the Branch Lines Company acquired power to construct the branch known as the Coal Branch, and, with the authority of the Governor in Council, to construct from the Coal Branch branches connecting with the coal mining areas in the vicinity. Apparently it was under the authority of this provision that the agreements were entered into with the Luscar Company and the Mountain Park Company.

If the Mountain Park Branch and the Luscar Branch are generally within the operation of the *Railway Act,* then there appears to be no good reason for holding that s. 185 does not apply to these branches, or that the Board would not have authority under that section to make an order as against the Grand Trunk Pacific Company, the operating company.

By the definition section, "railway" includes any railway which the company has authority to construct or to operate; and by s. 5, the Act applies to all persons, railway companies and railways within the legislative authority of the Parliament of Canada, with certain exceptions which are immaterial. S. 5 apparently contemplates railways which, apart from any declaration under s. 92 (10) of the *British North America Act,* are under Dominion jurisdiction. S. 7 deals with the effect of the Act as regards railways in respect of which such a declaration has been made; and s. 6 (*c*) contains such a declaration, affecting, if it be legally operative, all railways owned or operated by a railway company under the legislative jurisdiction of the Dominion. S. 6 (*c*) obviously and admittedly applies, and if it be within the competence of the Dominion, unquestionably has the effect of bringing these branches within the scope of the Railway Act. The authority of the Dominion Parliament to enact s. 6 (*c*) will be discussed later. For reasons to be stated, it appears to be inoperative as a declaration under s. 92 (10*c*) of the *British North America Act.*

But this is not necessarily conclusive on the question of the application of the *Railway Act.* If the Luscar Branch

is part of a railway in respect of which the Dominion has jurisdiction in the absence of a declaration under s. 92 (10*c*) of the *British North America Act*, then by force of s. 5 the *Railway Act* applies to it. Whether or not a line of railway operated as a branch of a Dominion railway—that is to say, a railway within s. 92 (10*a*), extending beyond the limits of a province or connecting two or more of the provinces—is an integral part of the Dominion railway in such a way as to give the Dominion jurisdiction over the branch, must be largely a question of fact to be determined from all the circumstances of the case.

The Mountain Park Branch and the Luscar Branch are, with the Coal Branch, operated under the joint authority of the Grand Trunk Pacific Railway Company's charter and the Grand Trunk Pacific Branch Lines Company's charter. The contracts are virtually contracts entered into by the coal companies with the authority of the provincial legislature for the construction of these branches for the Branch Lines Company, the cost of construction to be paid in the first instance by the coal companies, and reimbursed by a rebate on charges for the carriage of coal. The intention of the contracts is that the Branch Lines Company shall ultimately become the owner of both branches, and that they shall be operated as parts of the Grand Trunk Pacific system. We have not before us any information as to the arrangements between the Grand Trunk Pacific Company and the Branch Lines Company, or as to the relations between the companies, but no dispute has been raised as to the authority of the Dominion to enact the Branch Lines Company's Act of 1906 or the amending Act of 1911. S. 36 of the Act of 1906, by which it is declared that the company's undertaking is a work for the general advantage of Canada, seems to be of very doubtful validity, as applied, at all events, to works subsequently authorized. But it may be assumed that, if the facts were disclosed, it would appear that in fact the Coal Branch is a part of the Grand Trunk Pacific Railway undertaking, and therefore within the authority of the Dominion.

In fact, the Mountain Park Branch and the Luscar Branch are worked as part of the undertaking of the Grand Trunk Pacific Railway Company as a railway in operation; they are part of the railway which, under the name of the

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Grand Trunk Pacific Railway, connects the province of Alberta with the other provinces of the Dominion. The fact alone that the legal title has not yet passed to the Grand Trunk Pacific Branch Lines Company does not seem in itself to be a circumstance sufficiently important to segregate them from the principal line for the purposes of legislative jurisdiction. The proper conclusion seems to be that they come within the operation of the *Railway Act* by force of s. 5.

The grounds on which it can be argued that s. 6 (*c*) of the *Railway Act* does not constitute a valid declaration within s. 92 (10*c*) of the *British North America Act,* can be very concisely stated. The object of this provision, it is said, was not to enable the Dominion to take away jurisdiction from the provinces in respect of a given class of potential works; works, that is to say, which are not in existence, which may never come into existence, and the execution of which is not in contemplation; the purpose of the provision is rather to enable the Dominion to assume control over specific existing works, or works the execution of which is in contemplation. The control intended to be vested in the Dominion is the control over the execution of the work, and over the executed work. If a declaration in respect of all works comprised within a generic description be competent, the necessary consequence would appear to be that, with regard to the class of works designated by the description, provincial jurisdiction would be excluded, although Dominion jurisdiction might never be exercised, and although no work answering the description should ever come into existence.

In support of this view it may be said that the purport of the declaration authorized appears to be that the work which is the subject of it either is an existing work, beneficial to the country as a whole, or is such a work as ought to be executed, or, at all events, is to be executed, in the interests of the country as a whole. An affirmation in general terms, for example, an affirmation that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed, as beneficial to the country as a whole, would be almost, if not quite, meaningless, and could hardly have been contemplated as the basis of jurisdiction.

Of course, this provision of s. 92 must be construed reasonably, and reasonably applied. Parliament having assumed control of a work, such, for example, as a trunk line of railway within the limits of a province, may well, as included within the jurisdiction intended to be conferred by s. 92 (10*c*), have ample authority with regard to subsidiary works existing and non-existing, even though such subsidiary works should not have been specifically in contemplation at the date of the declaration. It is in light of of this consideration, it would appear, that the observation of Lord Macnaghten, in *The City of Toronto* v. *The Bell Telephone Company* (1), ought to be construed and applied.

There seems to be a preponderance of argument in support of the view that s. 6 (*c*) is not an effective declaration under s. 92 (10*c*) of the *British North America Act*.

The appeal should be dismissed with costs.

MIGNAULT J.—This is an appeal by leave of a judge of this court from a decision of the Board of Railway Commissioners for Canada holding that it had jurisdiction to entertain an application by the respondent McDonald for an order of the Board granting him running rights over a spur track in use by the appellant and for an order of the Board requiring the respondent, the Canadian National Railways, to grant him permission for the construction of a spur track to serve his coal lease.

The appellant is a colliery company and had been authorized by a statute (c. 78 of 1921) of the province of Alberta to construct a railway to connect with the railway of the Mountain Park Coal Company, Limited, at or near Leyland station. In April, 1923, the appellant entered into an agreement with the Mountain Park Coal Company, the Grand Trunk Pacific Branch Lines Company and the Grand Trunk Pacific Company, the two latter companies now represented by the Canadian National Railways, for the construction and operation of this railway. It also submitted its railway to the operation of certain agreements between the three other companies concerning the construction and operation of the railway of the Mountain Park Coal Company. The effect of all these agreements is

(1) [1905] A.C. 52, at p. 60.

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that these railways were built by the Grand Trunk Pacific Branch Lines Company at the expense of the two colliery companies, the cost of construction to be reimbursed to the latter by certain rebates allowed them on the shipment of all coal over these railways, it being agreed that when the companies are fully reimbursed the railways will become the property of the Grand Trunk Pacific Branch Lines Company. The Grand Trunk Pacific Company undertook to operate the railways and to furnish such rolling stock as would be necessary. In the agreement made by it with the three other companies, the appellant consented to any necessary application of the Grand Trunk Pacific Branch Lines Company (or the Canadian National Railways) to the Board of Railway Commissioners for Canada for approval of the location of the Luscar branch and the maintenance and operation thereof by the Grand Trunk Pacific Branch Lines Company.

The respondent McDonald was the owner of Tams coal lease, Mountain Park Branch, Canadian National Railways, in the vicinity of the Luscar branch, and desired to obtain from the Board of Railway Commissioners permission to use a "Y" of the Luscar branch and also to construct from this "Y" a spur track to serve his coal lease approximately 1,000 feet in length. This application was opposed by the appellant which denied the jurisdiction of the Board to grant it. The Board having decided that it could entertain the application, the appellant applied to a judge of this court for leave to appeal from the decision of the Board. This leave was granted and the order specified as follows the points of jurisdiction which were in question:—

(1) Whether s.s. (*c*) of s. 6 of the *Railway Act* of Canada is within the legislative powers of the Dominion of Canada.

(2) Whether assuming that Parliament has power to legislate as to the subject matter, a general declaration not specifying any particular railway or railways, as under s.s. (*c*) of s. 6 of the *Railway Act* of Canada, is a declaration complying with par. (*c*) of s.s. 10 of s. 92 of the *British North America Act*.

(3) Whether having regard to the provisions of c. 78 of the Statutes of Alberta, 1921, s.s. (*c*) of s. 6 of the *Railway Act* of Canada has any application to the Luscar Collieries Limited.

(4) Whether the Board of Railway Commissioners for Canada under s. 6, s.s. (*c*) of the *Railway Act* of Canada has jurisdiction to make any order establishing connection with or giving any running rights over the railway constructed by Luscar Collieries Ltd., and if not, has the Board of Railway Commissioners for Canada otherwise any jurisdiction to make such order.

The Attorney General of Canada intervened to support the jurisdiction of the Board of Railway Commissioners. The Attorney General of Alberta, although notified of the order granting leave to appeal, did not instruct counsel to appear on his behalf at the argument, although subsequently, in answer to certain questions put by the court, a factum was filed on his behalf. The Canadian National Railways, respondents, were represented by counsel who stated that he neither asserted nor disputed the jurisdiction of the Board to make the order applied for.

The third point of jurisdiction mentioned in the order granting leave to appeal does not require any special consideration if the appellant is wrong as to the other points. For if s.s. (*c*) of s. 6 of the *Railway Act* (of Canada) is within the legislative powers of the Dominion, and if the declaration therein contained complies with par. (*c*) of s.s. 10 of s. 92 of the *British North America Act,* the Board of Railway Commissioners has jurisdiction to allow the application of the respondent McDonald, and nothing in the Alberta statute can stand in the way of the exercise of this jurisdiction. If on the other hand the appellant is right in its attack on s.s. (*c*) of s. 6 of the *Railway Act,* the Board is without jurisdiction to grant the order applied for and no opinion need be expressed as to the effect of the Alberta statute. The outstanding question for determination on this appeal is whether s.s. (*c*) of s. 6 of the *Railway Act* is within the legislative jurisdiction of the Dominion, and it can be so considered only if it complies with the requirements of par. (*c*) of s.s. 10 of s. 92 of the *British North America Act.*

Subsection 10 of s. 92 of the latter Act deals with the jurisdiction of the province as to local works. It reads as follows:

10. Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

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The power conferred on Parliament to declare that works wholly situate within the province are for the general advantage of Canada or for the advantage of two or more of the provinces, is obviously a far-reaching power. Parliament is the sole judge of the advisability of making this declaration as a matter of policy which it alone can decide. And when the power is exercised in conformity with the grant, it vests in Parliament exclusive legislative authority over the local work which it removes from the provincial to the federal field of jurisdiction.

It is a matter of common knowledge that this power is frequently exercised by the Canadian Parliament. It has often done so in wide and comprehensive terms, as can be seen by the different enactments of the *Railway Act*. Thus in 1883, in an Act further to amend the *Consolidated Railway Act*, 1879, 46 Vict., c. 24, s. 6, Parliament declared ten named lines of railway to be works for the general advantage of Canada, and after this declaration it stated that

> each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada.

This enactment was repeated in the *Railway Act*, c. 109 of the Revised Statutes of 1886, s. 121, and in the *Railway Act* of 1888, 51 Vict., c. 29, s. 306. In 1893, by 56 Vict., c. 27 Parliament declared that the railway of any company should not be crossed, intersected, joined or united by or with any other railway, nor should any railway be intersected or crossed by any street railway, electric railway or tramway, whether constructed under Dominion or provincial or municipal authority or otherwise, unless the place and mode of the proposed crossing, intersection, or junction or union, are first approved by the Railway Committee. This, it was stated in a subsequent statute, 63-64 Vict., c. 23, 1900, did not imply that street railways and tramways, by reason only of crossing or connecting with one or other of the lines of railway mentioned in s. 306, should be taken or considered to be works for the general advantage of Canada. And in 1903, by 3 Edw. VII, c. 58, an Act to amend and consolidate the law respecting railways, which repealed *in toto* previous railway Acts, including of course s. 306 of 51 Vict., c. 29, it was declared by s. 7, that railways, steam or electric street railways or tram-

ways, the construction or operation of which is authorized by a special Act passed by the legislature of any province, connecting with or crossing a railway which, at the time of such connection or crossing, is subject to the legislative authority of Parliament, is a work for the general advantage of Canada in respect only to such connection and crossing or to through traffic thereon.

In 1919, by the *Railway Act* now in force, 9-10 Geo. V, c. 68, it was enacted by s. 6 as follows:

The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to,—

(*a*) every railway company incorporated elsewhere than in Canada and owning, controlling, operating or running trains or rolling stock upon or over any line or lines of railway in Canada either owned, controlled, leased or operated by such company or companies, whether in either case such ownership, control, or operation is acquired by purchase, lease, agreement or by any other means whatsoever;

(*b*) every railway company operating or running trains from any point in the United States to any point in Canada.

(c) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first-mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise, howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

This latter provision the appellant attacks as transcending the legislative jurisdiction of Parliament. Under the agreements above referred to, its railway is operated by the organization now known as the Canadian National Railways, which is subject to the legislative authority of the Parliament of Canada, and it will become the property of this organization when the appellant is fully reimbursed the cost of construction. It thus comes within the scope of the declaration made by Parliament that any railway so operated shall be deemed and is declared to be a work for the general advantage of Canada.

The argument on behalf of the appellant is that the power which the *British North America Act* confers on Parliament to declare for the general advantage of Canada local works and undertakings is a power which can be exercised only in respect of a specified work, a work not neces-

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sarily named, but so identified by its description that it can be located on the plans or upon the ground. This, the appellant contends, cannot be said of the declaration made in s. 6, which comprises railways now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada. It argues that the judgment of Parliament must be exercised as to the particular work which it declares to be a work for the general advantage of Canada, that the line must be drawn somewhere, and that a general declaration or a declaration applicable to a class of works, as distinguished from a specific work, is inoperative to remove the class of works from the provincial to the federal field of jurisdiction.

The learned counsel for the appellant could cite no decided case on the point at issue, for beyond a statement in the headnote, but not in the reasons for judgment, of a decision of the late Mr. Justice Street in *Grand Trunk Ry. Co.* v. *Hamilton Radial Electric Ry. Co.* (1), there is nothing in the reports bearing on this constitutional problem. The precise point now to be determined was indeed mentioned, but not decided, by their Lordships of the Judicial Committee in *Hamilton, Grimsby & Beamsville Ry. Co.* v. *Attorney General for Ontario* (2). This decision may however be usefully referred to as it holds that Parliament can at any time repeal a declaration which it has made under s.s. (*c*) of s.s. 10 of s. 92 of the *British North America Act*.

In 1888, the Railway Committee referred to this court a question as to the validity of a Manitoba statute authorizing the construction of a railway which crossed a branch of the Canadian Pacific Railway. The formal answer of the court is alone reported (*In re Portage extension of the Red River Valley Ry.*) (3), and was that the statute was valid and effectual to confer authority on the Railway Commissioner of Manitoba to construct the railway. The reasons on which the answer was based were not reported, but in the archives of the court an extended memorandum (so termed) or draft judgment of the late Mr. Justice Patterson was found. The learned judge was inclined to

(1) [1897] 29 O.R. 143. (2) [1916] 2 A.C. 583.
(3) Cassel's Digest 487.

favour the provincial contention as to the exercise of the declaratory power, but affirmed the validity of the Manitoba statute on the ground that a federal statute, not cited at the argument, impliedly recognized that the provincial Act governed the construction of the railway. He was of opinion that a declaration made by Parliament under s.s. (*c*) of s.s. 10 cannot be recalled, but this can no longer be said in view of the decision of the Judicial Committee in the case above mentioned.

The argument addressed to the court upon this reference by four very eminent counsel, Messrs. Edward Blake, Q.C. and Christopher Robinson, Q.C. for the Canadian Pacific Ry. Co., and Messrs. Oliver Mowat Q.C. (afterwards Sir Oliver Mowat) and Dalton McCarthy, Q.C. for the Manitoba Government, has fortunately been preserved and of this argument we have been furnished copious extracts. It does not seem possible to add anything to the discussion of the important constitutional problem which the court however did not solve. So the question submitted is in every way an open one.

Expressing now the opinion which I have formed after full consideration, it seems obvious that if Parliament can declare for the general advantage of Canada a specified work, it can also, in one declaration, comprise several works having the same distinguishing characteristics, or a class of works sufficiently described so as to leave no doubt as to the identity of each member of the class, as coming within the description of the enactment. Certainly if the works declared to be for the general advantage of Canada are adequately described, it is no objection that the enactment has grouped them together or described them as a class of works, each member of which can be identified as having been contemplated by Parliament when it made the declaration. And such a declaration cannot be termed a general declaration, if that really is an objection, because it comprises all the works so described. However, wide may be its application, it is specific in its description, and the judgment of Parliament is necessarily directed to each particular work which may now or hereafter come within this description.

It must not be forgotten that the power conferred on Parliament applies to such works as are, before or after

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their execution, declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces. The work may not be in existence when in advance of its execution it is declared for the general advantage of Canada. It must therefore be described so that when it does come into existence it can be identified as being the work which Parliament had in mind when it made its declaration. If this condition be fulfilled, there can be, in my judgment, no possible complaint against a declaration that a class of works, and each member of the class, is for the general advantage of Canada. It matters not that new members of the described class may come into existence after the declaration is made, for the declaration can be made before or after the execution of the work. Parliament has considered in advance each new member coming within the described class, and has exercised its judgment as to each. And it would seem as inconvenient as it would be contrary to the wide terms of the grant of power to require that each member of the class should be the object of a new declaration by Parliament when it comes into existence or when plans have been prepared for its construction.

If this interpretation of par. (*c*) of s.s. 10 of s. 92 of the *British North America Act* be sound, there is no room for the objection that the legislative jurisdiction of the provinces as to local works and undertakings is swept away by the declaration here in question. The argument before the court took a very wide range. It was urged that Parliament might conceivably declare all railways wholly situate within a province to be works for the general advantage of Canada, that a line must be drawn somewhere, and that the whole provincial jurisdiction as to local railways might be thus taken away.

With these objections or these fears we need have no concern. It is unnecessary to discuss where the line should be drawn, for the present case is certainly well within the line of a reasonable construction of par. (*c*) of s.s. 10. That is the only point on which we have to pass judgment. And it would seem as unreasonable as it would be impracticable to require that each time a provincial line is operated by a Dominion company a special declaration should be made by Parliament. The policy or the reason for the declara-

tion is a matter for the consideration of Parliament alone. All that it is necessary to say here, and that is the conclusion at which I have arrived, is that in enacting s. 6, s.s. (*c*) of the *Railway Act*, Parliament has not overstepped its legislative jurisdiction.

The appeal against the decision of the Board of Railway Commissioners should be dismissed. The appellant should pay the costs of both respondents and of the Attorney General of Canada.

NEWCOMBE J.—In the distribution of legislative powers by the *British North America Act* 1867 it is in effect enacted by the joint operation of s. 91 (29) and s. 92 (10) that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the class of subjects described as local works, which,

although wholly situate within the province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

There is no longer any question that works within the purview of this provision include railways.

The *Railway Act*, 1919, c. 68 of the Dominion, by s. 6 (*c*), which is one of the clauses defining the application of the Act, enacts that the provisions of the Act shall extend and apply to

every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

By Act of Alberta, c. 78 of 1921, power was granted to the appellant company to construct and operate a railway in the province of Alberta, known in the case as the Luscar Branch, for the transport of its coal to the railway line of the Mountain Park Coal Company, and in the execution of the power so conferred the appellant company constructed the Luscar Branch; assuming as I shall, because it was not questioned at the bar, that the agreements submitted are within the powers of the respective companies,

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the Canadian National Railways, by the effect of these agreements, acquired and exercise, subject to the terms specified, the operating rights upon the Luscar Branch, and it thus comes with the description of par. (*c*) of s. 6 above quoted, as being a railway operated by a company which is wholly within the legislative authority of the Parliament of Canada, and therefore a work declared to be for the general advantage of Canada.

But it is said that the legislative declaration is ineffective because upon the true interpretation of the pertinent provisions of the *British North America Act*, 1867, the declaration can competently be made only with reference to a work existing at the time or particularly specified. The question is like that which was decided favourably to Dominion authority by Street J. in *Grand Trunk* v. *Hamilton Electric Railway Co.* (1). A similar question was left undecided by their Lordships of the Judicial Committee in *Hamilton, Grimsby and Beamsville Co.* v. *Attorney General for Ontario and others* (2). The latter case however removes some of the doubts which formerly existed with regard to the meaning and effect of the 10th enumeration of s. 92. The Lord Chancellor (Buckmaster) in pronouncing the judgment said:

> Their Lordships are clearly of opinion that s. 92, s.s. 10, never intended that a declaration once made by the Parliament of Canada should be incapable of modification or repeal. To come to such a conclusion would result in the impossibility of the Dominion ever being able to repair the oversights by which, even with the greatest care, mistakes frequently creep into the clauses of Acts of Parliament. The declaration under s. 92, s.s. 10 (*c*), is a declaration which can be varied by the same authority as that by which it was made. In the present case their Lordships see no reason to doubt that if the statute of 1888 effected such a declaration as to place the whole railway under Dominion control, that declaration has been properly and effectually varied, and the appellant company have ceased to be, even if they ever once were, under the control of the Dominion Board.

From this it would seem logically to follow that the exclusive power of Parliament to declare works wholly situated within a province, either before or after their execution, to be for the general advantage of Canada is a legislative power to be exercised in the manner and subject to the incidents which are appropriate or belong to the general subjects of legislation which fall to the Parliament in the distribution effected by ss. 91 and 92; and since the

(1) 29 O.R. 143. (2) [1916] 2 A.C. 583.

declaration once made is susceptible of modification or repeal, it would not be an unreasonable consequence that it may be enacted for a temporary purpose, or to be effective conditionally.

Now it is common knowledge that the Parliament of Canada when acting within those limits by which its powers are circumscribed is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of the latter Parliament. *The Queen* v. *Burah* (1). The authority conferred upon the Parliament of Canada is as plenary and as ample within the limits prescribed as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits the Parliament of Canada is supreme and has the same authority as the Imperial Parliament. *Hodge* v. *The Queen* (2). It was in the exercise of powers such as these, conferred by ss. 91 and 92 (10) of the *British North America Act,* 1867, that the Parliament of Canada enacted the *Railway Act.* In par. (*a*) of s. 92 (10) it was not necessary for the Imperial Parliament to mention specifically or to describe individually every work and undertaking which was to come within the Dominion powers; every work of the general description passed under the words

> lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province.

Railways are works within the meaning of par. (*a*), because they are mentioned as exceptions from the general class of local works; so likewise are they works within the meaning of par. (*c*), and the word "works" as used in the latter paragraph is no less comprehensive, as to the character of the works embraced, than it is in paragraph (*a*), except that, in locality, area or extent, the works included within paragraph (*c*) are limited to the province; these are strictly local or provincial works, whereas in paragraph (*a*) the works although described as local are in reality Dominion or interprovincial; that I take it is the only distinction. The effect of paragraph (*c*) is that railways and other works wholly situate within a province may, before or after

(1) [1878] 3 App. Cas. 889, at pp. 902-903.

(2) [1883] 9 App. Cas. 117, at pp. 131-2.

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their execution, in the exercise of the uncontrolled judgment and legislative authority of the Parliament of Canada, be brought within its exclusive jurisdiction; and, by the force of the Imperial Act, the Parliament of Canada has the same power in this particular as is possessed by the Imperial Parliament, although of course the power must be executed in the prescribed manner, by way of declaration for the general advantage. It is thus a sovereign legislative power which the Parliament of Canada exercises; and, when it comes to execute that power, it is no more excluded from the use of general language to describe the works to which the declaration is to apply than the Imperial Parliament was in describing the works which were without any further legislative declaration assigned to the Parliament of Canada. In either case the general rules of legislative expression and interpretation must govern, and, applying these rules, it follows that the definition of the subject matter of the declaration may be in general terms or specific, so long as the language be apt to ascertain with certainty the works to which the declaration is to extend.

The practical difficulties and the inconvenience and inadequacy of the interpretation for which the appellant contends will be manifest upon reflection. It might for example not unnaturally be found expedient for the Parliament to assume permanent authority over factories for the manufacture of arms and ammunition, and no one of these factories might be too insignificant or of a character too local to be neglected in the general taking over. Then how could the project reasonably be effected save by a comprehensive declaration in general terms? It would be impracticable to specify every factory or every locality in Canada; and, if the declaration as affecting a particular work could be made only after the work was actually constructed or projected, and so could be identified as a separate individual of the class, it would during an interval escape the regulations for the enforcement of which it was the object of the declaration to provide.

It may be that the general advantage of Canada with relation to a work or class of works is in the judgment of Parliament determined by a characteristic or quality or effect which is common to all works of a certain class, and

therefore that the public interest or general advantage requires that Parliament should assume authority over every work of the particular kind or class. For example it might be considered that every local railway which terminates on the seaboard should, by reason of having that terminus and its connection with navigation and shipping, be regulated by Parliament. Must there be as many separate declarations as there are such railways, or may not Parliament invoke the expedient of general description to include all which possess the common and determining factor? I see no reason to the contrary so long as the declaration operates by way of description to recognize the works before or after their execution as being for the general advantage, and not as comprehending the whole subject matter from which Parliament is empowered to make its selections. Perhaps another apt illustration would be local wireless broadcasting stations as to which reasons for a comprehensive declaration suggest themselves, or are not difficult to imagine.

It will be perceived that by the express words of clause (c) declaration may take place before or after the execution of the work. It is mere conjecture that the imperial Parliament contemplated that the power should not be exercised with regard to a future work until it had become a fixed and definite design, or until it could be identified as a work actually in contemplation. The declaration may be made at any time, although it operates only when the work shall have come into existence, because the subject matter is defined as *works* of a class declared by the Parliament of Canada to be for the general advantage of Canada; therefore it would seem that until there is actually a work of the kind described in the declaration there would be nothing in the declaration except its potential authority, and therefore in the interval no disturbance of the pre-existing distribution of legislative power. Both in the introductory lines of s. 92 (10) and in s. 91 (29) works and undertakings belonging to classes are the subjects to which the exclusive legislative authority of Parliament attaches. Under s. 92 (10 c.) it is Parliament which creates the class by its declaration. Why may not Parliament, as it has done in practice, call into existence a class *uno flatu*? Why is it necessary that it should create the class by the less

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convenient method of specifying each constituent unit? I am utterly at a loss to discover in s. 92 (10 c.) any word or accent of Parliamentary intention that it is essential to the execution of the power to name a work to which the declaration is to apply, if the description be otherwise adequate to identify and include the work, or to define a class of works by describing the individual specimens rather than by apt words descriptive of the whole.

The judgment of the Judicial Committee of the Privy Council in *City of Toronto* v. *The Bell Telephone Company* (1), an authority which was not mentioned in the *Hamilton, Grimsby and Beamsville Case* (2), indicates that in the opinion of their Lordships, who constituted a strong board not unused to the interpretation of the *British North America Act,* the declaration in the former case, which was expressed in general terms, would have been effective if the works had been wholly situate within the province. The Bell Telephone Company of Canada was incorporated by Dominion statute, c. 67 of 1880, and it was subsequently amended by c. 85 of 1882. By s. 2 of the Amending Act it is provided that the company shall have power

to build, establish, construct, purchase, acquire or lease, and maintain and operate, or sell or let any line or lines for the transmission of messages by telephone, in Canada or elsewhere, and to make connection, for the purpose of telephone business, with the line or lines of any telegraph or telephone company in Canada or elsewhere.

By s. 4 of the original Act it is enacted that:

4. The said company shall have power and authority to purchase or lease for any term of years any telephone line established or to be established, either in Canada or elsewhere, connecting or hereafter to be connected with the lines which the company is authorized to construct, or to purchase or lease for any term of years the right of any company to construct any such telephone line.

S. 4 of the Amending Act is as follows:

4. The said Act of incorporation as hereby amended, and the works thereunder authorized, are hereby declared to be for the general advantage of Canada.

Two minor points were mentioned as worthy of notice in the judgment of their Lordships, and the second was concerned with the effect of the section last quoted. Lord McNaghten said, referring to the company's Act of incorporation as amended.

It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means.

(1) [1905] A.C. 52. (2) [1916] 2 A.C. 583.

As regards the works therein referred to, if they had been "wholly situate within the province," the effect would have been to give exclusive jurisdiction over them to the Parliament of Canada; but, inasmuch as the works and undertakings of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning.

The works referred to are described in the most general terms and they are ascertained and identified only by their description as telephone lines to be built, established, constructed, purchased, acquired or leased by the company; or as telephone lines established or to be established, connecting or to be connected with the lines of the company, and purchased or leased by the company. S. 4 of the Act of 1880 even goes so far as to provide that the telephone lines which the company shall have power to purchase or lease may be those which connect or may be connected with lines which the company is authorized to construct, and some of the lines which were the subject of the legislative declaration were therefore lines which were not only to be established in the future, but further to be identified by their connection with lines to be constructed by the company in the future. Nevertheless it is said that the effect of this general declaration, as to the works therein referred to, if they had been wholly situate within the province, would have been to give exclusive jurisdiction over them to the Parliament of Canada.

It was suggested on behalf of the appellant that the legislative declaration that every railway now or hereafter operated by a Dominion company shall be deemed to be a work for the general advantage of Canada should be interpreted to mean that such a railway should be deemed to be for the general advantage of Canada only while it is in fact being operated by the Dominion company; this is not the necessary effect or interpretation of the clause; but if it were the meaning, the objection would perhaps be fatal to the validity of the enactment if it were held that the power resulting from s. 92 (10 c.) could, as to any work or class of works, only be exercised permanently and in its entirety, that the power is exhausted by the exercise of it, and is in its effect irrevocable; but, seeing that the declaration is not incapable of modification or repeal, it may be enacted originally in a modified manner or to endure for a limited period; and, while of course care must be taken to see that

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the declaration is not uncertain, the general maxim *certum est quod certum reddi potest* would apply. Although conceivably there might be some difficulty in ascertaining the facts upon which such a declaration is to operate, or the existence of the conditions which are to accompany its operation, that is no more than a trouble which is incident to any statute, the operation of which is by its terms declared to depend upon facts or a condition of things which it may be necessary to establish by proof. It is in the abstract no valid objection to an Act of Parliament that it operates only for a limited time, or occasionally, or at intervals depending upon conditions, and the statutes abound with examples of such legislation. The declaration for general advantage of Canada is in effect a mere constitutional formula by the use of which Parliament, in the general public interest, assumes exclusive legislative authority, whether temporarily or without limitation of time, according to the intention, over works of the character specified in s. 92 (10 c.) which would in the absence of the declaration be regarded as local works within a province. I apprehend that if Parliament be endowed with the authority to declare a work to be for the general advantage of Canada and thus to acquire over it the exclusive legislative authority, and after a time to repeal that Act, thereby remitting the subject to its original provincial jurisdiction, it has equally the power to limit its declaration at the time of the enactment and to prescribe the time or the conditions at or upon which the declaration shall cease to apply and when the jurisdiction shall in consequence revert to the province; it is only necessary to express the *casus legis*. In this view it is unnecessary to determine whether the declaration in the present case would continue in force if the railway cease to be operated by the Dominion company. No doubt is suggested that in fact, at the time of the order of the Board of Railway Commissioners, the railway was operated, and is still operated, by the National Railways, and indeed will always be so operated if the existing dispositions be fulfilled, and it will be possible to determine any question as to the status of the railway at a time in the future if it should arise. At present the railway is clearly of the kind described by the clause of the *Railway Act* which embodies the declaration.

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It may be observed that the declaration of the appellant company's railway to be for the general advantage of Canada is not out of line with the general policy of the *British North America Act*, and not in that sense an interference with provincial rights, because this railway connects with the National Railway system and is therefore a connecting railway as well as a railway operated by the National authorities; but I do not find it necessary, in the view which I take of the case, to determine whether or not the Parliament could have exercised its authority, with respect to the Luscar Branch, situated and connected as it is, in the absence of a declaration for the general advantage.

RINFRET J.—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Woods, Field, Macalister & Craig.*

Solicitors for the respondent N. S. McDonald: *Parlee, Freeman & Howson.*

Solicitor for the respondent C.N.R.: *Geo. F. Macdonnell.*

HAMEL *v.* PATENAUDE

1924

*Nov. 26, 27.
*Dec. 30.

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

Sale—Immovable—Mandate—Commission—Profit—Arts. 1233, 1722 C.C.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and dismissing the appellant's action.

The appellants, real estate agents, brought action against the respondent to recover the sum of $5,000, as commission for the sale of an immovable property belonging to the respondent. The Superior Court maintained the action; the Court of King's Bench reversed this judgment.

The Supreme Court of Canada, after argument by the appellant's counsel and the respondent's counsel, reversed this judgment and maintained the appeal with costs.

L. E. Beaulieu K.C. for the appellant.

Lafleur K.C. and Duranleau K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1923] Q.R. 35 K.B. 333.

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*May 29.
*June 18.

THE CITY OF OTTAWA.....APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Assessment and taxes—Agreement for fixed valuation—Term of years—Computation—Mode of assessment.

In 1907 an agreement was entered into by the city of Ottawa with the Can. Atl. Ry. Co. which was undertaking to build a hotel in the city to cost not less than $1,000,000. The agreement provided "that for and during the period of fifteen years next ensuing from and including the year 1909 the total assessed value of the said hotel and the land used in connection therewith and all buildings * * * and appurtenances * * * is hereby fixed and agreed upon at the sum of five hundred thousand dollars and no more." During this period the rates on such valuation were to be the same as those imposed on property owners generally. In 1907 and since the system of the city was—and is—to prepare, not later than September 30 of each year, an assessment roll to form the basis of taxation for the following year if the council of that year so decides.

Held, affirming the judgment of the Appellate Division (56 Ont. L.R. 153) that the agreement for the fixed assessment value must be construed in connection with the system according to which the first assessment on the hotel property would be levied in 1910; the fifteen year period, therefore, included the year 1924.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the Ontario Railway and Municipal Board in favour of the appellant.

The only question for decision on this appeal is whether or not the fifteen-year period for a fixed assessment of the Chateau Laurier, under the agreement the material portions of which are set out in the above head-note, expired in 1923 or extended to 1924. The Court of Revision, County Judge and Municipal and Railway Board held that it ended in 1923 but were overruled by the Appellate Division.

Proctor for the appellant.

Tilley K.C. for the respondent.

The judgment of the Court was delivered by

DUFF J.—By a statute of the Ontario Legislature of 1907, ch. 79 of the statutes of that year, the Corporation of the City of Ottawa was authorized to conclude an agreement with the Canada Atlantic Railway Company, the respond-

PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) 56 Ont. L.R. 153.

ents' predecessors in title, to fix, for a period of years, on specified conditions, the municipal assessment for taxation purposes of a central passenger station to be constructed by the railway company, and also to fix at the sum of $500,000, for a period of fifteen years, the municipal assessment for such purposes of an hotel, also to be constructed by the railway company.

Pursuant to this authority, the municipality and the railway company executed an agreement on the 16th day of November, 1907, by which the railway company undertook (*inter alia*) to construct an hotel, to cost not less than one million dollars, and a fixed assessment was agreed to, for a period defined by the agreement.

The question in controversy between the parties to this appeal arises from the construction of clause 3 of the agreement of 1907, which reads as follows:—

3. And for the considerations aforesaid the city, in pursuance also of the powers and authority conferred on it by the said statute of the province of Ontario, chapter 79 of 7 Edward VII, agrees with the Canada Atlantic that for and during the period of fifteen years next ensuing from and including the year 1909, the total assessed value of the said hotel and the land used in connection therewith and all buildings, superstructures, substructures, fixtures and appurtenances whatsoever thereunto belonging shall be and the said assessment and valuation is hereby fixed and agreed upon at the sum of five hundred thousand dollars and no more, and it is hereby distinctly agreed and declared that the said above described property shall only be liable to be rated for all purposes of taxation by the city in each of the said fifteen years, on such fixed assessment valuation of five hundred thousand dollars and no more and that such rates to be imposed on said fixed assessment of five hundred thousand dollars shall be the usual and the same as the rates imposed on all ratepayers and property owners of the said city of Ottawa generally, in each of said fifteen years as provided by the provisions of the Assessment Act and amendments thereto.

For some years before 1907 it had been the practice of the municipality, in preparing the annual assessment roll, to follow the procedure authorized by section 57 of the Assessment Act (c. 95, R.S.O., 1914), and this procedure has been followed ever since. According to this plan, the assessment roll is prepared and completed in each year not later than the thirtieth of September, submitted to the Court of Revision before the end of the year, and forms, if the council of the ensuing year so decides, the basis of taxation for the latter year.

The municipality contends that the fifteen-year period defined by clause 3 came to an end with the year 1923, and that there is nothing in the clause to disable the municipal-

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ity from assessing the property in the assessment roll prepared in that year, which was to form the basis of taxation for the year 1924, at its full value in the normal way, without reference to the terms of the agreement. On behalf of the railway company, on the other hand, it is argued that the agreement is expressed in contemplation of the procedure already mentioned in relation to assessment, which was in force in the municipality, and that the declaration in clause 3, fixing the amount of the assessment during the specified period, governs the municipality in respect of any assessment made in any one of the years during that period, in conformity with that procedure, which was known to all parties, and which all parties assumed, and rightly assumed, would not be discontinued.

It would appear that the agreement must be interpreted in light of this procedure. It is impossible to deny that the roll prepared under sec. 57 of the Assessment Act in one year as the basis of taxation for the next year (at the discretion, it is true, of the next year's council), is properly described as an "Assessment Roll," or that the entries in it respecting assessable properties and their values are properly described as "assessments." The statute so describes the roll, and the statute provides for appeals in the ordinary way to the Court of Revision and the County Judge, in respect of the "assessments" comprised in it. When, therefore, the statute speaks of a "fixed assessment" of $500,000 "upon a hotel," and the agreement speaks of "the total assessed value of the said hotel and the land," and of the "said assessment and valuation," and of "the fixed assessment valuation," and of the "said fixed assessment," all these phrases are properly capable of application to the valuation or the assessment appearing in any annual roll made in conformity with the settled practice. There appears to be little force in the suggestion that either the statute or the agreement contemplates an assessment by operation of law in disregard of the ordinary procedure. Everybody must have assumed that the sum of $500,000 would be entered in the usual way in the annual roll as the assessed value of the company's property, for the reason alone, if for no other, that this would be the convenient and normal way of ensuring that this sum would be taken into account as one of the elements making up the total

value of taxable property in respect of which the rate would be struck. The language being fairly susceptible of this construction, it seems reasonable to read it in light of the existing course of procedure, and, in ascertaining its true construction, it is quite impossible to ignore the subsequent practice under the agreement. Under that practice, in the year 1909, the assessed value of the hotel property was entered as $500,000 in the roll prepared as the basis of taxation for the year 1910. Notice of this assessment, it must be assumed, was in due course sent to the company, and it was on this footing that the parties carried out the agreement thereafter. The majority of the Appellate Division seems to have rightly concluded that, in view of these considerations, the first part of paragraph 3 must be read as containing a declaration that, for the purpose of any assessment made during the specified fifteen years, including any assessment made in accordance with the existing procedure in any one of those years as the basis of taxation for the ensuing year, the value of the property was ascertained and fixed at the sum of $500,000, and that the effect of that part of the clause, if not qualified by the subsequent words, would be to preclude the municipality from entering as that value in the assessment roll prepared in 1923 any higher or other sum than $500,000.

This view is attacked upon two grounds: first, it is said that assessments of this character are not really assessments within the meaning of the clause, because they go into effect only at the discretion of the council of the following year. That objection has been sufficiently answered already. The next objection is that in effect, by this construction, the company receives the benefit of an exemption for sixteen, instead of fifteen, years. To this there are two answers: first, the parties must have realized that there was no certainty that for the earlier years, particularly for the year 1910, the fixed assessment would operate for the advantage of the company. In point of fact, it seems probable that it operated to their disadvantage in both the years 1910 and 1911. Secondly, if the parties had acted on the construction now advanced on behalf of the municipality, and taxed the company on the basis of an assessed value of $500,000 for the year 1909, the result would have been in fact an obviously ludicrous one. The hotel was

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not completed till 1912. The order in council authorizing the transfer of the land was passed only in October, 1909.

We cannot assume that the actual course of events was quite outside the expectation of the parties, and if it was at all in accordance with those expectations, it is impossible to suppose that the parties would have provided for taxes on the basis of a valuation of $500,000 in the year 1909. In this view it will be apparent that the construction advanced by the municipality, if adopted, postulates an intention to grant only an exemption for fourteen years, instead of fifteen years. The view above indicated as to the reading of the first part of paragraph three not only gives effect to the words employed by the parties, but gives effect also to their intentions as deduced from all the facts which may legitimately be taken into account for the purpose of construing those words.

But the first part of clause 3 cannot, of course, be read alone; and it is argued that, read with the remainder of the clause, the effect is materially qualified. The words to be considered are these:—

and it is hereby distinctly agreed and declared that the said above described property shall only be liable to be rated for all purposes of taxation by the city in each of the said fifteen years, on such fixed assessment valuation of five hundred thousand dollars and no more and that such rates to be imposed on said fixed assessment of five hundred thousand dollars shall be the usual and the same as the rates imposed on all ratepayers and property owners of the said city of Ottawa generally, in each of said fifteen years as provided by the provisions of the Assessment Act and amendments thereto.

The effect of this language may, I think, be fairly stated thus: The municipality is disabled from rating the property mentioned for any purpose of taxation in any one of the specified fifteen years upon a valuation of more than $500,000. It does not limit the effect of the earlier part of the paragraph: it is introduced not for the protection of the municipality, but for the protection of the ratepayer. If, by some carelessness or misapprehension, it is more limited in its scope than it should have been, that is not a ground for declining to give effect to the plain meaning of the words which precede it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Frank B. Proctor.*
Solicitor for the respondent: *George F. Macdonnell.*

CANADIAN NATIONAL RAILWAYS.....APPELLANT;

AND

TOWN OF CAPREOL.....RESPONDENT.

1925

*June 10.
*June 18.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Assessment and taxes—Exemption—Charitable institution—Construction of statute—Ejusdem generis—Railway building—Ontario Assessment Act (R.S.O. [1914] c. 195, ss. 5 (9) and 47 (3)).

By sec. 9, subsec. 5 of The Ontario Assessment Act every industrial farm, house of industry, etc., "or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain" is exempt from taxation. By sec. 47, subsec. 3 "the structures * * * on railway lands and used exclusively for railway purposes or incidental thereto * * * shall not be assessed." A railway company erected, on its own land, a building with all facilities for lodging, entertainment and recreation and handed it over to the Y.M.C.A. which agreed to provide suitable lodgings for its own members and employees of the railway. The railway company did not, and the Y.M.C.A. could not, make any financial gain therefrom.

Held, affirming the judgment of the appellate Division (56 Ont. L.R. 62) that the building was not exempt from taxation under sec. 9 (5); the words "or other charitable institution" in that subsection mean an institution *ejusdem generis,* as those previously mentioned; moreover the lodging house in this case was not a charitable institution conducted on philanthropic principles inasmuch as the Y.M.C.A. received an adequate return for the services supplied.

Nor was it exempt under sec. 47 (3); by other provisions of that section the structure must be "in actual use and occupation by the company" and by subsec. 3 it must be "used exclusively for railway purposes or incidental thereto" while other persons than railway employees took advantage of it.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) refusing the appellant's claim to exemption of its property from taxation.

The nature of the questions in dispute and the necessary facts are set out in the above head-note. The building erected by the railway company and the land on which it stood were assessed by the town and the assessment was confirmed by the Court of Revision and County Judge. The Railway and Municipal Board held that the building was exempt under sec. 47 (3) but the Appellate Division held differently and sent the case back to the Board for consideration of the effect of sec. 9 (5). The Board held against exemption under that provision and the case came again before the Appellate Division which decided that there was no right to exemption under either section.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Lafleur K.C. and *R. E. Laidlaw* for the appellant. The railway company erected this building for the sole object of improving the living conditions of its employees and realized no profit from it. This would make it a charitable institution in the ordinary sense. See *Commissioners of Income Tax* v. *Pemsel* (1); *In re City of Ottawa and Gray Nuns* (2).

And it is a charitable institution under sec. 5 (9) of the Assessment Act, the fact that the Y.M.C.A. received payment for its services being immaterial. *Shaw* v. *Halifax Corporation* (3); *In re Noailles* (4); *In re City of Ottawa and Gray Nuns* (2); *In re Estlin* (5).

The Municipal and Railway Board found that the fact is that the property was " used exclusively for railway purposes or incidental thereto " and is, therefore, exempt from taxation under sec. 47 (3).

R. S. Robertson K.C. and *G. E. Buchanan K.C.* for the respondent. A charitable institution to be exempt under sec. 5 (9) must be of the same character as those named in said subsection. *In re Stockport Ragged Industrial and Reformatory Schools* (6).

The institution in question is not conducted on philanthropic principles. *Reg.* v. *Sterry* (7); *Rex* v. *St. Giles* (8) at page 579.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant claims exemption from liability for assessment either under s.s. 9 of s. 5 or under s.s. 3 of s. 47 of The Ontario Assessment Act (R.S.O., c. 195) for a property in the town of Capreol.

On land owned by it in the town, Canadian Northern Realities, Ltd., a subsidiary corporation of the Canadian Northern Railway Company, erected at a cost of about $80,000 a building containing numerous bed-rooms, a reading-room and other rooms and facilities for lodgings, entertainment and recreation. This building, partly equipped, was handed over to the National Council of the Young Men's Christian Association of Canada to be operated under the terms of an agreement made between that body

(1) [1891] A.C. 531.
(2) 29 Ont. L.R. 568.
(3) [1915] 2 K.B. 170.
(4) 114 L.T. 1089.
(5) 88 L.T. 88.
(6) [1898] 2 Ch. 687.
(7) 12 Ad. & E. 84.
(8) 3 B. & Ad. 573.

and the Canadian Northern Ontario Railway Company. The association agreed to pay a nominal rental ($1 per year), to use the building as a branch of the Young Men's Christian Association and, *inter alia,*

to provide suitable lodgings at all times, subject to the capacity of the branch, to its own members and to employees of the railway at charges that shall be satisfactory to the Railway Superintendent.

The evidence shows that, although much the greater number of those who availed themselves of these privileges were railway employees, other citizens of Capreol also took advantage of them. The railway company contributed $150 per month towards the upkeep of the branch and provided, free of charge, fuel, water and light, and maintained insurance on the building, fixtures and equipment. The entire revenue is handled by the association which, by its charter, is prevented from making gain or profit for its members.

There is no doubt that the purpose of the railway company in erecting the building and placing it in the hands of the Y.M.C.A. was to improve the social and living conditions of its employees and that the only advantage it derives from the undertaking is in the improved morale and efficiency of its employees who make use of the institution.

In 1922 the town of Capreol assessed the land used in connection with the institution at $3,500 and the building at $50,000. The rate of assessment in the town was stated to be 45 mills on the dollar.

On appeal to the Court of Revision this assessment was confirmed and the District Court judge dismissed a further appeal taken to him. An appeal to the Railway and Municipal Board was allowed, however, and exemption granted under s.s. 3 of s. 47. On a further appeal to the Appellate Divisional Court, that court took a different view and referred the case back to the board to consider the claim for exemption under s.s. 9 of s. 5, in support of which further evidence was to be admitted. But, after hearing such evidence, the board did not consider the appellant entitled to exemption under this subsection and, upon the matter again coming before the Appellate Divisional Court, the claim for exemption on either ground was finally negatived by a majority of the court. Hence the present appeal.

Subsection 9 of section 5 of the Assessment Act exempts from assessment:

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9. Every industrial farm, house of industry, house of refuge, orphan asylum, and every boys' or girls' or infants' home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain, and every house belonging to a company for the reformation of offenders, and the land belonging to or connected with the same; but not when occupied by a tenant or lessee. 4 Edw. VII, c. 23, s. 5, par. 9; 1 Geo. V, c. 59, s. 1.

The claim of the appellant was that the Railway Y.M.C.A. at Capreol is

a charitable institution conducted on philanthropic principles and not for the purpose of profit or gain,

and that it is, therefore, entitled to the exemption claimed.

But it seems obvious that every charitable institution so conducted does not fall within s.s. 9 of s. 5. Special exemptions of undertakings of a charitable nature conducted on philanthropic principles and not for purposes of profit and gain are to be found in s.s. 2, 3, 4, 5, 10, 12 and 13. It seems reasonably certain, therefore, that the words

charitable institutions conducted on philanthropic principles and not for the purpose of profit or gain,

are not used in s.s. 9 in their most comprehensive sense.

We agree with Mr. Justice Ferguson that

these words take their colour from and are limited by the other words of the section

in which they are used and must be restricted in their application to institutions *ejusdem generis* as those enumerated. *In re Stockport Ragged, Industrial and Reformatory Schools* (1). The category appears to comprise institutions which provide board and lodging at the public expense, or otherwise gratis, to their inmates—*Tillmanns & Co.* v. *Knutsford* (2).

We cannot think that the legislature meant to exempt as a charitable institution an undertaking of which, as Mr. Justice Ferguson says,

the evidence establishes that the moneys collected by the Y.M.C.A. from their members, boarders and lodgers and received from the railway, were an adequate return to the appellants and the Y.M.C.A. for the lodging accommodation and services rendered by the Y.M.C.A., and that the accommodation, lodging and services were not offered, given or rendered as charities, and were not received or accepted as such.

The learned judge adds that in his opinion that is the meaning of the evidence and of the Board's finding. It would seem strange indeed if this institution, which clearly competes with the hotels, lodging houses and clubs of the

(1) [1898] 2 Ch. 687. (2) [1908] 2 K.B. 385.

town, were exempt from the taxation to which they are subject.

The claim to exemption under s.s. 3 of s. 47 must now be considered. The provisions of s.s. 3 can best be appreciated by reading it in the context in which it is found.

Sec. 47. (1). Every steam railway company shall annually transmit on or before the first of February to the clerk of every municipality in which any part of the roadway or other real property of the company is situate, a statement shewing:

(*a*) The quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality) as rated on the assessment roll of the previous year;

(*b*) The vacant land not in actual use by the company and the value thereof;

(*c*) The quantity of land occupied by the railway and being part of the highway, street, road or other public land (but not being a highway, street or road which is merely crossed by the line of railway) and the assessable value as hereinafter mentioned of all property belonging to or used by the company upon, in, over, under, or affixed to the same;

(*d*) The real property, other than aforesaid, in actual use and occupation by the company, and its assessable value as hereinafter mentioned;

and the clerk of the municipality shall communicate such statement to the assessor. 4 Edw. VII, c. 23, s. 44 (1).

(2) The assessor shall assess the land and property aforesaid as follows:

(*a*) The roadway or right of way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures and superstructures, rails, ties, poles and other property thereon;

(*b*) The said vacant land, at its value as other lands are assessed under this Act;

(*c*) The structures, substructures, superstructures, rails, ties, poles and other property belonging to or used by the company (not including rolling stock and not including tunnels or bridges in, over, under or forming part of any highway) upon, in, over, under or affixed to any highway, street or road (not being a highway, street or road merely crossed by the line of railway), at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, regard being had to all circumstances adversely affecting the value including the non-user of such property; and

(*d*) The real property not designated in clauses (*a*), (*b*) and (*c*) of this subsection in actual use and occupation by the company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises. 4 Edw. VII, c. 23, s. 44 (2).

(3) Notwithstanding anything in this Act contained, the structures, substructures, superstructures, ties, rails, poles, wires and other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine, repair and other shops) shall not be assessed. 6 Edw. VII, c. 36, s. 13.

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Anglin C.J.C.

(4) The assessor shall deliver at, or transmit by post to, any station or office of the company a notice, addressed to the company, of the total amount at which he has assessed the said land and property of the company in his municipality or ward shewing the amount for each description of property mentioned in the above statement of the company; and such statement and notice respectively shall be held to be the assessment return and notice of assessment required by sections 18 and 49.

(5) A railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements. 4 Edw. VII, c. 23, s. 44 (3-4).

Subsection 3 is obviously intended to exempt from taxation property of which the railway company is required to make a return under s.s. 1 and which would otherwise be assessable under s.s. 2. If, therefore, the property under consideration be not within s.s. 1 and s.s. 2, exemption cannot be claimed for it under s.s. 3. The only clauses of s.ss. 1 and 2 within which it might be suggested that this property would fall are the clauses lettered (*d*) in each subsection. But actual use and occupation of the property by the railway company is the condition of the application to it of each of those provisions. That condition excludes this property. Moreover, property exempted under s.s. 3 must be "used exclusively for railway purposes or incidental thereto."

Assuming, but without so deciding, that the use of this property solely as a club and lodging house for railway employees would fulfil the requirement of s.s. 3, that use is not exclusive, since other citizens of Capreol admittedly share in the benefits and advantages offered by the branch Y.M.C.A.

We are, for these reasons, of the opinion that on neither of the grounds set up is the property in question entitled to exemption.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. J. Reid.*
Solicitor for the respondent: *George E. Buchanan.*

IN THE MATTER OF LEGISLATIVE JURISDICTION OVER HOURS OF LABOUR

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL

1925

*June 11.
*June 18.

Constitutional law—Labour—Legislative jurisdiction—Treaty of Versailles—Labour Conference of League of Nations—Draft Convention—Submission to members.

In 1919 the International Labour Conference of the League of Nations adopted a draft convention limiting the hours of labour in industrial undertakings. It was referred to a select standing committee of the League with the result that an article in the Treaty of Versailles provided that "each of the members (of the Labour Conference) undertakes that it will * * * bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." The Dominion of Canada is a member.

Held, that the only obligation of the Dominion of Canada is to bring the draft convention before the competent authority for action.

Held also, that the matter of labour in industrial undertakings in Canada, is primarily within the competence of provincial legislatures, but Parliament can legislate as to labour in territories not yet organized into, or forming part of, a province and as to labour of servants of the Dominion if these are within the scope of the draft convention.

REFERENCE by the Governor General in Council of questions respecting legislative jurisdiction over hours of labour for hearing and consideration.

No. 1

P.C. 2218.

The Committee of the Privy Council have had before them a report, dated 23rd December, 1924, from the Minister of Justice, stating that he has had under consideration, upon reference from the Honourable the Minister of Labour, the report of the Select Standing Committee on Industrial and International Relations, which was adopted by resolution passed by the House of Commons of Canada on the 18th July, 1924, and is in the terms following:—

"A Resolution was adopted by the House of Commons on May 23, declaring it expedient that a certain Draft Convention which was adopted at the 1st Session of the International Labour Conference of the League of Nations in 1919 limiting the Hours of work in Industrial Undertakings to eight in the day and forty-eight in the week should be referred to the Select Standing Committee on Industrial and International Relations for examination and report,

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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having regard to the Labour Provisions of the Treaties of Peace and to the Order in Council of November 6, 1920, dealing with the jurisdiction of the Dominion Parliament and the Provincial Legislatures.

"Your Committee has held several sittings and made a careful examination of the Draft Convention, the Labour Part of the Treaties of Peace, and the Order in Council of November 6, 1920, dealing with the jurisdiction of the Dominion Parliament and of the provincial legislatures. Evidence was taken with respect to the present position of the eight-hour day in industrial employment in Canada and other countries. Information was presented to your Committee with reference to a conference which was held in Ottawa in September last between representatives of the Dominion and Provincial Governments which indicate that notwithstanding the view expressed in the Order in Council of November 6, 1920, doubt existed in certain quarters as to the jurisdiction of the federal and provincial authorities, respectively.

"It is accordingly recommended that measures be taken to refer the 'Draft Convention Limiting the Hours of Work in Industrial Undertakings to eight in the day and forty-eight in the week' to the Supreme Court of Canada for hearing and consideration under Section 60 of the Supreme Court Act together with such questions as will serve to secure an advisory judgment from the Court on the jurisdiction of the Dominion Parliament and of the provincial legislatures, respectively."

The Order in Council of November 6, 1920 (P.C. 2722) referred to in the foregoing report, was passed on the report of the then Minister of Justice (the Rt. Hon. C. J. Doherty) and deals, in part, with the nature of the obligation of the Dominion of Canada as a member of the International Labour Conference, constituted under the Labour Part (Part XIII) of the Treaty of Versailles and the corresponding provisions of the other treaties of peace with relation to the draft conventions or recommendations which may from time to time be adopted by the International Labour Conference and in order to appropriate legislative or other action being taken to give effect to them, and the opinion expressed by the Minister upon this point was set

forth in the following paragraph of the said Order in Council:—

"The Minister further states that he is of opinion that the provisions of the Labour Part of the Treaty of Versailles do not impose any obligation on the Dominion of Canada to enact into law the different draft conventions or recommendations which may from time to time be adopted by the Conference. The obligation as set forth is simply in the nature of an undertaking on the part of each member within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within a period of one year, then at the earliest practicable moment, and in any case not later than eighteen months from the closing of the Conference 'to bring the recommendations or draft conventions before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action.' The treaty engagement being of this character, it is not such as to justify legislation on the part of Parliament under the authority of section 132 of the British North America Act, 1867, to give effect to any of the proposals of the said draft conventions and recommendations, which must be held, as between the Dominion and the provinces, to be within the legislative competence of the latter. The Government's obligation will, in the opinion of the Minister, be fully carried out if the different conventions and recommendations are brought before the competent authority, Dominion or Provincial, accordingly as it may appeal, having regard to the scope and objects, the true nature and character of the legislation required to give effect to the proposals of the conventions and recommendations respectively, that they fall within the legislative competence of the one or the other."

The said Order in Council of the 6th November, 1920, also embodied the Minister's opinion upon the question whether the provisions of the "Draft Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week," adopted at the first session of the International Labour Conference at its first annual meeting, 29th October-29th November, 1919, came within the legislative competence of the Parliament

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of Canada or of the provincial legislatures. The Minister reported that the proposals of this Convention "involve legislation which is competent to Parliament in so far as Dominion works and undertakings are affected, but which the provincial legislatures have otherwise the power to enact and apply generally and comprehensively."

The Minister observes, however, that the Select Standing Committee on Industrial and International Relations of the House of Commons received information which indicated "that, notwithstanding the view expressed in the Order in Council of November 6, 1920, doubt existed in certain quarters as to the jurisdiction of the federal and provincial authorities, respectively."

The Minister considers it expedient, in view of the said report of the Committee on Industrial and International Relations and of the importance of the subject-matter involved, that the question which has arisen as to the respective legislative powers of the Parliament of Canada and the provincial legislatures in relation to the enactment of the legislation required to give effect to the provisions of the said draft convention should be judicially determined, and he, accordingly, recommends that the following questions, together with copies of the Treaty of Peace with Germany and the "Draft Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week,"* be referred by Your Excellency in Council to the Supreme Court of Canada, for hearing and consideration, pursuant to the authority of Section 60 of the Supreme Court Act.

(1) What is the nature of the obligation of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may be from time to time adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?

(2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention (copy of which is herewith submitted) in whole or in part lies and before whom such draft convention should be brought, under the provisions of Article 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?

(3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada?

The Committee submit the same for approval.

E. J. LEMAIRE,
Clerk of the Privy Council.

Lafleur K.C. and *Donohue K.C.* for the Dominion of Canada.

Geoffrion K.C. for the province of Quebec.

Bayly K.C. for Ontario.

Mathers K.C. for Nova Scotia.

The judgment of the court was delivered by

DUFF J.—The first of the questions submitted concerns the general effect of one of the clauses in Article 405 of the Treaty of Versailles and the corresponding provision in the other treaties of peace. This article is one of those comprised in the Labour Part (Part 13) of the treaties and it defines the undertaking entered into by each of the members respecting recommendations and draft conventions adopted by the general conference of representatives of the members of the League of Nations established as part of a permanent organization for the promotion of the ob-

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jects set forth in the preamble to that part. The pertinent clause is in these words:—

> Each of the members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

It seems very clear that the duty arising under this clause is not a duty to enact legislation or to promote legislation; it is an undertaking simply to bring the recommendation or draft convention before the competent authority.

No question is submitted as to the duty of the member arising under the succeeding clauses of the same article in the event of the competent authority or authorities giving its or their consent to the recommendation or draft convention; and upon this no opinion is expressed.

The second, third and fourth questions submitted relate to a particular draft convention, that, namely, adopted by the General Conference of the International Labour Organization of the League of Nations on the 29th of October, 1919, which has for its object the limiting of the hours of work in industrial undertakings as therein defined to eight hours in the day and forty-eight hours in the week.

Under the scheme of distribution of legislative authority in the British North America Act, legislative jurisdiction touching the subject matter of this convention is, subject to a qualification to be mentioned, primarily vested in the provinces. Under the head of jurisdiction numbered 13 in section 92, Property and Civil Rights, or under the sixteenth head, Local and Private Matters Within the Provinces, or under both heads, each of the provinces possesses authority to give the force of law in the province to provisions such as those contained in the draft convention. This general proposition is subject to this qualification, namely, that as a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government.

It seems questionable whether government employees, in industrial undertakings carried on by the Government,

such, for example, as shipbuilding, are within the scope of the convention. The point was not the subject of argument before us, and concerning it no opinion is intended to be expressed.

It is necessary to observe, also, that as regards these parts of Canada which are not included within the limits of any province, the legislative authority in relation to civil rights generally, and to the subject matter of the convention in particular, is the Dominion Parliament.

It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force. There would appear to be no doubt that, as regards such undertakings—a Dominion railway, for example—the Dominion possesses authority to enact legislation in relation to the subjects dealt with in the draft convention. The only Dominion legislation on this subject to which our attention has been called is to be found in sec. 287 of the Railway Act of 1919, which confers authority on the Board of Railway Commissioners to make orders and regulations concerning the hours of duty of persons employed on railways subject to the jurisdiction of the Board, with a view to the safety of the public and of such employees. It is understood that no orders or regulations have been made in execution of this power; and in view of the fact that this enactment, creating this unexecuted power, appears to be the only Dominion legislation in existence on the subject matter of the draft convention, the primary authority of the province in relation to that subject matter remains, subject to the qualification mentioned, unimpaired and unrestricted.

It follows from what has been said that the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any

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province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The convention should also be brought before the Lieutenant-Governor of each of the provinces for the purpose of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the province in relation to the subject matter of the convention.

The answers to the questions submitted are, therefore:—

To the first question: the obligation is simply in the nature of an undertaking to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

To the second question: yes, in part.

To the third question: the subject matter is generally within the competence of the legislatures of the provinces, but the authority vested in these legislatures does not enable them to give the force of law to provisions such as those contained in the draft convention in relation to servants of the Dominion Government, or to legislate for these parts of Canada which are not within the boundaries of a province.

To the fourth question: the Parliament of Canada has exclusive legislative authority in those parts of Canada not within the boundaries of any province, and also upon the subjects dealt with in the draft convention in relation to the servants of the Dominion Government.

PAINLESS PARKER (PLAINTIFF).....APPELLANT; 1925

*May 8.
*June 4.

AND

NICK KOGOS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Agreement—Construction—Interest—Specific performance

On the 20th July, 1922, K. agreed to purchase from J. an immovable for $85,000, payable $6,000 on the execution of the agreement and $79,000 as follows: $6,000, on the 20th July, 1923, 1924, 1925 and 1926, $25,000 on the 20th July, 1927, and the balance on the 20th July, 1928, with interest at 7 per cent, "the amount of the aforesaid deferred payments respectively to be applied first in payment of the interest upon the said purchase money to the date of the respective payments, then towards the said purchase money." K. paid the first instalment due on the date of the agreement and became entitled to possession of the premises. On the 8th of February, 1923, K. agreed to sell to P. the same property for $123,000 payable as follows: $7,000 on the execution of the agreement, $79,000 by assuming the payment of the above balance of purchase money due by K. to J., $28,000 on the 15th of March, 1923, and $1,000 on the 15th of each month, April to December, 1923, with interest at 7 per cent. This last agreement also provided that "all adjustments, including rents (were) to be made as of the 15th day of March, 1923, * * *." Of the first deferred payment of $6,000 payable 20th July, 1923, a sum of $3,605.70 was attributable to interest up to the 15th of March, 1923, upon the purchase money, according to the first agreement of sale. P. withheld the interest earned up to 15th March, 1923, amounting to the aforesaid sum of $3,605.70, claiming that he was entitled to that allowance upon the instalment of $6,000 due 20th July, 1923. K. refused to credit the interest, claiming that P. was not entitled to any deduction. P. sued for specific performance.

Held that, upon the true interpretation of the agreement of sale, P. was not liable for the interest accrued previously to 15th March, 1923, the adjustment date.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming, on equal division of the court, the judgment of the trial judge and dismissing the appellant's action for specific performance of an agreement of sale.

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

Farris K.C. and *Wismer* for the appellant.

Lafleur K.C. and *Barclay* for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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The judgment of the court was delivered by

NEWCOMBE J.—By agreement of 20th July, 1922, the defendant (respondent) agreed to purchase from Arthur William Jones and Arthur Philip Luxton, trustees under the will of the late Arthur Wellesley Vowell, deceased, certain real estate in the city of Vancouver for the sum of $85,000 payable, $6,000 on the execution of the agreement, and the balance of $79,000, with interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate of 7 per cent per annum, computed from 20th July, 1922, in the amounts and at the times following, viz: $6,000 on 20th July, 1923, and the like sum on the same day in 1924, 1925 and 1926; $25,000 on 20th July, 1927, and the balance on 20th July, 1928; and it was moreover provided that

the amount of the aforesaid deferred payments respectively be applied first in payment of the interest on the said purchase money to the date of the respective payments, then towards the said purchase money.

The respondent paid the first instalment of $6,000 and thus became entitled to and had possession of the premises. Afterwards he agreed to sell the property to the appellant (plaintiff), and by the agreement, dated 8th February, 1923, it was recited that the respondent had agreed to sell the property to the appellant, and the appellant had agreed to purchase it for $123,000,

payable in manner and on the days and times hereinafter mentioned, that is to say: the sum of seven thousand ($7,000) dollars on the execution of this agreement (the receipt whereof the said vendor doth hereby admit and acknowledge), and the balance payable as follows: $79,000, being the balance due and owing under a certain agreement for the sale and purchase of the said lands dated the 20th day of July, 1922, between Arthur William Jones and Arthur Philip Luxton, trustees under the will of Arthur Wellesley Vowell, deceased, which said agreement and the payments due thereunder the purchaser doth hereby assume, $28,000 on the 15th day of March, 1923, and $1,000 on the 15th day of each of the months of April, May, June, July, August, September, October, November and December, 1923, together with interest at seven (7%) per cent per annum, payable with the last instalment of principal.

Following these recitals the purchaser covenanted with the vendor that he would

well and truly pay, or cause to be paid, to the vendor the said sums of money above mentioned, together with interest thereon at the rate of 7 per cent per annum both before and after maturity, and on the days and times in manner above mentioned.

It was also agreed in effect that the purchaser should have

possession from the making of his first payment. The agreement contained also the following clause:

> All adjustments, including rents, are to be made as of the 15th day of March, 1923, provided however that the vendor shall not be required to account to the purchaser for any advance rents which he may have collected prior to the date hereof.

It will have been perceived that according to the intent of the agreement of 20th July, 1922, which evidences the respondent's title, and which is described in the case as the Vowell agreement, the deferred payments were to be applied first in payment of the interest upon the purchase money to the respective dates of payment, and then towards the principal; in consequence, according to the figures which were accepted for the purposes of the argument, the first of these deferred payments, amounting to $6,000, which became payable on 20th July, 1923, was, to the extent of $3,605.70, attributable to interest on 15th March upon the purchase money, and it was only the balance which went in reduction of the latter. The appellant had possession from the date of his agreement, 8th February, 1923, and, in view of the adjustment clause, it was not questioned that, if it were intended that the interest should be apportioned, the apportionment should take effect as from the last mentioned date. The defendant maintains however that, according to his understanding of the agreement, interest was not among the adjustments provided for, and that the plaintiff should assume and pay at his own charge the entire instalment of $6,000, which, by the Vowell agreement, became payable on 20th July next following the date of the agreement between the parties to the action. He claimed that this was true upon the interpretation of the latter agreement, or, if otherwise, that the agreement did not in this particular express the intention of the parties, and that it should therefore be reformed; upon the latter issue evidence was introduced.

The learned judge, who pronounced his judgment orally at the trial, found for the respondent upon the interpretation of the agreement, and that upon the appellant's interpretation, the instrument did not carry out the respondent's understanding; but he held moreover that, if it were necessary to reform the instrument in order to give effect to the intention found, he did not consider the evidence strong enough

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because rectification must be of a mutual mistake and it must be proved by satisfactory evidence.

The Court of Appeal was composed of four judges and they were divided in the result. The Chief Justice and M. A. McDonald J.A. would have allowed the appeal for reasons which they state, and which appear to me satisfactory, while Martin J.A. and McPhillips J.A. were for the respondent; they agreed with the trial judge upon the interpretation of the contract, and Martin J.A. moreover expressed the view that a clear case for rectification had been established by the proof to which he referred.

Considerable evidence was taken touching the negotiations which preceded the execution of the agreement, but, in the view which I take of the case, the question will be resolved upon the interpretation of the instrument, and I do not find it necessary to discuss the oral testimony.

It is obviously not the meaning of the recital that the purchaser shall pay to the vendor $79,000 as part of the stipulated purchase price, and also to the Vowell estate the amount said to be due and owing under the agreement of sale from it to the respondent. The parenthesis in the recital,

> which said agreement and the payments due thereunder the purchaser doth hereby assume,

is ancillary; it is evidently introduced as descriptive of the manner and the days and times of payment of the price or sum of $123,000, and it operates to define or to explain these by reference to the Vowell agreement, and to show that what is thus paid under that agreement is paid on the respondent's account and goes in diminution of the purchase price of $123,000. It must be realized that the $79,000, corresponding to the amount of the principal payments undertaken by the respondent in the latter agreement, is treated in the agreement between the parties to the action as a portion of the balance of the consideration money of $123,000, after deducting $7,000, the amount paid on the execution of the agreement, and there is nothing to define the manner or time of payment of the $79,000 except by way of assumption of the Vowell agreement.

The appellant's covenant which is found in the first paragraph of the operative part of his agreement provides that he shall pay to the respondent the sums of money mentioned in the recital, which aggregate exactly $123,000,

with interest at 7 per cent, but upon no principle of construction can this covenant be interpreted to include an obligation for the payment of interest accrued before the making of the agreement or while the vendor had the possession, and which is not included in the sums mentioned in the recital. That interest continues to be the obligation of the latter, to be discharged by him, or to be compensated if paid by the purchaser. The ordinary rule is that the purchaser does not pay interest accrued before the completion of the purchase, *Monro* v. *Taylor* (1), and I do not find anything in the language of the agreement to evince an intention that the appellant shall pay more than the stipulated consideration money of $123,000.

When the accounts came to be adjusted between the parties pursuant to the agreement, on or about 15th March, 1923, the appellant, who was in California, sent Mr. E. A. Parker, the man who looked after the construction of his offices, to pay the $28,000, which fell due at that time, and to see to the adjustments. He and Mr. Boultbee, a real estate agent who was acting for the plaintiff, met the respondent and they had some conversation, resulting in the payment of the $28,000, less $856.08 found payable by the respondent to the appellant, and E. A. Parker then gave the respondent a receipt for the latter amount, which he signed in the appellant's name, and which is expressed to be

> in full of all adjustments re sale Kogos to Parker, lots 25 and 26, block 9, D.L. 196. Balance of deferred payments due from Parker to Kogos, as per agreement of sale, $9,000.

This transaction, which, as has been said, took place on or about 15th March, was of course prior to the payment of the first instalment of $6,000 under the Vowell agreement, which fell due on 20th July following; the appellant was not present at the interview; no adjustment of interest was made or mentioned, and it is contended for the respondent that the fact that an adjustment was made, expressed to be in full, without any reference to the subject of interest, confirms his understanding of the contract that the interest accrued under the Vowell agreement was to be paid by the appellant. On the other side it is said that the agent was not fully instructed, and that, as the interest became pay-

(1) 8 Hare 70.

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able only at a later date, it would naturally stand over. It would have been prudent no doubt, and might have been expected, that, if the parties had realized that there was an outstanding question about interest, they would have at least stipulated a reservation in the receipt; but, however that may be, if, as I find, the contract is not ambiguous, the court may not look to this circumstance to aid in its interpretation. A receipt does not operate as a discharge.

As to the question of reformation, I see no reason to disturb the finding of the learned judges, including the trial judge, who considered that the evidence was insufficient. The contract of course binds according to its purport and tenor, and it is upon the respondent, seeking reformation, to show that it ought not to do so. I have considered the evidence very carefully, and not only does it fail to convince me that the instrument does not accurately express the understanding and intention with which the parties executed it, but I think it is reasonably apparent that the appellant did not intend or contemplate at the time that he should become bound for payment of purchase price in excess of $123,000.

For these reasons the appeal should be allowed with costs throughout, the counter-claim should be dismissed with costs, and there should be judgment for the appellant for specific performance of the agreement.

Appeal allowed with costs.

Solicitor for the appellant: *W. W. Walsh.*
Solicitor for the respondent: *E. Meredith.*

LE BUREAU DES COMMISSAIRES D'ECOLES CATHOLIQUES ROMAINES DE LA CITE DE QUEBEC (DEFENDANT) ..... APPELLANT;

AND

P. BILODEAU AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1925
*May 28
*June 4.

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

Contract—Architect—Annual salary—Extra commission on new works—Death before full execution of works—Right as to part of commission for preparation of plans and specifications.

On 1st May, 1921, T. agreed to act as architect for the exclusive benefit of the appellant in consideration of an annual salary of $3,000 which comprised all disbursements, commission or fees which the appellant would have paid otherwise for the same services. On 18th May, 1923, the appellant passed a resolution granting to T. over his salary a commission of 1½ per cent on the cost of all new constructions. T. died on the 6th November, 1923, without having received any part of such commission. The respondents are the executors of the estate of T. and claimed from the appellant the amount of salary due to T., the commission of 1½ per cent for all works already done on the new buildings and a further commission of ¾ per cent on the total cost of the buildings when completed as remuneration for the drawing of the plans and specifications according to the official tariff of architects' fees.

Held that the appellant was not bound to pay any amount over the salary earned and the commission of 1½ per cent of the value of the work actually done on the new buildings at the time of the death of T., such salary comprising any remuneration due him for the preparation of the plans and specifications for these works.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and maintaining the respondents' action.

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

L. A. Cannon K.C. for the appellant.

Galipeault K.C. for the respondents.

The judgment of the court was delivered by

RINFRET J.—Les parties s'accordent sur les faits de cette cause qui, en somme, est soumise pratiquement pour adjudication sur un point de droit.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret K.C.

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M. Georges-Emile Tanguay était architecte pratiquant à Québec.

Les commissaires d'écoles, par leur résolution du 1er décembre 1918, lui avaient demandé de mettre ses services à leur disposition, moyennant un salaire de $2,000 jusqu'au 1er mai 1919; de là, $2,400 au 1er mai 1920; de cette dernière date au 1er mai 1921, $2,700; et depuis le 1er mai 1921, $3,000. Monsieur Tanguay avait accepté ces conditions. Par contrat reçu devant maître Delagrave, notaire, le 29 décembre 1919, les termes de cette convention furent arrêtés entre les parties; et l'engagement fut conclu moyennant la rémunération prévue par la résolution.

Ce contrat déclare que le salaire

> comprend tous déboursés, commission ou honoraires que le dit bureau serait appelé à payer à un architecte pour remplir les devoirs ci-après mentionnés.

Ces devoirs, que M. Tanguay "s'engage" à remplir, sont:

> A.—préparer les plans généraux, les plans de détails, devis et quantités pour toutes constructions ou réparations d'écoles ou pour toutes bâtisses appartenant au dit Bureau soit comme propriétaire, soit comme locataire ou occupant.
>
> B.—fournir au dit Bureau copie des plans, devis, spécifications et estimés pour toutes et chacunes des dites constructions ou réparations d'écoles ou bâtisses occupées par le dit Bureau comme ci-dessus, et fournir et donner au dit Bureau les quantités et évaluations de toutes constructions ou améliorations d'écoles ou bâtisses occupées ou à être occupées par le dit Bureau et tous renseignements qu'il, le dit Bureau, jugerait utiles ou nécessaires.
>
> D.—surveiller tous travaux de construction de nouvelles écoles, trottoirs, ou de toutes réparations et améliorations faites aux dites écoles, constructions ou bâtisses appartenant ou occupées par le dit Bureau, faire un estimé préalable des dites constructions, réparations ou améliorations, en donner rapport détaillé à la demande du dit Bureau et faire un estimé des terrains ou constructions que le Bureau aurait l'intention d'acheter.
>
> D.—contrôler et vérifier tout compte produit touchant les dites réparations, constructions ou améliorations et pour l'ameublement de toutes constructions,—écoles ou bâtisses.
>
> E.—se tenir à la disposition du dit Bureau et assister aux séances générales et spéciales du dit Bureau lorsque sa présence sera requise.
>
> F.—se conformer en tous points aux voeux et aux désirs du dit Bureau quant aux plans des bâtisses, des réparations ou améliorations projetées, et quant à toute autre chose, acquisition d'immeuble ou autre, du domaine du dit Bureau, et où les services d'un architecte ou évaluateur seraient requis.

Le 18 mai 1923, les commissaires d'écoles adoptèrent la résolution suivante:

> Résolu: Qu'une commission de un et demi pour cent soit accordée à l'architecte de cette commission, G.-Emile Tanguay, à part de son salaire

régulier de trois mille piastres par année, sur les nouvelles constructions de l'année et sur celles de l'avenir.

Monsieur Tanguay est décédé le 6 novembre 1923, avant l'expiration de l'année qui a suivi l'adoption de cette résolution et sans avoir touché aucune partie de la commission qui lui était ainsi accordée. Les intimés sont ses exécuteurs testamentaires et réclament des commissaires d'écoles, qui sont les appelants, le paiement de la somme qui, dans leur opinion, représente cette commission.

L'on s'entend sur "les nouvelles constructions de l'année." Ce sont: L'école Notre-Dame de Québec; l'école Notre-Dame-du-Chemin; l'Académie Saint-Jean-Baptiste; le couvent des Dames de la Congrégation de Saint-Malo; et l'école des Frères Maristes, Saint-Malo, Québec. Mais les parties donnent à la résolution du 18 mai 1923 un sens différent qui, suivant le cas, attribuerait à la succession Tanguay la somme de $8,731.94 ou celle de $6,590.68. Les commissaires d'écoles admettent cette dernière somme, qu'ils se sont déclarés prêts à payer avant l'institution de l'action. Ils ont réitéré leurs offres par leur plaidoyer et ont déposé la somme en concluant au renvoi de l'action pour le surplus.

Le litige est exactement posé dans les paragraphes 8 et 11 de la déclaration:

8.—Pour constituer le dit montant, les demandeurs réclament pour la succession du dit feu Georges-Emile Tanguay, sur la commission de 1½ pour cent à lui octroyée par la résolution du 18 mai 1923, ¾ pour cent sur le prix total des différents contrats attribués, et ce pour services rendus par le dit feu Georges-Emile Tanguay, en rapport avec la confection des plans et devis complets, études préliminaires comprises, qui tous ont été faits et préparés par lui avant son décès, et qui ont servi à l'exécution des travaux, puis ¾ pour cent de la commission susdite pour frais de surveillance sur le coût des travaux exécutés au décès du dit architecte;

11.—Toute la différence entre les parties provient de ce que le défendeur prétend s'acquitter de ses obligations envers les demandeurs, en payant à ces derniers la commission de 1½ pour cent seulement sur le coût des travaux parachevés, sans tenir compte du fait que les plans et devis complets, études préliminaires comprises, ont été faits par feu Georges-Emile Tanguay, et qu'il ne restait plus au défendeur qu'à faire continuer la surveillance pour la balance des travaux à exécuter depuis le décès de l'architecte.

Deux états de compte ont été préparés suivant les prétentions respectives des parties, qui admettent que les exécuteurs testamentaires auront droit à l'une ou l'autre somme, suivant l'interprétation qui doit être donnée à la résolution du 18 mai 1923.

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La Cour Supérieure s'est rangée du côté des commissaires d'écoles. Elle a maintenu leurs offres.

En Cour du Banc du Roi, les opinions ont été partagées. Deux des juges ont été de l'avis de la Cour Supérieure; les trois autres, par conséquent la majorité, ont été d'opinion contraire et ont adopté l'interprétation des exécuteurs testamentaires.

La solution que nous cherchons dépend uniquement du sens et de l'intention de la dernière résolution des commissaires d'écoles.

Jusqu'à l'adoption de cette résolution, M. Tanguay était indiscutablement un salarié. Son salaire avait varié; mais il comprenait tout ce qu'on peut être

appelé à payer à un architecte pour remplir ses devoirs

sans aucune exception, et l'obligeait à

se conformer en tous points aux voeux et aux désirs du dit Bureau (des Commissaires) quant aux plans des bâtisses, des réparations ou améliorations projetées, et quant à toute autre chose, acquisition d'immeuble ou autre, du domaine du dit Bureau, et où les services d'un architecte ou évaluateur seraient requis.

Il devait même

se tenir à la disposition du dit Bureau et assister aux séances générales et spéciales du dit Bureau lorsque sa présence serait requise.

Il n'y avait donc, en tant qu'architecte, pas un seul devoir auquel M. Tanguay ne fût tenu, ni un seul service qu'il ne fût obligé de remplir moyennant la rémunération stipulée au contrat.

En vertu de la loi des architectes de la province de Québec, le conseil de l'association fixe, pour les services de ses membres (dont faisait partie M. Tanguay), un tarif qui, une fois approuvé par le lieutenant-gouverneur en conseil, est publié dans la Gazette Officielle de Québec. Suivant le texte de la loi (R.S.Q. art. 5245), il a pour but d'éviter devant toutes les cours de justice la preuve de la valeur des services, lorsqu'elle n'a pas été fixée par une convention. Les architectes ne sont pas liés par ce tarif. Ils peuvent y déroger.

C'est ce que fit M. Tanguay lorsqu'il convint de rendre aux commissaires d'écoles de Québec tous les services d'un architecte moyennant une rémunération annuelle. Son contrat avait pour but et pour effet d'exclure les honoraires fixés par le tarif et d'y substituer des honoraires différents.

La résolution du 18 mai 1923 ne modifie pas cette situation. Elle ne peut être considérée comme une convention

nouvelle ou indépendante du contrat. Elle n'est pas une convention complète par elle-même. Elle ne mentionne pas les services que M. Tanguay sera appelé à rendre. De toute évidence, elle n'est qu'un amendement du contrat originaire pourvoyant à une augmentation de la rémunération. Jusque là, le salaire de M. Tanguay était un montant fixe. A partir de la date de cette résolution, il aura droit à ce montant fixe et, en outre, à un montant supplémentaire qui variera suivant

les nouvelles constructions de l'année et celles de l'avenir.

Nous n'avons pas à nous occuper des constructions de l'avenir, puisque M. Tanguay est mort dans l'année et que, des deux côtés, l'on admet que ses droits ont cessé le jour de son décès.

Comme le contrat originaire avait pour but d'exclure le tarif et comme la résolution ne fait qu'augmenter le montant stipulé dans ce même contrat, il s'ensuit que le tarif continue d'être exclu et qu'on ne saurait y référer dans le but d'interpréter la résolution.

L'idée contenue dans la résolution est que, en plus de son salaire, M. Tanguay recevra une commission d'un pourcentage invariable calculé sur le coût des constructions parachevées. Il ne faut pas entendre par là les constructions lorsqu'elles auront été complétées, mais simplement tout le travail qui est accompli au moment du calcul du pourcentage. Non seulement les méthodes de calcul établies par le tarif des architectes sont éliminées par l'existence même d'une convention différente; mais le principe de cette convention s'oppose à l'application du tarif.

En effet, les honoraires indiqués au tarif sont basés " sur le prix qu'aura coûté la bâtisse " (Tarif, Article 1). La commission qui y est pourvue est calculée " sur le coût total des travaux " (Tarif, Article 8). Au contraire, la commission de M. Tanguay a pour base le coût des seuls travaux terminés.

Les honoraires attribués par le tarif sont fixés à raison du travail fait par l'architecte; la rémunération de M. Tanguay, en vertu de son contrat tel qu'amendé par la résolution, est établie uniquement à raison de son emploi au service de la commission scolaire, indépendamment du travail qu'il fera.

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En vertu de ce tarif, l'architecte recevra une commission de 5 pour cent s'il a fait tous les travaux, comprenant les études préliminaires, les plans complets, les devis, les détails et la surveillance. Il ne recevra qu'une partie de ces honoraires s'il n'a fait qu'une partie de ces travaux, soit: les études préliminaires seules; ou les plans et devis complets (les études préliminaires comprises); ou les détails; ou la surveillance. Pour chacun de ces cas, des honoraires partiels sont prévus.

Il en est autrement de M. Tanguay qui a droit à la totalité de son salaire et à la totalité de sa commission, quels que soient les travaux qu'il sera appelé à faire; et même s'il n'est pas appelé à en faire du tout. Avant la résolution si M. Tanguay eût fait tous les travaux pour lesquels les exécuteurs testamentaires réclament maintenant une commission de $\frac{3}{4}$ pour cent, il n'eût reçu rien autre chose que son salaire. Depuis la résolution, pour les mêmes travaux, il doit recevoir son salaire et la totalité de la commission qui y est stipulée. Il n'y est nullement question de subdivision. Et la méthode suggérée par les intimés nous paraît arbitraire.

Le paiement des plans et devis qu'il a faits est représenté par ce salaire et cette commission. Il eut eu droit à cette commission intégrale de la même façon si les commissaires d'écoles avaient jugé à propos de faire préparer les plans et devis par un autre architecte. Sa commission eût toujours, quand même, été calculée sur tout ce qui se serait dépensé pour les " nouvelles constructions " pendant que M. Tanguay était à l'emploi du bureau des commissaires.

Il s'ensuit que le montant auquel il a droit est indépendant du travail qu'il a fait. Contrairement au tarif des architectes qui subdivise la commission totale suivant le travail qui a été accompli par l'architecte lui-même, ici la base de la rémunération est le montant qui a été dépensé sur les bâtisses nouvelles à la date du calcul de la commission. Les procédés du tarif n'ont rien à faire avec cela. Sa commission est pour l'ensemble de ses services, sans égard à leur nature particulière.

Nous croyons donc que le juge de première instance avait exactement interprété la convention entre M. Tanguay et les commissaires d'écoles de Québec; et que l'appel

doit être maintenu, en infirmant la décision de la Cour du Banc du Roi et en rétablissant le jugement de la Cour Supérieure.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Taschereau.*

Solicitors for the respondents: *Galipeault, Lapointe, Rochette & Boisvert.*

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HIS MAJESTY THE KING.....APPELLANT;

AND

E. W. BOAK .....RESPONDENT.

1925

*May 26.
*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeal—Deafness of juror as ground for—Question of law or fact or "sufficient ground" within discretion of court—"Substantial wrong or miscarriage of justice"—Grand jury—Error in written order summoning persons—Oral order by judge valid—Presiding judge—Sections 1013 and 1014 Criminal Code—Jury Act, B.C. 1913, c. 34, s. 31.

An appeal on the ground that a juror was deaf and the jury, therefore, illegally constituted is not an appeal on a question of law within clause (*a*) of section 1013 Cr. C., neither is the question one of fact alone or of mixed law and fact within clause (*b*), but it falls within clause (*c*) of that section; and therefore leave of the Court of Appeal was a condition precedent to the respondent's right of appeal to that court.

Although on the case being referred back to the Court of Appeal the respondent may obtain leave, his appeal on the ground of the disqualification of the petit juror would ultimately fail, because in the circumstances of this case, even though that disqualification should be established, it did not cause a miscarriage of justice (s. 1014 (1) (*e*) Cr. C.) or should be dismissed because "no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2).

An order made by the judge designated to preside at the assizes directing the sheriff to summon other persons to serve on the grand and petit juries in the places of those whom the sheriff had been unable to serve was drawn up, by inadvertence, to cover only the summoning of petit jurymen.

Held that the order as pronounced by the judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up, and there had been no illegality in the constitution of the grand jury.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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The judge designated to hold the assizes may in advance of the actual opening of the court, for the purposes of section 31 of the *Jury Act* (B.C. 1913, c. 34) be regarded as the "presiding judge."

Judgment of the Court of Appeal ([1925] 2 W.W.R. 40) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), setting aside the conviction of the respondent for manslaughter and directing a new trial.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

J. A. Ritchie K.C. and *M. B. Jackson K.C.* for the appellant.

No counsel appeared for the respondent at the argument.

The judgment of the court was delivered by

ANGLIN C.J.C.—The Attorney-General appeals by leave of a judge of this court, under s. 1024 (*a*) of the Criminal Code, against an order of the Court of Appeal for British Columbia setting aside the conviction of the defendant and directing a new trial. Although he appeared by counsel on the application for leave to appeal and was duly served with notice of the appeal, the defendant was not represented on the argument and the appeal was heard *ex parte*.

Convicted of manslaughter on his trial before Mr. Justice Murphy and a jury, the defendant appealed to the Court of Appeal for British Columbia. Three grounds of appeal were urged:—

(*a*) misdirection

(*b*) illegality in the constitution of the grand jury; and

(*c*) disqualification of a petit juror through deafness.

The judgment of the Court of Appeal, pronounced by the Chief Justice, was that the conviction be set aside and a new trial ordered on the ground that one of the petit jurors was disqualified by deafness; that the question involved in this ground of appeal was a question of law alone in respect of which leave to appeal was unnecessary; that such leave was accordingly refused; and that the members of the court might pronounce separate judgments. (S. 1013 of the Criminal Code, as enacted by 13-14 Geo. V, c. 41, s. 9.)

(1) [1925] 2 W.W.R. 40.

Judgments were accordingly delivered by each of the judges who composed the court.

(*a*) There was no expression of opinion by any of them on the alleged misdirection.

On ground (*b*) two of the learned judges (Martin and M. A. Macdonald, JJ.A.) were of the opinion that the appeal should be allowed and the indictment quashed. McPhillips J.A. expressed no opinion on this point. Galliher J.A. was of the view that this ground of appeal was met by s. 1011 of the Criminal Code; and the learned Chief Justice thought that it should, if known, have been raised at the trial by motion to quash the indictment and that in any case it involved a question of fact and law as to which an appeal would not lie without leave, which, presumably, he would have refused.

(*c*) Martin, Galliher and McPhillips, JJ.A., were of opinion that the objection to the disqualification of the petit juror raised a question of law alone within clause (*a*) of s. 1013 in respect of which there was a right of appeal without leave; that evidence taken by direction of the Court of Appeal under s. 1021 established deafness amounting to disqualification of the juror Keown; that, as a result, there had been a miscarriage of justice; and that the conviction should be set aside. The Chief Justice, dissenting, held that the question raised by this ground of appeal was one of mixed law and fact falling within clause (*b*) of s. 1013; that, in the absence of a certificate of the trial court that it was a fit case for appeal, no appeal lay without leave of the Court of Appeal; and that, under the circumstances, which he detailed, leave should be refused. Mr. Justice M. A. Macdonald expressed no opinion on this ground of appeal.

The Court of Appeal is a statutory court (Criminal Code, s. 2, s.s. 7; s. 1012 (*b*). The right of appeal to it is conferred and defined by s. 1013 of the Criminal Code (13-14 Geo. V, c. 41, s. 9). Subsections 1 and 3 of that section read as follows:—

1013. (1) A person convicted on indictment may appeal to the court of appeal against his conviction;

(*a*) on any ground of appeal which involves a question of law alone; and

(*b*) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal

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which involves a question of fact alone or a question of mixed law and fact; and

(c) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(3) No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the court of criminal appeal for any province, in respect of motions for or the granting of new trials of persons convicted on indictment, are hereby abolished.

The Criminal Code does not contain a provision corresponding to s.s. 4 of s. 20 of the English Criminal Appeal Act. (7 Edw. VII, c. 23.)

The defendant asserted a right of appeal under clause (*a*) of s.s. 1 of s. 1013 and, alternatively, asked leave to appeal if his case should be deemed to fall not within that clause but within clause (*b*) or clause (*c*) of that subsection. There was no suggestion that any other remedy was open to him.

By s. 921 (1) of the Criminal Code

Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such juror in criminal cases in that province.

By s. 5 (1) of the Jury Act (B.C. 1913, c. 34) a person afflicted with deafness incompatible with the discharge of the duties of a juror is absolutely disqualified for service as a juror. Such disqualification is not a ground of challenge for cause. (S. 935 of the Criminal Code.)

We are of the opinion that the ground of appeal resting on the alleged disqualification of the petit juror does not fall within clause (*a*) of s. 1013. That clause was meant to cover questions of law arising out of the proceedings at the trial based upon facts admitted or conclusively found and not involving the appreciation or weighing of evidence by the appellate court. This is implied in the terms "law alone." The facts on which such questions were submitted under the former practice were found and stated by the trial judge: no matter of fact was open for decision by the appellate court. Here the deafness of a juror incompatible with the discharge of his duties was in issue; its existence was contested by the Crown; such determination of it as there was at the trial, if any, was adverse to the defendant; and in any case this ground of appeal involved the determination of a question of fact by the Court of Appeal upon evidence not before the trial court but taken by direction of the Court of Appeal under

the powers conferred upon it by s. 1021. This ground of appeal clearly did not "involve a question of law alone."

Neither, in our opinion, is the question one of fact alone, or of mixed law and fact within clause (*b*) of s. 1013. We incline to the view that the questions contemplated by that clause relate to matters which are in issue on the trial and the determination of which by the trial court is challenged.

In our view the ground of appeal now under consideration falls rather within clause (*c*) of s. 1013—

any other ground of appeal which appears to the Court of Appeal to be a sufficient ground of appeal.

(Archbold, Cr. Pl., Ev., Pr., 26th Ed., 338). The question is as to the constitution of the petit jury. Where such a defect in the constitution of the petit jury is charged as might involve a miscarriage of justice (s. 1014 (1) (*c*)) the Court of Appeal may regard it as something which, if established, would be a sufficient ground of appeal. But an appeal lies under clause (*c*) of s. 1013 only "with leave of the Court of Appeal."

We are, therefore, of the view that leave of the Court of Appeal was a condition precedent to the defendant's right of appeal. Inasmuch as the Court of Appeal proceeded on the view that such leave was unnecessary it did not exercise the discretion conferred on it by the statute in respect to the giving or refusing of leave. It follows that its order setting aside the defendant's conviction and directing a new trial cannot be maintained on the ground on which it was based.

Under such circumstances the usual course would be to remit the case to the Court of Appeal in order that it should pass upon the defendant's application for leave to appeal. But we should not send the case back for that purpose if satisfied that, although the defendant should obtain leave, his appeal on the ground of the disqualification of the petit juror must fail, because, even though that disqualification should be established, it did not cause a miscarriage of justice (s. 1014 (1) (*c*)), or should be dismissed because "no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2)). The pertinent facts are stated by Macdonald C.J.A. as follows:—

During the trial a rumour was started which came to the ears of the trial judge to the effect that one of the jurors was afflicted with deaf-

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ness. Counsel for the appellant urged that the trial should be proceeded with. He even went the length of offering an undertaking that no question would be raised concerning the juror in question in case of an appeal. This was practically a confession that there was no ground for the rumour; but be that as it may, the accused, through his counsel, had the opportunity of having the rumour confirmed or denied, and if confirmed of asking that the jury should be dismissed and a new jury called, but far from taking that course he gave as one of his reasons for urging that the trial be proceeded with, that some of his witnesses were from a distance and might not be available again. The undertaking was not accepted by the learned judge, but that does not affect the fact that the objection which counsel might then have taken against the proceeding at the trial was not taken. The appellant took his chance of success with the jury as it was then constituted, and with knowledge that there was a question respecting the hearing of one of the jurors, and it was only when he failed to secure an acquittal that this rumour was revived. * * * We were satisfied, on consultation with the learned trial judge, that the test made by him of having the sheriff call over, once in an ordinary tone of voice, and once in a lower tone, was not known to either the appellant or his counsel but there is no suggestion that the appellant was not made aware of the alleged deafness of the juror.

It is thus apparent that the question of the deafness of the juror Keown was canvassed during the trial and that, with the knowledge that the learned trial judge was aware that that question had been raised and must have satisfied himself that Keown's deafness was not so great as to be incompatible with his discharge of the duties of a juror before allowing the trial to proceed with him as a member of the petit jury, counsel representing the defendant, to suit his own purposes, acquiesced in that course being taken.

Under these circumstances we are not disposed to admit the right of the defendant to contend on appeal that the presence of Keown on the petit jury resulted in a miscarriage of justice; and, if he should be allowed to do so, we are fully convinced that

no substantial wrong or miscarriage of justice has actually occurred. (Cr. C. s. 1014 (2)).

We, therefore, think that so far as the defendant's appeal to the Court of Appeal rests on this ground it should now be dismissed.

The objection to the constitution of the grand jury rests on the facts that an order of Mr. Justice Murphy, purporting to be made by him as presiding judge at the assizes, and directing the sheriff to summon other persons to serve on the grand and petit juries in the places of those whom the sheriff had been unable to serve (Jury Act, B.C. 1913,

c. 34, s. 31) was in fact made by him six days before the assizes opened and by inadvertence was drawn up to cover only the summoning of additional petit jurymen, although the record shews that it was sought in respect of the grand jury as well as of the petit jury. There is no doubt that the learned judge meant his order to cover both grand and petit jurors and there is equally no doubt that the omission of the words "the grand jury and" in the operative clause was a mere clerical error entirely due to a slip, or inadvertence, on the part of the solicitor who drew the order up.

Under these circumstances we incline to think the order as pronounced by the learned judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up. *Hatton* v. *Harris* (1); *Milson* v. *Carter* (2). In any case, however, if the consequences of the mistake made in drawing up the order should afford a ground on which "the appeal, might be decided in favour of the appellant," we are convinced that "no substantial wrong or miscarriage of justice has actually occurred" as a result of such mistake.

Although the statute authorizes "the presiding judge" to make the order and, on a strict construction, this might be held to confer jurisdiction only after the sittings of the Assize Court had begun, convenience obviously requires that the jury panels shall be filled in advance of the actual sitting of the court. Giving to s. 31 (of the Jury Act) a construction designed to advance the remedy it was meant to afford, we are of opinion that the judge designated to hold the assizes may in advance of the actual opening of the court for the purposes of the section be regarded as "the presiding judge" to whom the sheriff is to report and who may, on request made on behalf of the Crown, make the order.

Moreover, we incline to agree with Mr. Justice Galliher that s. 1011 of the Criminal Code, notwithstanding the absence from it of the word "summoning," was meant to preclude the impeaching of a verdict on the grounds such as these. The defendant's appeal to the Court of Appeal on this ground should, therefore, likewise stand dismissed.

(1) [1892] A.C. 547. (2) [1893] A.C. 638, 640.

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There remains the ground of misdirection. This was not discussed at bar and so far as appears from the material before us was not passed upon in the Court of Appeal. Moreover the charge of the learned judge is not in the record. Having regard to the further fact that the defendant was not represented on the argument of the appeal, we think the only course open to us is to remit the case to the Court of Appeal in order that that court may pass upon the grounds of appeal based on misdirection.

Appeal allowed.

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*May 26, 27.
*June 18.

BENJAMIN STEVENSON (RESPONDENT) ..... APPELLANT;

AND

DAME FLORA FLORANT (PETITIONER) ..... RESPONDENT.

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

Paternal authority—Tutorship—Minor child in care of tutor—Right of parent to regain possession—Habeas corpus—Proper remedy—Arts. 83, 113, 120, 165, 243, 245, 290 C.C.—Art. 1114 C.C.P.

The rights of the tutor given by Art. 290 C.C. do not extinguish those of the parent under Arts. 113, 243 and 245 C.C.; and therefore the tutor, to whose care the mother previously had confided her child after the death of the father, cannot assert the right to refuse to surrender possession of her child to her, even though she had renounced to her legal right to tutorship.

The writ of *habeas corpus* is the proper remedy, as recognized by law and jurisprudence, of a mother who wishes to regain possession of her child illegally kept or detained from her.

In determining such right, consideration should be given to the interests of the child, without, however, confusing the interests with the wish or will of the child.

Judgment of the Court of King's Bench (Q.R. 38 K.B. 314) affirmed (*a*).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, which maintained a writ of *Habeas Corpus* and ordered the possession of a minor child to be given to the respondent.

(*a*) Appeal to the Privy Council.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1923] Q.R. 38 K.B. 314.

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

Geo. A. Campbell K.C. and *A. S. Bruneau* for the appellant. As between mother and tutor, the mother's right is not absolute, where, as in this case, the mother has renounced to the charge of tutorship and has voluntarily transferred to the tutor the care of the child's person.

The right is not absolute, but depends on the circumstances, the determining factor being the interest of the child.

Under the circumstances of this case, the respondent is not entitled to proceed by way of *habeas corpus,* but should have proceeded by way of ordinary writ of summons.

H. G. Gérin-Lajoie for the respondent. The right of the mother to regain possession of her child is a right resulting from the principles of paternal authority.

The rights of tutorship cannot extinguish that right.

The writ of *habeas corpus* is the proper remedy in the circumstances of the case, according to the doctrine of the authors and the jurisprudence.

The judgment of the court was delivered by

RINFRET J.—Cette cause présente deux questions résultant

1. d'un conflit apparent entre les droits d'une mère et ceux d'un tuteur sur la personne d'une fille mineure;

2. de la recevabilité d'un bref *d'habeas corpus* comme remède approprié pour déterminer ces droits.

Gertrude Stevenson, la fille de l'intimée, est une enfant posthume. La mère, restée veuve et sans moyens, ne pouvait subvenir aux besoins de son enfant, et crut de l'intérêt de cette dernière de consentir à ce qu'elle restât chez les grands-parents paternels. Quoique l'enfant n'eût aucuns biens, on lui fit nommer un tuteur, et la mère renonça à la charge en faveur du grand-père.

Les grands-parents demeuraient à Ste-Sophie, qui est situé à environ trente-trois milles de Montréal, où la mère s'établit pour gagner sa vie. Malgré la modicité de ses ressources pécuniaires, l'intimée fit à son enfant des visites

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régulières et avait l'habitude de lui apporter des vêtements, des jouets et des friandises.

Graduellement la condition de l'intimée s'améliora et elle parvint à gagner un salaire suffisant pour lui permettre de reprendre à sa charge l'obligation naturelle et légale de " nourrir, entretenir et élever son enfant " (Art. 165 C.C.).

Gertrude avait atteint l'âge de neuf ans. C'était le moment de lui faire suivre les classes. Les grands-parents demeurant à la campagne, ils jugèrent à propos de l'envoyer à Montréal, chez une tante, auprès de qui elle eût une chambre (" rooming ") pour lui permettre de suivre les cours du " high school." Sa mère apprit cela et n'y fit d'abord aucune objection. Mais l'instinct maternel prit le dessus; et, un jour que la fillette se promenait sous les soins d'une institutrice attachée à l'établissement tenu par la tante, l'intimée chercha à s'emparer de son enfant. L'institutrice résista et la tentative n'eut pas de résultat immédiat. Cependant l'esprit de la mère s'était éveillé à la véritable nature de ses droits; et, au moyen de la présente requête pour émission d'un bref *d'habeas corpus,* elle réclame la possession et la garde de son enfant. Le grand-père, qui est l'appelant, oppose à la requête une résistance énergique en invoquant ses droits de tuteur et la longue période d'années pendant laquelle il a eu soin de l'enfant, en ajoutant qu'il en est résulté une affection réciproque très vive qu'il serait cruel de briser aussi brusquement.

La Cour Supérieure a trouvé que

> la preuve faite en cette cause établit que la requérante a toujours été digne de la garde de son enfant, et qu'elle l'est encore; (que) la pauvreté seule l'a fait consentir à s'en séparer, elle s'est toujours montrée bonne mère, visitant souvent (son enfant) et lui apportant des choses nécessaires à la vie aussi bien que des jouets et friandises. (Aujourd'hui qu'elle se trouve) dans une position financière qui lui permet d'assurer à son enfant les soins et instruction et l'éducation convenables et appropriés il est temps, dans l'intérêt de l'enfant. que sa mère, la requérante, lui donne ou lui fasse donner, comme c'est son droit maternel, sacré et inaliénable, la formation intellectuelle, morale et religieuse de son choix.

La cour a donc maintenu le bref *d'habeas corpus ad subjiciendum* et a confié l'enfant à la mère.

La Cour du Banc du Roi a confirmé ce jugement à l'unanimité.

La concordance de vues en Cour Supérieure et en Cour du Banc du Roi, appuyée comme elle l'est sur une exacte

appréciation des circonstances, n'a entraîné devant cette cour aucune discussion sur les faits.

Le grand-père a quatre-vingts ans et la grand'mère au delà de soixante-quinze. Malgré toute leur tendresse et leur sollicitude, il paraît clair que leur âge ne leur permettra pas d'accorder encore longtemps leur attention et leurs soins à la fillette. Il est donc prudent, même en se plaçant uniquement à ce point de vue, de la pourvoir dès maintenant d'un autre protecteur. La santé de l'enfant n'entre pas en balance, puisque, pour les fins de son instruction, les grands-parents étaient obligés de la placer en chambre à Montréal et que son accommodation, sous ce rapport, n'offre pas de différence sensible avec ce que la mère est en état de lui procurer.

Nous ne faisons que constater en passant que le résultat du litige ne diminuera pas le bien-être de Gertrude Stevenson, sans toutefois attacher à cette question une importance décisive.

Abordons premièrement le côté des droits du tuteur. L'appelant a semblé vouloir faire état de la renonciation de l'intimée à la charge de tutrice. Il a voulu qu'on y vît une sorte de convention qui aurait pour effet de lier l'intimée et contre laquelle elle ne pourrait plus réclamer.

Il est inutile de dire que les droits qui dérivent de la puissance paternelle ne peuvent jamais faire l'objet d'un pacte de ce genre. Ces droits sont conférés au père et à la mère par la nature et par la loi. Il n'est pas en leur pouvoir de s'en départir eux-mêmes. Un contrat qui aurait cet objet serait intrinsèquement immoral et illégal. La loi elle-même n'intervient pour atténuer ou écarter l'autorité paternelle que dans les cas où les parents sont incapables ou indignes de l'exercer.

La renonciation contenue dans l'acte de tutelle n'a donc pas affecté les droits de l'intimée en tant que mère; mais eût-elle été faite dans ce but (et en dehors des cas d'adoption que la loi de Québec permet maintenant), elle devrait être à cette fin considérée comme absolument nulle et incapable de mettre la moindre entrave aux conclusions de l'intimée.

La cour du Banc du Roi a depuis longtemps tranché cette question. *Barlow* v. *Kennedy* (1). Fuzier-Herman Code Civil—Art. 373, n° 32.

(1) [1871] 17 L.C.J. 253.

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Mais, très ingénieusement, l'appelant invoque les pouvoirs et les devoirs qui lui sont conférés par le code civil en sa qualité de tuteur:

Le mineur non émancipé a son domicile chez ses père et mère ou tuteur (art. 83 C.C.).

Si le père est disparu, la mère a la surveillance des enfants mineurs et elle exerce tous les droits du mari quant à leur personne et à l'administration de leurs biens, jusqu'à ce qu'il y ait un tuteur (art. 113 C.C.).

Le tuteur prend soin de la personne du mineur et le représente dans tous les actes civils (art. 290 C.C.).

On ne saurait en tirer l'argument que l'appelant suggère. Il fallait que la loi attribuât ces pouvoirs au tuteur, parce qu'il pouvait être appelé à les exercer. Les codificateurs ont été obligés de prévoir le cas où le père ou la mère seraient indignes ou incapables de les remplir. C'est pourquoi ils ont inclu ces devoirs parmi ceux du tuteur. Il fallait pourvoir aux cas où les circonstances l'exigeraient.

Ces droits résultant de la puissance paternelle appartiennent aux parents dès la naissance de l'enfant. La tutelle est dative et les pouvoirs qu'elle comporte n'existent que depuis la date où elle est conférée. L'article 243 du code civil attribue au père l'autorité sur l'enfant jusqu'à la majorité ou l'émancipation de ce dernier. Jusque là le mineur non émancipé ne peut quitter la maison paternelle sans la permission de son père (art. 244 C.C.).

Il ne fait absolument aucun doute qu'à défaut du père cette autorité appartient à la mère (arts. 113, 120, 245 C.C.). Les seules causes qui en font perdre l'exercice, en dehors de la majorité ou de l'émancipation de l'enfant, sont l'incapacité (comme, par exemple, l'interdiction), ou l'indignité (comme les mauvais traitements qui pourraient compromettre son intelligence ou sa vie, ou l'immoralité).

L'octroi de la tutelle à une autre personne que la mère n'a pas pour résultat de faire disparaître la puissance paternelle.

Il faut donc considérer les articles de la loi qui confèrent au tuteur des droits sur la personne du mineur comme insérés dans le code civil pour prévoir le cas où le mineur serait privé de son protecteur naturel et légal, qui est la mère, à défaut du père. Les pouvoirs du tuteur se bornent autrement à l'administration du patrimoine du pupille.

Et même si le domicile légal de ce dernier est chez son tuteur, sa résidence obligatoire continue d'être la maison paternelle. (Baudry-Lacantinerie, 3ième éd. vol. 5, p. 149).

L'un des deux époux étant décédé, la puissance paternelle est exercée par le survivant, tuteur ou non tuteur, remarié ou non remarié. (Demolombe, vol. 6, n° 374).

Demolombe ajoute:

La puissance paternelle et la tutelle sont deux pouvoirs distincts, qui peuvent co-exister ensemble, réunis sur la même tête ou séparés.

Mais comment, direz-vous, cela est-il possible?

La puissance paternelle a pour mission de gouverner la personne et d'administrer les biens de l'enfant. Or la tutelle a aussi absolument la même mission. Donc ces deux pouvoirs ne sauraient exister en même temps. Leur existence simultanée est néanmoins incontestable; seulement ce syllogisme est vrai en ce sens, que l'un des pouvoirs en effet l'emporte quelquefois sur l'autre dans l'exercice de certains attributs, ainsi que nous allons l'expliquer.

Il examine ensuite les différentes hypothèses possibles (nos. 375, 376, 377, 378, 379 et 380); puis il conclut que, entre le survivant des père et mère et le tuteur, parent ou étranger,

c'est au survivant qu'appartient, en vertu du droit de puissance paternelle, la garde de l'enfant et la direction de son éducation.

Telle était l'ancienne jurisprudence (Nouveau Denizart, tôme 7, *verbo* Education, no. 4; et tôme 9, par. 12, no. 4; Sirey, 1830-11-337).

La même doctrine est enseignée par Baudry-Lacantinerie (3ème éd., vol. 5, p. 142) et Aubry & Rau (5ème éd. tôme 1er, par. 111). La note 7, à la page 674, au bas de ce paragraphe 111, se lit comme suit:

L'autorité tutélaire, qui peut exister concurremment avec la puissance paternelle, ne saurait restreindre les droits de cette dernière. En pareil cas, les pouvoirs du tuteur se bornent à l'administration du patrimoine; et le gouvernement de la personne reste, en général, confié au père ou à la mère. C'est au survivant des époux, investi de la puissance paternelle et capable de l'exercer, qu'appartiennent les droits d'éducation, de correction et d'émancipation.

Fuzier-Herman (*verbo* Tutelle), après avoir exposé les principes de l'administration de la personne du mineur par le tuteur, résume la situation comme suit:

684. Les principes qui précèdent, relatifs à l'administration de la personne du mineur, ne reçoivent leur complète application qu'au cas de décès des père et mère ou que lorsque le survivant d'eux a perdu ou ne peut exercer la puissance paternelle. Au cas contraire, l'administration du patrimoine appartient seule au tuteur, la personne du mineur devant rester sous la puissance paternelle du père ou de la mère survivant.

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Déjà, dans le même répertoire de Fuzier-Herman (*verbo* Puissance Paternelle), on trouvait:

94. Ces droits continuent à appartenir au survivant des époux, qu'il soit ou non tuteur de ses enfants. Tutelle et puissance paternelle sont en effet choses très distinctes et peuvent co-exister sans se porter préjudice l'une à l'autre. D'où il suit que, d'abord, l'autorité paternelle subsiste entière, après la mort du père ou de la mère, dans la personne de celui des deux qui survit: elle n'est en rien modifiée ou altérée par la qualité de tuteur des enfants dont se trouve investi l'époux survivant, de manière à subordonner son autorité à celle du conseil de famille. Grenoble, 11 août 1854, précité.

101. Il faut même généraliser, comme nous l'avons dit plus haut et poser en principe que l'exclusion ou la destitution de la tutelle n'enlève pas au parent survivant l'exercice de la puissance paternelle.—Cass., 3 mars 1856, Wey, (S. 56.1. 408, p. 52, 2. 266, D. 56. 1. 290);—15 mars 1864, X..., (S. 64,1,155, p. 64, 972, D. 64, 1. 301) Paris, 9 mars 1854, précité, ...Poitiers, 21 Juill. 1890, Guilberteau-Billaud, (S. 91, 2.17, p. 91, 1, 103, D. 91, 2. 73).—*Sic* Marcadé, t.2, n. 135, 244; Demolombe, t. 6, n. 379 et s.; Laurent, t. 4, n. 263 et s.; Magnin, t. 1, n. 439, 442; Chardon, t. 2, n. 66 et s.; Bernard, p. 207; Leloir, t. 1, n. 310; Taudière, p. 104.—*Contra,* de Fréminville, t. 1, n. 806; Demante, t. 2, n. 117 bis-11; Rivière, Rev. Cath. des inst., 1881, t. 17, p. 135.

Il faut donc décider que la qualité de tuteur de l'appelant ne lui confère pas sur la personne de Gertrude Stevenson des droits qu'il puisse opposer à l'autorité paternelle de l'intimée, qui est la mère. C'est donc à la mère, et non au tuteur, qu'appartient le droit de garde et d'éducation de Gertrude Stevenson.

Mais ce droit, prétend l'appelant, ne peut pas, à tout événement, être affirmé au moyen du bref *d'Habeas Corpus.* Cette procédure n'est admise que dans le cas où une personne est emprisonnée ou privée de sa liberté. Or, dit-il, en l'espèce, Gertrude Stevenson est librement chez moi. Si toutefois la mère veut faire reconnaître son droit de garde et d'éducation elle devra adopter une autre procédure.

Sans doute, la tendance moderne et la pratique constante de cette cour sont de se dégager, autant que possible, des règles de procédure pour ne prononcer les arrêts que sur le mérite des questions et le fond même du litige. Il est difficile, de prime abord, de voir pourquoi, si le bref émis en cette cause ne cadre pas exactement avec les prescriptions de l'article 1114 du Code de Procédure Civile, l'intimée ne pourrait pas se réclamer de l'article 3 du même code; surtout quand la cour, comme dans le cas qui nous occupe, a permis la production de plaidoiries écrites et l'audition de témoins comme dans

une enquête ordinaire. Si le grief de l'appelant consiste uniquement dans le fait qu'on aurait dû le poursuivre au moyen du bref de sommation habituel, il n'a pas réussi à démontrer que, dans le cas actuel, la méthode différente qui a été adoptée lui avait causé le moindre préjudice.

Mais le bref *d'Habeas Corpus,* qui s'appuie sur le fondement même des droits constitutionnels du citoyen britannique, est d'un caractère trop spécial, pour que ce débat puisse être écarté sur le principe qu'il ne soulève qu'une simple chicane de procédure.

En principe, c'est la personne qui est emprisonnée ou privée de liberté qui, elle-même, s'adresse au juge pour faire constater si la cause de sa détention est justifiable. Le code permet cependant qu'un autre le fasse pour elle. Ici, la requête ne pouvait venir de l'enfant; et si quelqu'un était qualifié à agir pour elle, c'était évidemment l'intimée.

Mais s'agit-il d'un cas où la personne est privée de sa liberté?

Il serait oiseux de rappeler ici les étapes historiques du bref *d'Habeas Corpus ad subjiciendum* en matières civiles. En ce qui concerne la province de Québec, elles ont été retracées de façon complète par Mr le juge Mathieu dans la cause de *Daoust* v. *Schiller* (1), et par Mr Ludovic Brunet, dans l'opuscule qu'il a consacré à l'étude de cette question. A travers les lois successives (art. 1114 du Code de Procédure Civile de 1897; art. 1040 du Code de Procédure Civile de 1867; art. 20 du c. 95 des Statuts Refondus du Bas-Canada (1861); art. 1er du c. 8 des Statuts du Bas-Canada (52 Geo. III, (1812), on retrouve invariablement les mêmes expressions:

lorsque quelque personne sera emprisonnée ou privée de sa liberté.

Il est bien compris que nous nous bornons ici à la législation qui étendit aux matières civiles le bénéfice et le privilège d'un bref dont le recours, en matière criminelle ou supposée criminelle, remonte à une origine bien antérieure même à l'acte 31 Charles II (1679) et au moins jusqu'à la Grande Charte (1215).

Le parlement anglais, en 1816, adopta une loi (56 Geo. III, c. 100) au même effet que celle dont jouissait le Bas-Canada depuis 1812.

(1) [1900] 2 R. de Pr. 529.

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Il convient donc de rechercher comment, *in pari materia*, cette condition de la privation de la liberté ("restraint of liberty") a été interprétée en Angleterre, le pays d'origine du bref *d'Habeas Corpus*.

Or, il est indéniable que, par extension, l'on y a assimilé à une privation de sa liberté le fait pour un enfant en bas âge d'être sous la garde d'une personne autre que celle à qui la loi confère cette autorité et ce contrôle.

Déjà, en 1831, le juge Patteson pouvait-il affirmer, en rendant jugement *re McClellan* (1).

I understand Mr. Jeremy's argument against the restoration of the child to its father to be—first, on the ground that this court does not interfere, by *habeas corpus*, to take an infant out of the custody of any one, unless something like force or improper restraint of the person exists —and, secondly, under the peculiar circumstances of this case, the court will not be disposed to interfere. As to the first ground, I think the authorities do not warrant the objection. The law is perfectly clear as to the right of the father to the possession of his legitimate children, of whatever age they be. In the case of *Rex* v. *De Manneville* (2), the court held that the father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the court sees no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy, domiciled in this kingdom, and the mother being an English woman, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such an apprehension. With respect to the argument that some force or improper restraint must be used, in order to authorize the court in removing an infant from the custody of any one, the authorities referred to shew that it is not necessary that any force or restraint should exist on the part of the person having the custody of the infant towards it; but there must be some force or improper restraint on the part of the father, in order to enable the court to take it from him.

En 1836, dans la cause de *The King* v. *Henrietta Lavinia Greenhill* (3), le Lord Chief Justice Denman disait (p. 640):

When an infant is brought before the court by *habeas corpus*, if he be of an age to exercise a choice, the court leaves him to select where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father.

Et Coleridge J. (p. 643):

But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists; and

(1) 1 Dowling's Rep. 81, at p. 84.

(2) 5 East, 221.

(3) 4 Ad. & E. 624.

where the child is in the hands of a third person, that presumption is in favour of the father.

En 1857, dans la cause de *The Queen* v. *Maria Clarke* (1), Lord Campbell, Lord Chief Justice, s'exprime comme suit (p. 193):

The question then arises, whether a *habeas corpus* be the proper remedy for the guardian to recover the custody of the child, of which he has been improperly deprived. Certainly the great use of the writ, the boast of English jurisprudence, is to set at liberty any of the Queen's subjects unlawfully imprisoned; and, when an adult is brought up under a *habeas corpus*, and found to be unlawfully imprisoned, he is to have his unfettered choice to go where he pleases. But, with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him the child is supposed to be set at liberty. *The King* v. *De Manneville* (2) clearly proves that such is the fit mode of proceeding if the child is under seven. Is there any reason for following a different course between seven and fourteen? The intellectual faculties of the child may be considerably developed in this interval; and the child may now have a very strong inclination to leave the home of the guardian, and, from religious as well as frivolous motives, to be educated at a different school from that which the guardian has selected. But the consequences which would follow from allowing such a choice are most alarming. We must lay down a rule which will be generally beneficial, although it may operate harshly in particular instances. If the proposed choice were given to the child, the relation of guardian and ward would still subsist; the guardian might retake the child wherever he finds it; and he might maintain an action against the person who, contrary to his wishes, takes or detains the child. Then, how could nurture be carried on with such a doctrine, which, if established, would apply to every father of a family in the kingdom, in respect of all his children, male and female, above the age of seven years. If a father wishes to take his son when ten years old from a private school where flogging is not practised, and send him to Eton, and the boy refuses to come home, and is brought up by *habeas corpus*, is he to be permitted to say that, on consideration, he is of opinion that the private school is preferable to any public school where flogging is permitted, and therefore he makes his choice to return to the private school, the master being willing to receive him. Or suppose that a Protestant mother, guardian for nurture of a daughter seven years of age, sends her to a boarding school professing to be a Protestant seminary; in a short time she finds that attempts have been successfully made by teachers to convert the girl to the Roman Catholic faith; the girl refuses to come home, saying, in analogy to the language used by Alicia Race: "I will not go home to my own mother; I will stay here where I may pray to the Mother of God;" she is in consequence brought up by *habeas corpus*. Are we to examine her, and, finding her of quick parts and professing to be a sincere convert to the Roman Catholic faith, to tell her that, in spite of the wishes of her mother, she is at liberty to return to the school where she has been converted. Such a doctrine seems wholly inconsistent with parental authority, which both reason and revelation teach us to respect as essential for the welfare of the human race.

(1) 7 El. & Bl. 180.

(2) [1804] 5 East, 221.

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La jurisprudence, en Angleterre, s'est de plus en plus affirmée dans ce sens; et Halsbury, The Laws of England (1909), la résume ainsi (vol. X, p. 40, n° 91):

Where the restraint is imposed on civil grounds under claim of authority, the legal validity of such claim may be investigated and determined; and where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be inquired into on the return to a writ of *habeas corpus*, and the custody awarded to the person having the legal right thereto.

A la page 52, n° 109:

A parent, guardian or other person, who is legally entitled to the custody of a child, can regain such custody, when wrongfully deprived of it, by means of the writ of *habeas corpus*. The unlawful detention of a child from the person who is legally entitled to its custody, is, for the purpose of the issue of the writ, regarded as equivalent to an unlawful imprisonment of the child. It is therefore unnecessary to allege, in applying for the writ, that any restraint or force is being used towards the infant by the person in whose custody and control it is for the time being.

A la page 57, n° 120:

Any person who is legally entitled to the custody of another may sue out the writ in order to regain such custody.

Enfin, dans Short and Mellor, "The Practice of the Crown Office" (1908), à la page 313, on trouve l'exposition suivante de la pratique courante:

With reference to the custody of children the judges of the common law courts have exercised a larger jurisdiction in granting writs of *habeas corpus* than in other cases. They have exercised powers somewhat analogous to those which the Court of Chancery has always exercised in its character of *parens patriae*. For instance, the writ was issued irrespective of the wishes or desire of the child detained, and in making the rule absolute, the court has always exercised a certain discretion in order to protect the child, in addition to merely setting the infant free from restraint.

Les auteurs citent le passage du jugement de Coleridge J. *re Greenhill* (1), reproduit plus haut, et ils continuent:

And all the judges agreed that age, and not mental capacity, was to be taken to be the criterion of a capacity to choose. In *The Queen* v. *Clarke* (2), and *The Queen* v. *Howes* (3), it was laid down that the age at which children should be deemed to have discretion was fourteen in the case of a boy and sixteen in the case of a girl.

Voilà donc quelle est, en Angleterre, l'adaptation qu'on fait du bref *d'habeas corpus* au cas des enfants mineurs. Il n'y a pas de raison juridique pour que le même texte ne reçoive pas ici la même interprétation, lorsqu'il s'agit de la compétence d'un bref identique et que nous tenons de la constitution anglaise.

(1) 4 Ad. & E. 624. (2) 7 El. & Bl. 186.
(3) [1860] 3 El. & El. 332.

Dans la province de Québec, certains jugements plus anciens—et il faut reconnaître que la liste en est longue—paraissent avoir incliné dans un sens différent *Stoppellben* v. *Hull* (1), confirmé par la Cour de Revision (2); *Riley* v. *Grenier* (3); *Vautrin* v. *Dupuis* (4); *Robert* v. *Véronneau* (5); *Pickering* v. *Caloran* (6); *Rousseau* v. *Lapointe* (7); *Morency* v. *Fortier* (8); *Garcin* v. *Croteau* (9).

Peu de ces arrêts cependant ont refusé de reconnaître l'applicabilité à un pareil cas du remède par voie *d'habeas corpus*. La plupart ont admis que ce bref était un recours compétent, mais ont refusé de l'accorder dans les circonstances particulières de la cause. Le juge W. Dorion, qui a prononcé en 1876, le jugement de *Stoppelben* v. *Hull* (10), sur lequel les décisions, depuis rendues dans le même sens, paraissent s'être largement appuyées, dit lui-même:

But, says the father, until my child has attained the age of majority she can have no will, no opinion, no judgment except mine, and she being detained against my will, she must be considered as detained against her will. This might perhaps be urged in cases where a child of tender age or other, such as an insane person, incapable of making a choice, was concerned, but in a case of this kind (meaning Stoppelben), where the contrary appears, I cannot admit this doctrine, nor do I find it propounded authoritatively in any of the authorities cited.

Et le juge Mathieu, en conclusion de la longue revue qu'il a faite de la question re *Daoust* v. *Schiller* (11), n'est pas loin de s'exprimer de la même façon à la page 553:

On peut suivant les circonstances considérer comme contrainte, l'enlèvement et la détention d'un enfant qui n'a pas l'âge de raison, et la soustraction de cet enfant à la garde légale de ses parents. Si l'enfant n'a pas l'âge de raison, nous croyons, avec Hurd, que l'enlèvement de l'enfant de la garde de ses parents, peut équivaloir à la contrainte donnant lieu au bref *d'habeas corpus*, et que le droit des parents d'avoir la garde de leur enfant, ou le devoir de l'enfant de retourner sous leur garde peut équivaloir au désir d'être mis en liberté et soustrait à cette contrainte. Si un étranger va sans motif enlever un enfant qui n'a pas l'âge de raison à la garde de son père, nous croyons que le tribunal pourra sur *habeas corpus* ordonner que l'enfant soit remis au père, vu que cet enlèvement peut être considéré comme une contrainte; mais nous croyons qu'il n'y a que le cas où l'enfant est contraint ou doit être considéré comme étant contraint et privé de sa liberté où sa remise au père doit être ordonnée sur bref *d'habeas corpus*. Tout ce que le tribunal peut faire

(1) [1876] 2 Q.L.R. 255.
(2) 3 Q.L.R. 136.
(3) [1888] 33 L.C.J. 1.
(4) [1900] 3 R. de P. 232.
(5) [1903] R. de P. 426.
(6) [1905] 7 R. de P. 350.
(7) [1906] 8 R. de P. 43.
(8) [1897] Q.R. 12 S.C. 68.
(9) [1905] Q.R. 27 S.C. 198.
(10) 2 Q.L.R. 255, at p. 257.
(11) 2 R. de Pr. 529.

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sur un bref *d'habeas corpus,* c'est de constater s'il y a contrainte, et, si cette contrainte est constatée de la faire cesser, en remettant les choses dans l'ordre.

Mais cela même est admettre que, dans tous les cas où la garde des enfants mineurs est en jeu, le bref *d'habeas corpus* est le remède approprié. C'est essentiellement un bref d'enquête (" writ of inquiry ").

Il a pour but d'examiner les causes de détention et de constater s'il y a contrainte. La loi ne suppose nulle part que l'enfant mineur pourra opposer son désir de liberté à la volonté de ses parents. C'est la jurisprudence qui a introduit ce correctif à la puissance paternelle. Elle n'a pas cependant posé de principe absolu. Elle s'est inspirée d'une discrétion restreinte basée sur certaines conditions d'âge et d'intelligence de l'enfant, en tenant compte des circonstances spéciales à chaque cas particulier. Concéder, comme le juge Dorion et le juge Mathieu, qu'il est certains de ces cas où le bref pourrait être accordé, c'est admettre qu'il faut dans chaque cas rechercher si les conditions requises existent pour le maintien du bref, qu'il y a lieu à l'"inquiry" à laquelle pourvoit le bref; c'est donc conclure à la compétence de *l'habeas corpus.*

Il est inutile, en effet, de signaler qu'il faut éviter de confondre entre la recevabilité du bref et la question de savoir s'il devra être maintenu, après que l'"inquiry" aura démontré s'il y a, au sens où l'on entend ces mots pour les enfants mineurs, privation de leur liberté. Pour les fins de cette enquête et pour " remettre les choses dans l'ordre," *l'habeas corpus* est l'instrument voulu, éminemment approprié et efficace.

C'est ce qu'un grand nombre d'arrêts ont reconnu.

Dans *Barlow* v. *Kennedy* (1), les faits offraient beaucoup de ressemblance avec ceux de la présente espèce. Voici comment les résume le juge Badgley:

The respondent petitioned the provincial judge for the district of St. Francis, for the issue of a writ of *Habeas Corpus ad subjiciendum,* and which was issued forthwith, to obtain the custody and possession of his minor child. The facts are that four years previous to the application, the mother of the child having died, the petitioner, the child's father, being very needy, and personally unable to care for and have charge of the infant, agreed that she should be given over to Barlow, and brought up by him and his wife, who were very respectable and in good circumstances. Kennedy was to have executed a contract to that effect, but had

(1) 17 L.C.J. 253.

failed or neglected to do so, but allowed the child to remain as agreed upon with the appellant's family, where it has been kindly cared for as their own child. Kennedy had lately remarried, and being in circumstances to take care of his child, made this application to recover her, although it is manifest that neither his means nor position as a common labourer will allow or enable him to bring up the child with the comfort and welfare afforded by Barlow and his wife; and in consequence, guided by these very charitable motives for the child's comfort and advantage, the petition was dismissed by the judge, to whom the application was originally made.

Dans les circonstances qui viennent d'être exposées, la Cour de Révision avait infirmé le jugement de première instance et avait maintenu le bref *d'habeas corpus*. La Cour du Banc de la Reine confirma cette dernière décision à l'unanimité. Le seul juge qui enregistra son dissentiment le fit parce qu'il était d'avis que le refus de la Cour Supérieure était sans appel; mais ce même juge fut le plus expressif, dans ses notes, sur la compétence du bref *d'habeas corpus* en l'occurrence.

Cet arrêt remonte à 1871. Il a été suivi de ceux de *Ex parte Grace Ham* (1); *la Mission de la Grande Ligne* v. *Morrissette* (2); *Truax* v. *Ingalls* (3), où le juge Lynch fait une revue des autorités anglaises, américaines et canadiennes et conclut en faveur

of the principle that the illegal keeping of a child, even with its own consent, constituted such a constraint as is covered by the *Habeas Corpus* Act.

A son tour, le juge Davidson *re Lorenz* v. *Lorenz* (4), décide:

1. The unauthorized removal of a minor of tender years from legal custody is equivalent to confinement and restraint of liberty, and *habeas corpus* will lie to restore it to its proper guardians.

2. A girl of nine years of age is too young to exercise a controlling right of choice between her father and mother who live apart, and it lies within the discretion of the judge to hand her over to whichever of the parents he thinks it best in her interest.

Le juge Demers *re Moquin* v. *Turgeon* (1), juge:

Une veuve, mère d'enfants âgés de six à huit ans, a le droit d'en avoir la garde, et le recours de *l'habeas corpus* est ouvert en sa faveur pour se les faire remettre par leur grand'mère et oncle, qui les ont élevés et chez qui ils demeurent.

Le juge Beaudin, *re Trépanier* v. *Lefebvre* (2), a maintenu le bref et ordonné la remise d'une enfant en la possession du père, sur le principe qu'il avait

(1) [1912] Q.R. 42 S.C. 232. (2) [1913] 15 R. de Pr. 225.

(1) [1883] 27 L.C.J. 127.
(2) [1889] M.L.R. 6 Q.B. 130.
(3) [1898] 4 R. de J. 442.
(4) [1905] Q.R. 28 S.C. 330.

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le droit à la garde de son enfant d'une manière absolue, s'il ne s'en est pas rendu indigne par sa mauvaise conduite,

dans une instance que le juge lui-même relate de la façon suivante:

Le requérant est le père de Yvette Trépanier, âgée de 10 mois, issue du mariage du requérant avec Aldéa Neveu, maintenant décédée, fille de l'intimée par le premier mariage de cette dernière.

L'intimée fait rapport sur le bref *d'Habeas Corpus* qu'elle est la grand'mère maternelle de l'enfant; que sa fille Aldéa Neveu est décédée vers le 1er juin; que le 28 juin 1913 par écrit sous seing privé, le requérant confia à l'intimée son enfant, s'engageant à ne lui jamais enlever la dite enfant du vivant de la dite dame intimée, quand même il viendrait à se remarier. Elle demande à ce que suivant l'écrit par lequel la dite enfant lui a été confiée, le bref *d'Habeas Corpus* soit cassé et annulé.

Ce dernier arrêt est de 1913. Viennent ensuite, en 1917, *Kostel* v. *Hampton* (1), et, en 1920, *Brin* v. *Mayer* (2), où le juge Surveyer décide:

2. Les parents ont un droit absolu à la garde de leur enfant, même s'ils se sont volontairement, dans le passé, départis de cette garde en faveur d'un étranger, qui l'a acceptée.

Il reste à mentionner le jugement de Sir François Lemieux *re Fournier* (3), et la décision de la Cour du Banc du Roi *re Osmun* v. *Morin* (4). Nous croyons que le véritable sens de ce dernier arrêt est contenu tout entier dans ces mots du juge Lavergne:

Les circonstances actuelles, du reste, ne donnaient pas lieu au bref *d'habeas corpus*.

C'est une cause d'espèce.

Quant à l'affaire Fournier, le savant juge-en-chef de la Cour Supérieure de Québec s'appuie primordialement sur les principes du droit public et du droit constitutionnel pour refuser de soustraire à l'enrôlement militaire un mineur de moins de 18 ans qui s'est volontairement engagé sans le consentement de son père. Il n'y a pas là d'analogie avec la question qui fait l'objet de notre discussion.

On voit donc que, si la jurisprudence est loin d'être d'accord, son évolution plus récente l'a rapprochée de la pratique moderne en Angleterre, telle qu'on la trouve exposée dans les passages tirés de Halsbury et de Short and Mellor que nous avons cités plus haut.

Nous avons déjà indiqué que c'est de cette pratique que nous devons nous inspirer et il est satisfaisant de constater que c'est également vers cette conclusion que s'est défini-

(1) 23 R.L. n.s. 307.
(2) 23 Rapp. de Prat. 270.
(3) [1916] 32 D.L.R. 720.
(4) [1918] Q.R. 27 K.B. 282.

tivement dirigée l'opinion judiciaire de la province de Québec.

Les jugements de la Cour Supérieure et de la Cour du Banc du Roi, en cette cause-ci, sont conformes aux précédents anglais et à la jurisprudence qu'ils ont établie en matière *d'habeas corpus*. Ils sont, à travers plus d'une hésitation, l'aboutissement logique des études patientes et élaborées auxquelles cette importante question a donné lieu. En affirmant la prépondérance des droits de la mère sur ceux du tuteur quant à la garde et au contrôle de la personne de l'enfant mineur; en décidant que, dans les circonstances, il y avait ouverture en faveur de la mère au recours de *l'habeas corpus* pour se faire remettre son enfant, nous sommes d'avis que ces jugements sont bien fondés et qu'ils doivent être confirmés.

Nous ne voudrions pas cependant laisser échapper cette occasion d'appuyer spécialement, pour dire qu'il a toute notre approbation, sur le passage suivant des notes de Mr. le juge Greenshields (1):

I am not unmindful that the interests of the child should, to some extent, and perhaps to a considerable extent, be considered. But let it be well understood that the interest of the child is not to be confounded with the wish or will of the child. It can be readily understood that a young child, living with its old grandparents, might, for some reason or other, prefer to remain there. It is possible that these aged people would exercise less restraint and control over the child. It is possible that the child even might prefer the home or house in which her grandparents lived rather than that occupied by her mother. In the present case the child was asked if she wished to leave her grandparents, and she said "No." Pressed for a reason, she said she was frightened of her mother, and she gave a reason which has no foundation in fact. Asked if her mother had always been good to her. she answers, "Yes," and asserts that she was always kind to her and never said any hard words.

Rien ne nous paraît, en effet, moins satisfaisant que d'essayer de déterminer l'intérêt de l'enfant en se basant sur ses inclinations du moment; surtout de les déduire des déclarations plus ou moins incertaines qu'il peut proférer en cour à cet égard. En général, le témoignage des enfants doit être accueilli avec beaucoup de circonspection. A plus forte raison, dans des cas comme ceux-ci, serait-il fallacieux de s'en rapporter aux préférences indiquées par leurs réponses. L'atmosphère n'est pas favorable. Il y a toutes les chances du monde qu'ils se déclarent pour ceux avec qui ils ont accoutumé de vivre.

(1) Q.R. 38 K.B. 314, at pp. 317, 318.

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Dans plusieurs des arrêts que nous avons cités, les juges expriment l'avis qu'il faut donner effet à la volonté des parents à l'encontre du désir exprimé par les enfants. Lord Campbell, dans la cause de *Clarks* (1), soulève même un doute sur l'opportunité d'interroger l'enfant. Comment peut-on faire de ce dernier le juge d'une question aussi grave et aussi difficile? (Voir sur ce point les remarques très justes de Mignault, vol. 11, pp. 148 et 149).

Comme le dit fort sagement Mr. le juge Philippe Demers: *Moquin* v. *Turgeon* (2):

> Le père, et la mère, à son défaut, ont d'après le droit naturel droit à la garde de leur enfant.—Pour qu'ils soient privés de ce droit, il ne suffit pas d'un caprice de l'enfant; il faut une raison, soit que le père ait abusé de son droit, soit qu'il soit indigne ou incapable de l'exercer. Dans ces cas, étant incapable de remplir son devoir, il ne peut réclamer de son droit. C'est ainsi que les auteurs peuvent logiquement dire que l'intérêt des enfants doit seul guider le juge.
>
> Se bâser sur d'autres principes c'est tomber dans l'arbitraire. Qui d'ailleurs peut dire ce qui sera en définitive le plus avantageux pour les enfants, la garde de leur grand'mère ou celle de leur mère? Dieu seul le sait. Il me paraît plus sage, dans le doute, de suivre la loi naturelle.

L'intérêt de l'enfant, qu'il faut prendre en considération, son bien-être, ne résident pas surtout dans le confort matériel, mais dans les soins et l'affection paternels, dans les avantages de l'éducation familiale et religieuse. Le chagrin passager que l'enfant va, sans doute, ressentir en laissant ceux avec qui il a vécu et qui furent bons pour lui, et en changeant d'entourage, ne saurait se comparer à la satisfaction permanente et au bonheur solide qu'il ne tardera pas à éprouver en réalisant qu'il est désormais chez lui, dans sa demeure, par droit de naissance et non plus en vertu de la bienfaisance d'un étranger qui n'a pas envers lui d'obligation légale; (*Brown* v. *Partridge* (3), confirmé par cette cour le 13 mai 1925); en grandissant dans l'honneur et le respect pour ses parents (art. 242 C.C.), à l'ombre de leur autorité (arts. 243 et seq.). C'est là l'intérêt bien compris de l'enfant d'accord avec celui de la famille et de l'état.

Suivant le mot du chancelier Boyd, *in re D'Andrea* (4):

> The normal well ordered home is unquestionably preferable to the foster home, however well ordered.

Ce que Laurent exprime en d'autres termes (vol. IV, p. 368):

> Mais il ne s'agit pas ici * * * de la liberté individuelle; il s'agit de

(1) 7 El. & Bl. 186.
(2) Q.R. 42 S.C. 232.
(3) [1925] 1 W.W.R. 378.
(4) [1916] 37 O.L.R. 30, at p. 33.

sanctionner un droit qui est établi dans l'intérêt même de l'enfant. Son droit à lui consiste à être élevé; or, pour qu'il puisse l'être, il faut qu'il soit sous la garde de son père.

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Appeal dismissed with costs.

Solicitors for the appellant: *Kerry & Bruneau.*
Solicitors for the respondent: *Kavanagh, Lajoie & Lacoste.*

GEORGE H. WELSH (PLAINTIFF).....APPELLANT;

AND

EDMUND R. POPHAM (DEFENDANT)....RESPONDENT.

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*May 12.
*June 4.

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

Sale—Mortgage—Real property—Transfer of mortgaged land—Absolute in form but as security only—Claim by mortgagee against transferee under implied covenant—Land Titles Act, R.S.A. (1922), c. 133, ss. 54, 55, 179.

Where a transfer of mortgaged land was given by the mortgagor as security only, but was absolute in form and contained no declaration negativing or modifying the covenant by the transferee with the transferor and mortgagee for payment of the mortgage, declared by section 54 of *The Land Titles Act* to be implied in the transfer, and where in a memorandum of agreement it was stipulated that upon payment of the amount in which the mortgagor was indebted to him, the transferee should re-transfer to the mortgagor a title to the land in fee simple subject to existing encumbrances or "other encumbrances of equal amount."

Held, affirming the judgment of the Appellate Division, (20 Alta. L.R. 449), that section 54 did not render the transferee liable to the mortgagee for the amount of the mortgage. By the interpretation of sections 54 and 55 of *The Land Titles Act* in light of section 179 of the same Act, their *ex facie* meaning appears to be subject, at least, to this gratification, that they must not be construed or applied in such a way as to disable the courts from giving effect to the terms of any agreement constituting a "disposition" of the land within the meaning of section 179, entered into either contemporaneously with or subsequently to, the execution of the transfer.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge and dismissing the appellant's action to recover from the respondent certain mortgage moneys.

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

*PRESENT:—*Anglin* C.J.C., and Duff, Mignault, Newcombe and Rinfret JJ.

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A. G. Virtue for the appellant. The covenant implied by section 54 cannot be negatived in any manner other than that set out in the Act, i.e., by express declaration in the instrument.

Any agreement between the transferee and the mortgagor cannot annul a covenant existing by virtue of section 54 between the transferee and the mortgagee.

Macleod Sinclair K.C. for respondent.

While *prima facie* a transferee of mortgaged property is directly liable to the mortgagee on the implied covenant, nevertheless by section 55 of the Act the implication or presumption is capable of being negatived, rebutted or modified by evidence as to the exact relationship between the transferor, mortgagor and the transferee expressly agreed to between them or to be implied from the actual facts and circumstances surrounding the transaction.

The judgment of the court was delivered by

DUFF J.—The only question requiring discussion is that arising out of the claim of the appellant based upon s. 54 (1) of *The Land Titles Act*, c. 133, R.S.A. 1922. The facts can be stated in a sentence or two. The appellant held a mortgage (executed in May, 1918) to secure a loan of $1,600 on certain Alberta lands, the property of one Henderson. In October, 1919, the respondent took from Henderson a transfer under *The Land Titles Act* of the same lands. This transfer was duly registered, and the respondent became the registered owner of the land, subject to the appellant's mortgage.

The transfer was in fact taken as security for moneys owing by Henderson to the respondent, the terms of the arrangement, with the exception of the amount of the indebtedness, being stated in a memorandum of agreement of November, 1919, which is in evidence.

The ground on which the appellant, who was plaintiff in the action, bases his claim is, that by force of s. 54 (1) of *The Land Titles Act*, the respondent, being a transferee of the mortgaged lands, subject to the mortgage, is under an obligation, both to the mortgagee and to Henderson, to pay off the mortgage; and the point to be decided is whether,

(1) Reported as *Walsh* v. *Popham*, [1924] 20 Alta. L.R. 449; [1924] 2 W.W.R. 1193.

in the circumstances of this case, such is the effect of s. 54 (1).

By the agreement of November, 1919, it is stipulated that on payment by Henderson to the respondent of the amount in which Henderson was thus indebted to him together with interest at a specified rate, the respondent should retransfer to Henderson a title to the land in fee simple, subject to existing encumbrances or "other encumbrances of equal amount." In the meantime the respondent was to have the right to sell the land, accounting to Henderson for the surplus, after repayment of debt, interest and costs. The land has proved to be valueless, and, in the circumstances of this case, if the proposition upon which the appellant bases his appeal be accepted, it must follow that the respondent is obliged to pay the appellant's mortgage debt, and that he is entitled to no indemnity from Henderson, because, by the terms of s. 54 (1), if that enactment is operative, the respondent is under an obligation to indemnify Henderson in respect of this very mortgage. This result follows, according to the appellant's contention, notwithstanding the fact that by the terms of the written agreement of November, as already mentioned, the sole obligation of the respondent, which arises only on payment of Henderson's debt to him, is to transfer the land to Henderson, subject to existing encumbrances.

By s. 139, c. 24, of the Statutes of Alberta, 1906 (now s. 179, R.S.A. 1922), it is provided:—

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted.

By virtue of this section (apart altogether from other sources of jurisdiction) the Supreme Court of Alberta has jurisdiction to give effect to the understanding between Henderson and the respondent evidenced by the agreement of November, 1919, and to the equitable rights arising from that understanding. Subject to any modification of those rights effected by s. 54 (1), the respondent, as between himself and Henderson, must be treated as a mortgagee of the land which was the subject of the arrangement, and their rights, *inter se,* must be determined on that footing. The existence of a right of indemnity,

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inhering in the mortgagor, as against the mortgagee in respect of the prior mortgage would, of course, be incompatible with a proper recognition of these rights, besides being inconsistent with the express stipulation of the agreement of November.

Coming now to s. 54 (1), if that section stood alone, there could be no difficulty in giving effect to the agreement of November as modifying any implied covenant arising from the statute. But by s. 55,

> every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument;

and it is argued that this provision, if operative at all, must operate as declaring exclusively the procedure by which the implication arising under the earlier section can be displaced.

Section 55 is, however, a section which applies not only to the covenant implied by force of s. 54 (1), but to every covenant and every power implied in any instrument by virtue of any provision of the Act; and it is by no means clear that, by rejecting the contention advanced by the appellant, one would be depriving it of all effect. Moreover, these sections, 54 and 55, must be read with s. 179—formerly s. 139, quoted above—and, so far as possible, effect be given to all of them. Interpreting ss. 54 and 55 in light of s. 179, their *ex facie* meaning on any reading of the words appears to be subject, at least, to this qualification, that they must not be construed or applied in such a way as to disable the court from giving effect to the terms of any agreement, constituting a "disposition" of the land within the meaning of s. 179, entered into either contemporaneously with, or subsequently to, the execution of the transfer. Where there is, as in this case, an express agreement in writing creating equitable rights equivalent, as between the parties, to an equity of redemption, the application of s. 179 presents no difficulty whatever; nor would there appear to be any difficulty in applying that section in any case in which, by proper and sufficient evidence, it was shown that the transferee had accepted the transfer and the title conveyed by it under any arrangement vesting in the transferor equitable rights in the land and incompatible in its nature or in its terms with the implication declared by s. 54.

In the circumstances of this case, therefore, s. 54 (1) did not create any covenant for indemnity in favour of the transferor; and since the terms of that section leave no doubt that the transferee's obligation to the mortgagee is only to arise in circumstances in which the transferee is, by virtue of the statute, under an obligation to indemnify the transferor, it follows that the appellant must fail. This view is in harmony with the course of decision in Alberta and Saskatchewan. *Short* v. *Graham* (1); *Evans et al* v. *Ashcroft and The British Canadian Trust Company* (2); *Great West Lumber Company* v. *Murrin & Gray* (3); *Montreal Trust Company* v. *Boggs and Beresford* (4); *Dominion of Canada Investment and Debenture Co.* v. *Carstens* (5); *in re Macdonald Estate* (6).

Two of the learned judges in the court below have taken the view that the transfer ought to be rectified by inserting in it an express declaration negativing any implication under s. 54.

If a covenant of indemnity in the terms of that section had appeared in the transfer, there could have been no difficulty in rectifying the instrument to bring it into accord with the common intention of the parties as established by the agreement of November; and a decree for rectification would, if necessary, appear to be a proper decree in this case.

In the view already expressed, however, that, in the circumstances, s. 54 (1) is inoperative, rectification is unnecessary.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Virtue & Paterson.*

Solicitors for the respondent: *Mann, Dawson & Co.*

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(1) [1908] 7 W.L.R. 787.
(2) [1915] 8 W.W.R. 899.
(3) [1916] 32 D.L.R. 485, [1917] 1 W.W.R. 945.
(4) [1915] 25 D.L.R. 432, 31 W.L.R. 914, 8 W.W.R. 1200.
(5) [1917] 36 D.L.R. 25, [1917] 3 W.W.R. 153.
(6) [1925] 2 D.L.R. 748, [1925] 1 W.W.R. 1031.

1925
*May 19.
*June 18.

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

AND

NEW BRUNSWICK POWER COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Statute—Application—Retroaction—Order of court—Commission of Public Utilities—Finality of proceedings—10 Geo. V, c. 53; 14 Geo. V, c. 74 (N.B.).

In 1920 by 10 Geo. V, c. 53, the Board of Commissioners of Public Utilities, under another name, was created in New Brunswick and authorized to make a contract with any municipality for supplying electrical energy therein. In 1924 by an amending Act it was given power, when a corporation had constructed, or desired to construct, works for distributing electricity on a highway on which were similar works of another corporation, to make an order approving of the location and of construction of the works of the new works which shall then be deemed lawful and may be operated by such corporation incurring liability to any other; nothing done by the Board in this respect is open to judicial review and no court shall by injunction or otherwise restrain the construction or operation of works so approved. By sec. 61, subsection 2, the Act of 1924 does not apply to pending litigation "unless otherwise ordered by the court before which such litigation may be pending." In 1923 litigation started between the N.B. Power Co. and the city of St. John. The city, under statutory authority and a contract with the Board, was constructing works for supplying electricity within its limits and the Power Co., which had carried on the same business for some years applied for an injunction and damages alleging a wrongful interference with its property and operation of its system. The action came on for trial in 1924 when the Act of that year above referred to was in force and the trial judge, under the provisions of sec. 61 (2) ordered that it should apply to such litigation on condition that the city should promptly apply to the Board for approval of its works. The Appeal Division set aside this order holding that the judge had no power to make it and granted the injunction and damages.

Held, that the legislature had delegated to the court the legislative authority to declare the Act applicable and that the trial judge had properly exercised the power so delegated.

Held also, that the Power Co. was entitled to damages for injury incurred prior to the Board's approval of the enterprise of the city.

Qu. Was the order of the trial judge open to review?

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick reversing the order at the trial directing that a statute of the province should be retroactive.

The facts are fully set out in the above head-note.

PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

Baxter K.C. for the appellant.

Fred. R. Taylor K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal arises out of a dispute between the city of Saint John and the New Brunswick Power Company—a company which, with its predecessors in title, has for a number of years been carrying on the business of distributing electric current through the city of Saint John and the surrounding district. In 1920, the legislature of New Brunswick passed an Act (c. 53 of the statutes of that year) authorizing the appointment by the Lieutenant-Governor in Council of a commission, to be known as the "New Brunswick Electric Power Commission," and providing, *inter alia,* for contracts between the Commission and the municipalities for the supply by the Commission of electrical energy for the production of light, heat and mechanical power.

By amendments in 1922 and 1923, municipalities entering into such contracts may

acquire land and real and personal property and erect, construct and operate works for the transmission and distribution of electrical power or energy in the municipality.

By chapter 74 of the statutes of 1922, sec. 1, it was provided that it should be lawful for the city of Saint John to engage in the business of supplying electric light, heat and power and "any and all other forms of use of electrical energy" to persons and corporations within the limits of the municipality.

The appellant municipality, having entered into a contract with the provincial Power Commission within the meaning of this clause, proceeded to construct a distribution system in the city of Saint John. This action was brought in March, 1923, claiming an injunction and damages on the ground that in the construction of its distribution system the appellant municipality was, in violation of the respondent company's rights, wrongfully interfering with the respondent company's property and with the operation of its system.

The action was tried before Mr. Justice White in August and September, 1923, and judgment was delivered on the 28th of October, 1924. The learned trial judge held that the respondent company had established the existence of

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Duff J.

the wrongful interference alleged and stated that, in his opinion, the company would have been entitled to an injunction in respect of the wrongful acts of the appellant municipality had it not been for a certain statute which in the meantime had been enacted by the New Brunswick legislature; and some account of this legislation (c. 26 of the statutes of 1924) is necessary to make intelligible the character and effect of the judgment of the learned trial judge, as well as that of the Court of Appeal.

It is best to permit the legislation to speak for itself. The pertinent provisions are in these words:—

59. (1) Where a corporation has constructed or desires to construct works for conducting, furnishing or distributing electricity for light, heat or power purposes, in, under or upon any highway, or part of highway in, under or upon which any other corporation has already constructed and has works for the like purposes, or any of them, upon the application of the first mentioned corporation and after notice to the other and hearing any objection which it may make, the Commission may, if it is of opinion that the location and mode of construction of such works are proper, approve of the same, and all works which such first mentioned corporation has constructed or may thereafter construct, the location and mode of construction of which have been so approved, shall be deemed to have been constructed under statutory authority and to be lawfully constructed and may be maintained and operated by such corporation without its incurring any liability to any other corporation in respect of the construction, maintenance or operation of such works, any statute or law to the contrary notwithstanding, provided that the location and mode of construction, maintenance and operation are maintained up to the standard approved by the Commission.

(5) The powers conferred by this section may be exercised from time to time as occasion may require.

(6) The provisions of this section shall apply to works of a corporation constructed at any time before, as well as after the passing of this Act.

60. The Commission shall have exclusive jurisdiction as to all matters in respect of which authority is, by the next preceding section, conferred upon it, and nothing done by the Commission within its jurisdiction shall be open to question or review in any action or proceeding or by any court.

61. (1) No court shall have authority to grant or shall grant an injunction or other order restraining, either temporarily or otherwise, the construction, maintenance or operation of any works the location and mode of construction of which have been approved by the Commission, if the same are being, or have been, constructed in the place and according to the mode which have been so approved.

(2) Notwithstanding anything contained herein, the provisions of this Act shall not apply to any litigation now pending in any court, unless otherwise ordered by the court before which such litigation may be pending.

By the same statute it was provided that the designation of the Commission created by the Act of 1920 should

be altered, and should thereafter be the "Board of Commissioners of Public Utilities."

The learned trial judge by his judgment exercising the powers vested in him by sec. 61 (2), ordered that the provisions of the statute should apply to all cases of alleged interference in respect of which relief was asked in the action, provided that an application were made by the appellant municipality within thirty days to the Board for "approval and allowance of the location and construction" complained of by the respondent company.

The appellant municipality made application to the Board, and accordingly, on the 28th of January, 1925, an order was made by the Board to the effect that the location and mode of construction of the works of the appellant municipality be altered in conformity with the report of Professor Baird, which the Commission had before it, subject to the approval of an inspector, to be appointed by the Board; and, for the purpose of effecting this, the appellant municipality was authorized to affix insulators and other appliances to the poles of the New Brunswick Power Company, and to attach the wires of the municipality to the said insulators or other appliances.

The respondent company having appealed to the Court of Appeal, it was held by that court that the learned trial judge had improperly exercised the authority conferred by subsection (2) of section 61. The court accordingly reversed the judgment of the learned trial judge, granted the injunction prayed, and directed a reference as to damages. The reasons for judgment were delivered by Mr. Justice Crockett, and the view taken appears to have been that the legislature had expressed its intention that the statute should not apply to any litigation then pending in any court, and that the authority under which the learned trial judge acted was an authority "to reverse at its will" this "clearly expressed intention."

The legislature appears to have left it to the court before which the litigation might be pending to determine whether or not the statute should apply to matters in dispute in that litigation—that is to say, whether, in such matters, the Board should have jurisdiction. The legislature did not express its intention that the statute should not apply to such matters, and left the whole matter to the court, but

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did not, in express language at all events, indicate any rule or principle by which the court was to be guided.

The first subsection of section 59 leaves no room for doubt that the situation which has given rise to the present litigation is precisely the kind of situation in which the Act was intended to operate. Had there been no litigation pending between the parties, there could have been no manner of doubt as to the authority of the Board to approve, under such conditions as it might see fit to prescribe, of the "location and mode of construction" of the appellant municipality's works; or that, the directions of the Board being observed in respect of the construction, maintenance and operation of those works, no liability would be incurred by the appellant municipality thereunder in respect of anything done thereafter, in compliance with the orders of the Board. It is equally clear, also, that the jurisdiction of the Board is an exclusive jurisdiction, and that neither the Board nor the parties to any proceedings authorized by the statute are subject in respect of such proceedings to any control by any court.

The proper view of the statute would appear to be that, in the absence of some such provision as subsection (2) of section 61, the existence of pending litigation would not affect the authority of the Board as to future acts. Due effect can be given to the enactment without allowing it to create immunity from damages sustained before the approval of the works, and it ought not to be construed retrospectively beyond the limit to which the language of it necessarily extends. See per Bowen L.J., in *Reid* v. *Reid* (1). As to future acts, the subsection mentioned appears rightly to have been considered necessary in order to qualify the rigour of the other provisions of the statute, and the order of the learned trial judge appears to have been consonant with the general policy of the Act.

The Court of Appeal seems rightly to have held that this authority with which the Supreme Court was invested, to determine the applicability or non-applicability of the statute, was, in its nature, a delegated legislative authority; and there is much to be said for the view that the character of the authority itself gives rise to a presumption that the

(1) 31 Ch. D. 402 at pages 408-9.

exercise of it was not to be open to review. It is not necessary to decide that question. The order of the learned trial judge seems in the whole to have been the proper order. The Board is much better equipped than any court of law to do complete justice to all parties concerned; and the learned trial judge rightly assumed that the rights of the respondent company would be protected and its legitimate interests not overlooked by the Board.

The judgment of the Court of Appeal, in so far as it directs a reference as to damages, and as to costs, should not be disturbed, but in other respects the judgment of the trial judge should be restored, but modified as to costs in the manner now to be mentioned.

In the very special circumstances of this case the appellant municipality should have no costs of this appeal, and should pay all the costs of the action down to and including the trial.

Our intention has been called to a statute of the New Brunswick Legislature passed since the date of the judgment of the Court of Appeal. This is a declaratory Act, and it is unnecessary to consider whether or not its provisions ought to be noticed by this court in deciding upon the questions in controversy on the appeal, and no opinion is expressed upon that point. This is unnecessary, because the purport of the statute is, by legislative declaration, to affirm the decision of the learned trial judge in so far as concerns the jurisdiction of the Public Utilities Board.

Appeal allowed without costs.

Solicitor for the appellant: *J. B. M. Baxter.*
Solicitor for the respondent: *Fred. R. Taylor.*

1923
*Nov. 9.
1924
*Feb. 5.

FRED BRISCOE CARSCALLEN, EXECUTOR OF THE ESTATE OF JOHN C. CARSCALLEN (DEFENDANT) ..... APPELLANT;

AND

ETHEL CARMICHAEL AND JESSIE MAIR, EXECUTRICES OF THE ESTATE OF THOMAS G. CARSCALLEN (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Partnership—Death of partner—Continuance of business—Distribution of profits—Burden of proof

The respective testators of the parties hereto were partners in business and the respondents' testator also carried on a separate business. The moneys received therefrom and from other sources outside the partnership affairs being deposited in the partnership account. In 1910 a settlement between the parties took place and the appellant's testator was paid $2,000 by cheque drawn upon the firm account. On appeal from a former report it had been held that, on the evidence then before the court, this sum was paid to equalize the interest of the partners in the firm's assets and that the balance of moneys in the firm's bank account after such payment was made belonged to the partnership; but the matter was referred back to the Master to permit the present respondents to adduce further evidence to controvert these conclusions.

Held that it must be regarded as *res judicata* that the sum of $2,000 was paid to equalize the interests of the partners in the then subsisting assets and that the moneys in bank after the settlement were partnership assets, unless the present respondents should prove on the reference back that any part of the moneys belonged to their testator.

Held also that the evidence on the reference back had not displaced the *prima facie* case on these points made by the appellant on the first hearing before the Master.

In the result the appeal was allowed to the extent of some $300 to which the appellant was entitled.

Per Duff J.—The appeal should be allowed *in toto*.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario restoring the local master's report which had been varied by a Judge in Chambers.

The facts are stated in the above head-note.

R. S. Robertson K.C. for the appellant.

H. S. White K.C. for the respondents.

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

THE CHIEF JUSTICE.—I concur with the reasons for judgment stated by Mr. Justice Anglin.

IDINGTON J.—I have an impression that the judgment of the learned Chief Justice of the Exchequer Division in disposing of the appeal from the Master's last report herein, presented the correct view to be taken herein, by any one recognizing the settlement of 1909 between the parties now deceased and respectively represented herein by appellant and respondents.

I should therefore have preferred that the appeal herein had been allowed entirely and the judgment of said Chief Justice restored.

I cannot say, however, that I have, in face of so many diverse judicial views as have been taken of the curiosities presented by the evidence, sufficient confidence in my said impression to entitle me to dissent from the unanimous opinion of the majority of this court, and others who have had to consider the case in course of nearly six years of litigation.

I see no useful purpose to be served by pursuing the matter further.

DUFF J.—I agree with the opinion expressed in Mr. Justice Magee's judgment that the respondents did not acquit themselves of the onus which I think quite clearly rested upon them, to show that the monies deposited in the bank to the credit of the firm, $2,703.74, on the first January, 1910, were not partnership monies. I do not mean by that that there appears to be upon a review of the evidence merely a balance of considerations in favour of the appellant upon this point, but that the respondents have quite failed to produce evidence adequate to support a judgment in their favour. I think Mr. Justice Magee's reasoning is convincing, and I concur in the conclusion at which he arrived, and should accordingly allow the appeal, substituting a judgment in the sense of that conclusion. The usual consequences as to costs should follow. I can only add that it seems to be regrettable that the extent and burden of the litigation should be so outrageously disproportionate to the amount involved; but for this, I am happy to say, no responsibility rests upon the professional representatives of the parties concerned.

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Anglin J.

ANGLIN J.—With Mr. Justice Magee I am of the opinion that the bank accounts standing in the name of the firm of Carscallen Bros. at the date of the settlement of 1909-10 were *prima facie* firm assets and that the burden of proving that they were the individual property of Thomas G. Carscallen was on his representatives. I also agree with the view of that learned judge that the evidence in the record does not suffice to displace the presumption of firm ownership arising from the fact that these monies stood to the credit of the firm.

That the payment of $2,000 then agreed to be made to John C. Carscallen was designed to equalize the drawings of the two partners was his evidence before the master; that that payment was *prima facie* intended to bring about a condition of equality in interest in the assets of the firm was the holding of Mr. Justice Middleton in his reasons for judgment on appeal from the first report of the local master, or, as put in that learned judge's formal order, the declaration then made was

> that the settlement made on the 1st of January, 1910, was to equalize the interest of the partners in the then subsisting partnership assets.

In his reasons for judgment Mr. Justice Middleton also said that he did not agree with the master's acceptance of the plaintiff's contention that the sum of about $1,000 then in bank to the credit of the firm was vested in Thomas G. Carscallen as a result of the settlement. On the evidence, as it then stood, it was held that all the moneys in bank to the credit of the firm must be deemed firm assets. To that extent there is *res judicata.*

But a clause in the order referring the matter back to the master reserved

> liberty to the plaintiffs to establish the right, if any, of the late Thomas G. Carscallen to any of the money standing in the name of the partnership.

That could be done only by adducing further evidence. Mr. Justice Magee's observation as to the result of the first reference—that

> the whole attempt of the plaintiffs to prove ownership of the $2,703.74 by Thomas was abortive and the evidence offered taken as a whole was inept and inconclusive,

is I think equally applicable to the reference back. I agree in his conclusion thus expressed:

> The onus was clearly I think on the plaintiffs to disprove the firm's apparent ownership and this in the face of their testators' admitted heavy (?) drawings they have not done.

To bring about the result indicated by Mr. Justice Middleton as the purpose of the settlement, $2,000 was paid to John C. Carscallen out of the moneys standing to the credit of the firm—as that learned judge said in his judgment, "by the partnership." The statement in his later memorandum—

> I do not know if this was paid out of the partnership and do not determine this—

must have reference to the reservation of liberty to adduce further evidence on the reference back. The payment being made out of moneys standing to the credit of the firm was *prima facie* accepted by John C. Carscallen as a firm payment and not as a payment by Thomas C. Carscallen or chargeable to him personally. As put by Mr. Justice Magee,

> his acceptance of payment by firm cheques goes far to indicate that it was Thomas' undertaking the $2,000 should be paid by the firm and not by himself.

Again the evidence does not, in my opinion, displace the presumption that the payment was a firm disbursement or justify any other view being taken of it.

The master's second report contains these paragraphs:—

> 3. I find that the amount of $2,000 agreed to be paid the said J. C. Carscallen on the 1st January, 1910, and which was paid him was in full payment of his share of the profits of the undertaking business to that time.
>
> 4. That the only other assets of the partnership business he was entitled to share in at that time was the uncollected accounts of the business on the 1st January, 1910, amounting to $1,550.40 and the plant and chattels of the partnership property.

In his reasons for so reporting he says:—

> About 1910 some claim was apparently made by J. C. that he had not received his share of the profits of the business and after some negotiations and figuring his brother agreed to allow him $2,000 in payment of his share of the business to the 1st January, 1910, which was all the interest he could possibly have in the moneys deposited in the name of the firm. This amount was paid him and thereafter he could only be entitled to receive his half share of the profits of the undertaking business, being of course entitled to a half interest in the plant and chattels.

From these findings it is apparent that the residue of the moneys in bank at the date of the settlement, after deducting the $2,000 to be paid to John C. Carscallen, viz., $703.74, were treated by the master as the personal property of Thomas G. Carscallen and were not taken into account as partnership assets as, in my opinion, they should have been, and, as I incline to think, the order of Mr. Justice Middleton required unless new evidence given on the reference

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back should establish that they were the individual property of Thomas G. Carscallen. As already stated such evidence was not given.

In restoring the second report of the master, which had been varied by Mulock C.J.E., the Appellate Divisional Court proceeded on the view of the matter now under consideration taken by the master, as appears from the following passage in the judgment delivered by Mr. Justice Hodgins:—

> The Master has proceeded upon the idea, which is to my mind consistent with what occurred and with the evidence and accounts, that the settlement was payment in full up to the 1st January, 1910, of the respondent's testator's "share in the business" as it is put in his first judgment or as expressed in his formal report, "in the profits of the undertaking business to that time." The Master treating 1st January, 1910, as a starting point, has taken the whole accounts of the business since then and has allowed the respondents' testator one-half of everything realized except the residue of the moneys in the bank, which is now less than was shewn to be there on 1st January, 1910, charging him with what he had drawn or collected. Having regard to what is found respecting the bank accounts and to the evidence of Baker, the Master clearly meant and said that the cash in the banks was no part of the assets of the business on 1st January, 1910, but were wholly the property of the appellant's testator.

It would follow from what I have already indicated that in my opinion in respect of this item of the bank accounts the share of the appellant, executor of the late John C. Carscallen, should be increased, as Mr. Justice Magee would have directed on the hearing of the appeal from the order of Mulock C.J.E. varying the master's second report, by the sum of $351.87.

Incidentally I should observe that in dealing with this matter the majority of the learned judges in the Appellate Divisional Court would appear to have been under a misapprehension of fact, as is indicated in the following paragraph from the judgment of Mr. Justice Hodgins:—

> If the money in the bank when the settlement was made was $5,847.42 and the respondent's testator became by virtue thereof entitled to one-half of it, namely, $2,700 it is odd that he should have agreed to its being used the next year as a fund out of which the appellant's testator could pay the $2,000 and so reduce his share in that asset to $1,700.

The balance of money in the bank when the settlement was made was not $5,847.42, but $2,703.74; $5,847.42 was a sum stated by an accountant, Baker, who gave evidence on the second reference, to represent moneys deposited to the firm credit during the period 1906-9 derived from sources other than the partnership business. As Mr. Justice Magee says

The bank pass books shew moneys in the Merchants Bank on 1st January, 1910, to be in current account $1,634.63 and savings bank $1,069.11, or together $2,703.74.

Regarding the bank accounts as they stood at the date of settlement as the individual property of Thomas G. Carscallen, the master necessarily dealt with the payment of $2,000 to John C. Carscallen as having been made, not as a firm disbursement, but as a payment on acount of Thomas G. Carscallen and chargeable to him personally. In so doing I think he ignored the effect of the judgment of Mr. Justice Middleton directing the reference back. Proceeding on this basis the master took no account of the $2,703.74 in bank on the 1st of January, 1910, as a firm asset, as he should have done. On the other hand he did not charge the firm account with the $2,000 paid to John C. Carscallen, which also should have been done. Taking both these items into the account would mean that the balance of $14,456.68, found by the master to be the sum distributable, should have been increased by $703.74, and the share therein of John C. Carscallen should, accordingly, have been not $1,232.77, as reported, but $1,584.64. To this extent the defendant's appeal should be allowed.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.
Judgment varied.

Solicitor for the appellant: *V. M. Wilson.*
Solicitor for the respondent: *D. H. Preston.*

FRANK J. WEBB AND A. W. REEVES (DEFENDANTS) ..... } APPELLANTS;

AND

FELIX DIPENTA AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1924
*Nov. 13.
*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Contract—Specific performance—Agreement to sell land—Time limit—Vendee owning interest—Agreement to sell on failure to purchase whole—Sale pending purchase agreement—Amendments—Penalty.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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D. and others, by contract in writing, agreed to sell certain land, within a stated time, for $30,000 to W. who, within such period, was to have the exclusive right to buy it. W. had an interest in the land which, if he failed to purchase, he agreed to sell for $1,000. But, while the contract was in force, he sold this interest to R. for $4,000 of which he got paid $1,125 on account. W. did not purchase within the time stated and was tendered a deed with a cheque for $1,000 to convey his interest as agreed to D. and others. This being refused, the latter brought action for specific performance of the contract and to have the deed to R. set aside as being given without consideration and with a collusive and fraudulent intent. The trial judge dismissed the action holding the conveyance to R. to be *bona fide* and that performance could not be decreed. The court *en banc* accepted his finding of *bona fides* but held the plaintiffs entitled to other relief than damages against W. for breach of contract, which the trial judge held was the only remedy they had. The relief granted by the court *en banc* was to award to the plaintiffs the balance of the purchase money due from R to W. and give them the benefit of a lien or charge of W. on his interest in the land for payment of his purchase money therefor.

Held that, under the *Registry Act* of Nova Scotia then in force (R.S.N.S. 1900, c. 137, s. 15), R. has acquired a title clear of all legal and equitable claims; but the option agreement was still in existence as against W. and also bound R., after he had actual notice of it, to the extent to which it was then available; and it should be given effect to on equitable principles as to the unpaid purchase money.

The question whether the right to the vendor's lien ever existed was not raised by the plaintiffs, nor evidence upon the subject taken at the trial.

Held that the judgment appealed from (57 N.S. Rep. 262), should be varied by striking out the direction that the plaintiffs should have the benefit of any lien in favour of W. as unpaid vendor.

Evidence was given at the trial showing that W. had obtained an advance from a bank, which was not a party to the action, on the security of the money payable to him by R.

Held, that R. is entitled to protection against the bank's claim and the case should be remitted to the court below to have the bank added as a party and its rights to R's purchase money ascertained. That court has inherent power to correct the error in its judgment resulting from its failure to dispose of the bank's claim. R's failure to bring this matter to the attention of the court on the settlement of the judgment would, according to the general rule of procedure, be a reason for depriving him of his costs but the court feels justified in making an exception in this case.

Idington J. dissenting, would allow the appeal and restore the judgment of the trial judge.

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

The facts are fully stated in the head-note.

C. B. Smith K.C. for the appellants.

W. F. O'Connor K.C. for the respondents.

(1) 57 N.S. Rep. 262.

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WEBB v. DIPENTA

Rinfret J.

The judgment of the majority of the court was delivered by Rinfret J.

RINFRET J.—The appellant Webb and the respondents herein, on the 2nd November, 1922, entered into the following contract:—

This agreement made the 2nd day of November, A.D. 1922,

Between Tony D. Pistone, broker; Felix Dipenta, business man; Alex. Martinello, business man; all of the city of Sydney in the county of Cape Breton, hereinafter called the vendors on the one part, and Peter J. Webb, of the city of Sydney in the county of Cape Breton, real estate broker, hereinafter called the purchaser of the other part.

Whereas, the vendors allege that they are part owners of the estate known as the Monastery of Petit Clairveaux of Big Tracadie, in the counties of Antigonish and Guysborough, and the province of Nova Scotia, containing 709½ acres more or less.

Now this agreement witnesseth that the vendors in consideration of the sum of five dollars of lawful money of the Dominion of Canada, in hand well and truly paid to them by the purchaser, the receipt whereof is hereby acknowledged, hereby covenant and agree to sell to the purchaser, his heirs or assigns, or the nominee of the said purchaser, free from encumbrances, the said land and buildings for the sum of thirty thousand dollars ($30,000) at any time before the second day of July, A.D. 1923. This offer to be irrevocable until the said last mentioned date. This offer, if accepted before the said date, shall thereupon constitute a binding contract of purchase and sale; all adjustments to be made to the date of transfer; the purchaser to examine the title at his own expense.

This offer may be accepted by a letter posted or telegram sent to the vendors at their last known address.

If the vendors paint the exterior walls of all wooden buildings and the roof of the Monastery as well, the purchaser agrees to pay for the land and buildings herein, in that event, the sum of thirty-five thousand dollars ($35,000). Should the purchaser fail to buy the property herein on or before the 2nd day of July, 1923, then he will sell to the vendors for one thousand dollars ($1,000) whatever interest he may have in the herein mentioned property. The purchaser herein is hereby appointed by us to be the sole and only agent or party, from the date of the ensealing and delivery of this agreement until the said 2nd day of July, A.D. 1923, with authority to sell and purchase this property, and he is thereby given exclusive rights to sell, buy or bargain for the sale or purchase of the above estate within the time herein mentioned. We, the vendors herein, bind ourselves to abstain from any dealings, either directly or indirectly, with persons or corporations of whatsoever nature, for the purpose of sale, purchase, transfer, or dealing of or with the herein estate.

It is hereby declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and by binding upon the parties hereto, their heirs, executors, administrators and assigns forever.

Signed, Sealed and Delivered in the presence of:
(Sgd.) A. A. OLLERHEAD.

(Sgd.) TONY D. PISTONE (Seal)
(Sgd.) FELIX DIPENTA (Seal)
(Sgd.) ALEX. MARTINELLO (Seal)
(Sgd.) P. J. WEBB (Seal)

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Webb failed to buy the property on or before the 2nd July, 1923. About the 11th of July, the respondents tendered him a deed and a cheque for one thousand dollars ($1,000) for his interest in the property. He declined to accept them and then disclosed the fact that he had already deeded the property to the appellant Reeves.

The respondents thereupon brought this action to enforce their contract specifically, alleging that Webb had transferred his interest to Reeves for the purpose of defeating their rights under the agreement, and that such transfer was without consideration and was taken by Reeves with knowledge of the agreement of the 2nd November, 1922, and entered into between Webb and Reeves with a collusive and fraudulent intent.

By the prayer of their statement of claim, respondents asked for a declaration that the deed from Webb to Reeves was void, an order setting it aside, specific performance of the agreement of the 2nd November, 1922, and that the appellants should be ordered to execute a proper conveyance to the respondents of all their interest in the property; and "such other relief as to the Honourable Court may seem right and proper."

The appellants Webb and Reeves filed separate defences.

Webb pleaded that the agreement of the 2nd November, 1922, did not and was not intended to preclude his disposing of any interest he might have in the lands therein referred to. He denied the tender and added that, if made, it was made too late. He admitted the execution of a deed of his interest to Reeves, but denied that it was without consideration or collusion and fraudulent and that it had been made in order to defeat the respondents' rights.

Reeves also denied that the deed was without consideration and more particularly that he had knowledge of the agreement between Webb and the respondents.

The trial judge found that the respondents had failed to prove a covinous agreement between Webb and Reeves. He declared that he accepted the latter's evidence in full and that this showed that Reeves was not aware of the agreement of the 2nd November, 1922, which was not registered, as he had ascertained by having the records searched. Reeves was held to have been a *bona fide* purchaser for value of Webb's interest in the property. It was therefore immaterial whether Webb had acted in bad faith or not.

Cameron v. *Moseley* (1). The fact was that Webb had placed it out of his power to perform his part of the agreement of the 2nd November, 1922, and specific performance could not therefore be decreed against him. The respondents were left with the possibility of recovering damages for breach of contract against Webb, if they elected so to proceed.

Upon appeal, while all the judges accepted the trial judge's findings of fact, a majority of the court differed from him in regard to the relief to which the respondents were entitled.

Mr. Justice Rogers, with whom the Chief Justice and Mr. Justice Chisholm concurred, was of opinion that, on the facts as they appeared, there was an insuperable difficulty to granting specific performance simpliciter as against Reeves, who had honestly entered into the bargain and had completed his title by registration without notice, actual or constructive, of the agreement of the 2nd November, 1922. He thought, however, that the option agreement was still in existence as against Webb and also bound Reeves, after he had actual notice of it, to the extent to which it was then available; and that it should be given effect to on equitable principles as to the unpaid purchase money.

Webb had sold his interest to Reeves for $4,000; he has been paid $1,125 on account of the purchase money and was still entitled to a balance of $2,875 which, in equity, was the money of the respondents and should be accounted for to them.

The court *en banc* accordingly awarded the respondents judgment against Webb for $125 representing the amount by which he had been paid in excess of the sum of $1,000 which he was to get from the respondents under the agreement of the 2nd of November. It further declared that the respondents were entitled to all unpaid purchase money in respect of the property sold by Webb to Reeves, namely, $2,875; and decreed that Reeves should pay this amount to the respondents, who, it held, were also entitled to the full right and benefit of a lien and charge of Webb, as vendor, for the unpaid purchase money against the interest in the lands conveyed by him to Reeves.

(1) 56 N.S. Rep. 300.

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In the words of Mr. Justice Rogers:—

> The court thus turned over to the respondents all the benefit of their contract upon which it could lay its hands.

As the view of the case on which equitable relief was thus accorded had not been presented on the pleadings or at the trial, the court *en banc* allowed all proper and necessary amendments and dealt with the action as if they had been formally made.

Mr. Justice Mellish dissented. Although of opinion that the disposition of the case made by the majority of the court might be justified by the facts disclosed by the evidence, he thought that it should not be made without Reeves having had an opportunity to raise such defences as he might desire to offer. He was unwilling to interpret the general prayer in the statement of claim "for such relief as the court may think right and proper," as sufficient to warrant such a disposition of the rights of the parties on the pleadings and evidence as they stood. The evidence had disclosed that, in the previous November, Webb had secured an advance from the Bank of Commerce and assigned to the latter any moneys that he might receive from the sale of the property now in question. The respondents had made no intimation that they were willing to recognize such assignment. Moreover, they had thus far taken pains to have the sale from Webb to Reeves set aside and, in his opinion, unless they were now willing to affirm that sale, their only remedy lay in damages; and it was very doubtful whether they could now affirm the sale after having elected to disaffirm it.

Finally, in his view, the appellants might have sought relief against the clause in the agreement requiring Webb to make a conveyance of his interest for $1,000, as in the nature of a penalty or forfeiture for his failure to carry out the other terms of the agreement. Under all these circumstances, he deemed it not desirable to make the disposition of the case favoured by the majority of the court.

It will thus be apparent that the judges in the Nova Scotia courts differ only in regard to the propriety of granting upon the present record a remedy appropriate to the state of facts upon the existence of which they are in accord.

It cannot be and is not disputed that, under "The

Registry Act" of Nova Scotia then in force (R.S.N.S., 1900, c. 137, s. 15), Reeves has acquired a title clear of all legal and equitable claims. But the unregistered agreement of the 2nd November, 1922, was nevertheless a document of a nature to create an interest in land, upon its being accepted by the respondents. No repudiation by Webb resulting from the mere alienation to Reeves, in the absence of communication to respondents, could affect the latter's right to insist upon specific performance so far as possible (Williams, Vendor & Purchaser, 3rd ed., vol. 1, p. 14). The acceptance here was unconditional and made within reasonable time; and, if Webb could still set up irregularity in the tender of the 11th July, after he had rendered any tender futile by conveying the property to Reeves, any exception to it was abandoned at bar.

What we have really to consider in this case, is whether the granting of the remedy decreed by the court *en banc* should be upheld on the present record.

No doubt the administration of the relief by way of specific performance is in the discretion of the court—a discretion not arbitrary or capricious, but judicial, and to be exercised according to fixed rules (Lord Chelmsford in *Lamarre* v. *Dixon*) (1), yet "more elastic than is generally permitted in the administration of judicial remedies" (*Harris* v. *Robinson*) (2). Although the trial judge refused to decree specific performance, he did so only because he thought that "Webb had placed it out of his power to perform his part of the agreement." It is not pretended that the form of relief accorded by the appellate court was submitted for his consideration, nor does it appear that, if it had suggested itself to him, he would have refused to resort to it, rather than merely reserve to the respondents a right of action in damages against Webb.

The question now before us, however, is whether the remedy directed by the court *en banc* is not the best that could be devised under the circumstances; and, if all legitimate interests are otherwise adequately protected, whether the granting of that remedy should not be approved. It must not be forgotten that the refusal to grant specific

(1) L.R. 6 H.L. 414, at p. 423. (2) 21 Can. S.C.R. 390, at p. 397

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performance, in a case like the present one, does not rest upon the nature or terms of the contract, nor upon any principle of justice that operates in favour of the defendant, but is based upon the necessity of the case arising out of the nature of the relief sought

(Fry, Specific Performance, 6th ed., page 463, par. 990).

For that reason, it is well understood that in capacity to perform a contract "literally and exactly" is not a reason for refusing to perform it in substance (Fry, p. 467, par. 1001) and the courts will be anxious to compel the execution of such a contract *cy-près*, if it is otherwise unobjectionable, and "such a plan is feasible" (Fry, page 470).

The following extract from Williams, Vendor and Purchaser (3rd ed., vol. 1, page 536), is in point:—

> If the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first purchaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But, after he has received such notice, he cannot safely pay the rest of his purchase money; for he will not be entitled to set up his contract of sale as specifically enforceable against the first purchaser, and, as between himself and the vendor, that contract will be rescinded and he will be discharged from all further performance of his obligation thereunder.

Reference is made in a note to *Jones* v. *Stanley* (1); *Story* v. *Windsor* (2); *Hardingham* v. *Nicholls* (3); *Tourville* v. *Naish* (4). See also XXV Halsbury, Laws of England, page 377, no. 838. But for the Registry Act, that precise relief might have been awarded here. Yielding to the requirements of the Registry Law, the court will modify the relief which it would otherwise have granted, but only so far as is necessary to meet those requirements.

The Appellate Court has put into effect *cy-près* the principle expounded above; it has followed the property where it has found it, in another guise, converted into money (*Ferguson* v. *Wilson*) (5).

The course taken commends itself on equitable principles, unless it can be excepted to upon any legitimate ground open to the parties herein.

(1) 2 Eq. Ca. Abr. 685, pl. 9.
(2) 2 Atk. 630.
(3) 3 Atk. 304
(4) 3 P.W. 307.
(5) 2 Ch. App. bottom of p. 87.

Now the objections taken to the course followed are enumerated in the reasons of the dissenting judge in the court *en banc* and in the grounds taken before us by counsel for appellants. Some of them are opposed to the application of the relief generally; the others are open only to one or the other of the parties individually.

The first objection of Mr. Justice Mellish is that the court *en banc* could not dispose, as it has done, of the rights of the parties on the pleadings as they stood. But that difficulty no longer exists after all necessary amendments have been allowed. The exercise of the power to amend, when warranted, as it is here by the Judicature Act of Nova Scotia and Rule XXVIII made thereunder, is discretionary and, consistently with its jurisprudence in matters of practice and procedure, this court will rarely, if ever, interfere with it.

Another objection of the dissenting judge is based upon his doubt whether the respondents would be willing to accept the relief in the form ordered by the majority of the court *en banc,* that difficulty has also disappeared since the respondents have acquiesced in the judgment and are defending it before this court. And there is no inconsistency in their action. The result of the decree which they are now upholding is to enforce, as far as may be, the very relief which the respondents sought by their original statement of claim.

Another objection of the dissenting judge is that Webb might perhaps have himself claimed a relief in equity against the clause in the agreement requiring him to make a conveyance of his property worth $4,000 at least for $1,000, as a penalty or forfeiture for his failure to carry out the other terms of the agreement.

This objection was not taken in the statement of defence, nor apparently before the trial court. It is urged before us no doubt on account of its having been suggested by the dissenting judge in appeal.

We are unable to construe the clause in the agreement of November, 1922, now under consideration, as stipulating anything in the nature of a penalty or a forfeiture. It was, in fact, assented to in consideration of the main agreement by which Webb was given from the 2nd November, 1922, until the 2nd July, 1923, exclusive authority to

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sell, purchase or bargain for the sale or purchase of the property for the sum of $30,000 (or $35,000 if the exterior walls and roof of the monastery were painted). The agreement was irrevocable, and on a sale made during that time, any profit in excess of the stipulated sum would have belonged exclusively to Webb. On the other hand, he voluntarily agreed that, in exchange for the right thus granted, he would, if he did not buy the property before the said 2nd day of July, 1923, sell to the respondents for $1,000 whatever interest he might have in it.

Any hardship on the defendant which might flow from the specific performance of such an agreement would be merely a consequence of the fact that his speculation proved unfortunate for him (*Haywood* v. *Cope*) (1). The agreement apparently secured to him, at least when he signed it, an expectancy of profits corresponding in some measure with those which the respondents may now reap from their contract. Moreover, the mere inadequacy of the consideration, unaccompanied by any element of fraud or misrepresentation, would hardly afford him a good defence in the premises (Fry, 6th ed., nos. 399, 426, 436, 440, 444).

There remains a last objection suggested by the dissenting judge in appeal based upon the assignment by Webb to the Bank of Commerce of any money that he might receive from the monastery property. This really appears to be the most serious ground upon which the judgment *a quo* may be assailed.

What may be the rights of the Bank of Commerce under the assignment is not by any means clear, but this no doubt is due to the fact that only a passing reference was made to it in the evidence and, at the trial, it was not thought necessary further to inquire into it.

It does result, however, from the judgment of the court *en banc* that, while the interests of the Bank of Commerce cannot be said to have been finally disposed of, because it was not a party to the case, yet the appellant Reeves is ordered to pay the balance of the purchase money to the respondents although he had been made aware of an alleged assignment of the same purchase money by Webb to the bank.

(1) 25 Beav. 140.

Lord Langdale M.R., *in re Thomas* v. *Dering* (1), lays it down as a general principle

> that the court will not execute a contract, the performance of which * * * would be prejudicial to persons interested in the property, but not parties to the contract. The court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how the proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor.

See also what Lord Romilly, M.R., says in *Attorney-General* v. *Sittingbourne* (2).

Reeves is undoubtedly entitled to be protected against any claim of the bank before being required to make payments to the respondents. This can properly be done by remitting this action to the Supreme Court of Nova Scotia in order that the Bank of Commerce may be added as a party to it and that proper steps may then be taken to ascertain what rights, if any, it has in the money payable under the Webb-Reeves contract, and to determine the respective priorities of the bank and the respondents in regard thereto. That being done, proper directions can be given for payment by Reeves; and, on complying with them, his contractual obligations will be fully discharged.

The consideration given to the objections of Mr. Justice Mellish has disposed of all but one of the points in respect of which the appellants at bar alleged error in the judgment of the court *en banc*.

There remains only the objection resulting from the fact that the judgment appealed from decided that the appellant Webb had a vendor's lien against the estate of the appellant Reeves in the lands in question and that the respondents are entitled to the benefit of such lien.

The question whether the right to this lien ever existed was not raised by the pleadings. No evidence upon the subject was taken at the trial, and neither there nor in the court *en banc* was the matter ever mentioned.

Had the issue been raised, it would no doubt have been open to Reeves either to show that the right of lien had been expressly waived or that for other reasons such a lien did not exist or was not available to the respondents.

It is, however, unnecessary further to inquire into the propriety of the decree of the court *en banc* in that respect,

(1) 1 Keen, 729, at pp. 747, 748.

(2) L.R. 1 Eq. 636, at the bottom of p. 639 and p. 640.

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since the declaration of the existence of a lien was not really material for the purpose of arriving at the conclusion which has been reached. Counsel for the respondents has stated before us that he did not insist upon the maintenance of the lien and the objection of the appellant Reeves on that ground can be met by striking out from the formal judgment any reference to the existence of such lien and charge in favour of Webb as unpaid vendor.

In the result, it follows therefore that this court finds itself in accord with the disposition which the Supreme Court of Nova Scotia *en banc* has made of this case and with the relief which it has seen fit to grant to the respondents, save the declaration of lien, and subject to the further inquiry into the respective rights of the respondents as found by that judgment and those of the Canadian Bank of Commerce.

It is eminently satisfactory that the matters in controversy can be thus finally determined and further litigation avoided. This accords with the spirit of the Judicature Act.

While, however, pleadings may be amended at any stage in order to do justice, care should be taken that issues should not be determined without due notice and hearing, and this is a principle which we are sure is fully recognized by the Supreme Court of Nova Scotia, but unfortunately in this case, in working out a measure of equitable relief and directing the necessary amendments, the majority of the court failed to consider the possibly competing rights of the Canadian Bank of Commerce, which, as appears from the testimony of one of its local managers, had, in order to secure an advance to the appellant Webb, obtained from him an assignment of any moneys payable from a sale of the Monastery property which might include the moneys payable by Reeves. The court was not, however, lacking in inherent jurisdiction to correct this error and to give directions which would have avoided the necessity of this appeal, and it would have been good practice and in the interests of economy if the appellant Reeves had presented his grievance to the court when the judgment came to be settled, and the fact that he failed to do so would ordinarily be a reason for depriving him of the

costs of this appeal in accordance with the principle enunciated in *Tucker* v. *N. B. Trading Co.* (1); and *Wilson* v. *Carter* (2). The following observation of Lord Hobhouse in the latter case is applicable:

> Their Lordships do not doubt that the court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect.

A fortiori of course the court has power to correct slip or an oversight in the judgment pronounced when settling the terms of a decree or order. His Lordship proceeded to say:

> Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course.

The suggestion was, however, made during the course of the argument, and it met with no denial, that this jurisdiction is not exercised in Nova Scotia, and, moreover, since the right of the bank was one of the grounds of dissent expressed by Mellish, J., the appellant Reeves may have considered that the question had not escaped consideration by the majority of the court. In these circumstances we are disposed to think that the appellant Reeves ought not to be deprived of his costs of this appeal; but, for the reasons which we have stated, this case must be regarded as an exception from the rule of practice which prevails in this court that costs will not be allowed for the correction of an error upon appeal which might conveniently have been set right by application to the court below.

For these reasons the appeal of the appellant Reeves should be allowed; the judgment should be varied by striking out the declaration of lien, and the action should be remitted to the Supreme Court of Nova Scotia to add the Canadian Bank of Commerce as a party and to inquire into and determine the respective priorities of the appellants and the bank with respect to the moneys payable under the agreement of sale from Webb to Reeves; further directions and subsequent costs reserved to the Supreme Court of Nova Scotia. The appellant Reeves should have his costs of this appeal.

(1) 44 Ch. D. 249. (2) [1893] A.C. 838.

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IDINGTON, J. (dissenting).—This appeal arises out of an action brought by respondents against appellants in which the former, suing upon an agreement giving an option, alleged by their declaration that appellant Webb had, in order to defraud respondents of their rights under said option, conveyed the land in question to his co-appellant, Reeves, who well knew such fraudulent purpose, and respondents sought to have the said conveyance to Reeves set aside, and specific performance of said option directed.

The learned trial judge who heard the evidence of Reeves accepted his story and found he had bought in good faith and for valuable consideration and paid a substantial part of the price.

The action was accordingly dismissed with costs. The respondents made no application to amend their pleadings, nor, so far as I can see, was the case fought out on any other issue than that raised by said pleadings.

On appeal to the Court of Appeal that court maintained said findings of fact, but seemed, by a majority, to discover some other cause of action that respondents might have in way of following the fruits of the sale from Webb to Reeves through a presumed vendor's lien that Webb might have in virtue of the sale made by him to Reeves, and allowed the appeal to that court.

I may say there was no evidence adduced on that point and indeed the pleadings would not, until amended, permit of such a trial.

It is by no means certain to my mind that, under the circumstances, a lien existed.

A vendor's lien is so often defeated by reason of the attendant circumstances that accompany or ensue upon the carrying out of a sale that I would be very loath to hold that one existed unless a straight issue, of that question of its existence, had been raised at the trial.

Moreover there does appear, accidentally as it were, evidence leading me to believe it quite probable that the agreement of Reeves with Webb had been entirely assigned by Webb to the Canadian Bank of Commerce as security. If so, the said bank would, even if the existence of a vendor's lien was put beyond peradventure, have to be made a party in order to protect appellant Reeves.

The last word may not have been said on the question of respondents' right to enforce the option they claim.

For the foregoing reasons and those assigned by Mr. Justice Mellish in his dissenting opinion, I think this appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge restored; without prejudice, however, to the respondents' rights, if any, to bring another action for other causes of action, than the issue fully tried out in this action.

I cannot refrain from observing that by his factum respondents' counsel, though two courts below have decided against the cause of action set up, seems far from being convinced that it has no foundation.

Appeal allowed with costs.

Solicitor for the appellants: *R. M. Langille.*
Solicitor for the respondents: *Finlay MacDonald.*

CANADIAN WESTINGHOUSE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Carrier—Bill of lading—Burden of proof—Negligence

The bill of lading for carriage of goods by railway provided that the carrier should be liable for any loss or damage thereto except, *inter alia,* if the same was caused by act or default of the shipper. Also, that when at the shipper's request the goods were carried in open cars the carrier would only be liable for negligence and upon it would be the burden of proving freedom from such negligence. Goods were shipped on open cars upon which it was the duty of the shipper to load them.

Held, that the carrier has not discharged the burden of proving freedom from negligence if the court or jury is left in a state of real doubt as to negligence or no negligence.

Held also, that the carrier is not obliged to show how the accident causing injury to the goods was brought about; he is only required reasonably to satisfy the judge or jury that all possible precautions were taken against risks to be reasonably anticipated.

*PRESENT:—Idington, Duff and Mignault JJ. and Maclean J. *ad hoc.*
*Sir Louis Davies C.J. took part in the hearing of this appeal but died before judgment was pronounced.

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In this case the evidence did not suffice for a decision either as to the negligence in whole or in part of the shipper in loading the cars or as to whether or not the accident was due to a defect in the car or railway or neglect in working the railway for which the carrier is answerable. Therefor a new trial is ordered.

Per Idington J. dissenting. The appeal should be allowed and the judgment of the trial judge restored.

Judgment of the Appellate Division (54 Ont. L.R. 238) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of a Judge in Chambers in favour of the appellant.

The facts are stated in the above head-note.

Lafleur K.C. and *Leacy K.C.* for the appellant.

Tilley K.C. and *John D. Spence* for the respondent.

IDINGTON J. (dissenting).—This arises out of an action tried by the Honourable Mr. Justice Logie wherein appellant sought to recover damages done to its goods shipped at Hamilton to be carried to Grand'Mère in Quebec, and which were destroyed in an accident, near Elliott in Eastern Ontario, as the result of the first of the two cars on which they were loaded having evidently got off the track followed by some fourteen more cars all of which were more or less wrecked.

The learned trial judge found the respondent liable and entered judgment for $52,928.72.

The now respondent appealed therefrom to the Appellate Division of the Supreme Court of Ontario.

That court reversed said judgment and dismissed the action.

Some remarkable propositions of law and fact put forward on the argument before us induced me to read the entire evidence in the case and as result thereof and perusal of the several judgments respectively of the learned trial judge and those writing in the Appellate Division, and due consideration thereof, I have come to the conclusion that the learned trial judge's judgment was well founded and should be restored.

I agree entirely in his statement of the facts so far as that sets them forth as it does fully in a general sense and see no useful purpose to be served by repeating same here.

He, at the close thereof and his reasons for judgment, rested same upon a needlessly narrow basis which has been

laid hold of in argument in the court below and here, as if covering all he had said worthy of consideration.

The paragraphs I refer to are as follows:—

Sitting as a jury, I draw the inference upon the evidence of Leslie Wilson and others of the defendants' servants, that the defendants' theory as to how the accident occurred cannot be the true one.

That a load which had travelled 210 miles without oscillation or loosening of its packing, should suddenly run amock on a smooth and perfect piece of track by reason of an alleged breaking of some packing under the deck of the car, seems incredible.

Had the accident occurred on a curve, I could understand the force of the argument, but there was uncontradicted evidence that upon a track and roadbed such as was proved to exist at the point of derailment such an oscillation as Wilson described was impossible.

How, then, did the accident occur? A broken flange, a weakened spring, a sudden failure of the running gear, any one of these would account for it.

But the defendants do not help the court as to these possibilities. They are obvious possibilities from which unexplained negligence might be inferred and they are not eliminated.

But I do not base my judgment on these.

There is evidence for me, sitting as a jury, to act upon in the admittedly defective condition of the car flooring from which I draw the inference that the accident happened by reason of this giving way suddenly—thus setting up the oscillation observed by Wilson and in consequence, the wreck.

I respectfully submit that the entire possibilities, indeed probabilities, of the cause of the accident were far from being confined by the evidence to "the admittedly defective condition of the car flooring" or its giving way suddenly.

That, and much other, evidence in the case tends to demonstrate that the car was an old one liable to have many weaknesses besides that one.

That flooring being now admittedly so suggests its condition should be taken as an indication and guide, that old age in all the parts of that car, despite its having been in a repair shop, as alleged in respondent's factum, but for obvious reasons not laboured with in the evidence, should be looked to for the many other possible causes of its strange movements.

Hence we should, looking to the almost overwhelming evidence of experts and others as to the actual cause of the accident, ask how such a getting on the rail and consequent fall could have happened, and if we apply our own common sense to the facts so submitted, we shall find there evidently was something far beyond the breakage of some material used to secure safe carriage.

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The train was on a safe level track at the time in question. The mere breakage of a small block of wood, put there for safety sake, even if it occurred as contended, would not account for the car climbing the rail and bringing about the disastrous consequences now in question.

But if by reason of other defects correspondent with the results of old age which rendered the floor of the car such as never should have been tendered for such use as asked for by appellant, led to its climbing the rail, then such motion on its part would account for the breaking of the pieces of wood used to tie it there.

The story about another like piece of wood having been found farther back is simply not proven. No one pretends to swearing it was found immediately after the accident where someone says it was found next day.

How many curious people crowd into the scene of such an accident and pick up and throw away anything found.

The pitiable part of this whole business in question herein, is that no real and proper method of investigation was immediately instituted, and hence no explanation forthcoming but such inferences as are, I submit, quite unwarrantable, are presented as if facts. Neither the wheel nor any part of the truck it belonged to was sought out for identification and inspection of their breakages, and I cannot agree that in any way has the respondent discharged the onus cast upon it which the bill of lading contract does.

Res ipsa needs some knowledge of facts to permit it to speak. It goes far enough here to tell us that the actual application made, though not in express words, was in defiance of the story *res ipsa* tells.

This putting of the cart before the horse, however ingenious, is met by evidence shewing that the destruction of these blocks of wood was more likely to have been the result of the car leaving by climbing the rails and that caused by some other accidental defect in its flange being broken or a weakened spring, or sudden failure of its running gear.

I do not think that the learned trial judge at all intended to discard such possibilities, but inadvertently expressed himself as if he intended to, and found part only of the full grounds on which he desired to rely, as his previous expression indicated.

At all events it is the wider aspect of the case I desire to present and which seems in accordance with the facts as he has presented them in earlier passages.

I cannot agree with Mr. Justice Ferguson's view that the appellant was bound to see by close inspection the actual nature and unseen defects of the car offered and that the respondent's liability under its bill of lading was not bound by its acts in regard thereto as part of its obligation to demonstrate that it had not been negligent.

It is proven by more than one witness that the system adopted for safely packing upon a flat car such goods as in question for transportation, had been in use by appellant for twelve years or more, and no railway accident ever heard of as result thereof. The extent to which this was the case during said period is not told. If ten or twenty times or more a year it might have absolutely demonstrated the absurdity of oscillation theory being relied upon so successfully as it has been.

I would allow the appeal with costs here and in the Court of Appeal, and restore the judgment of the learned trial judge.

The judgment of the majority of the court (Duff, Mignault and Maclean JJ.), was delivered by:—

DUFF J.—By the first section of the bill of lading, so called,

> the carrier of the goods herein described shall be liable for any loss or damage thereto except as hereinafter provided.

By sec. 3,

> the carrier shall not be liable for loss, damage or delay to any of the goods herein described caused by * * * inherent vice in the goods or the act or default of the shipper or owner.

And again, by section 3:

> when * * * at the request of the shipper, the goods are transported in open cars, * * * the carrier * * * shall be liable only for negligence; and the burden of proving freedom from such negligence shall be on the carrier.

The liability of the carrier declared by section 1 is qualified by the exceptions expressed in the sentences quoted from section 3. The onus is, of course, upon the carrier to bring himself within the exceptions; and, in the present instance, the respondents could, in point of law, establish freedom from responsibility by bringing themselves within the conditions of either of these exceptions. The open car

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on which the machinery was carried was supplied at the request of the appellant company, and under the regulation of the Board of Railway Commissioners, it was the duty of the appellant company to load the car—a duty which they undertook to perform. If the derailment and consequent injury to the machinery were directly caused, in whole or in part, by negligent loading, the appellant company is not entitled to recover, because, if that be so, the loss is at least a loss caused in part by its negligence, and that circumstance, according to settled and well-known principles, disentitles it to recover any part of the loss. Again, it is open to the respondents to shew freedom from negligence on their part, or, in other words, that the accident did not arise from any want of care on their part. This, of course, would be an answer to the appellant company's action. We think it is of some importance to notice rather particularly this point touching the burden of proof. We think the last words of section 3, "the burden of proving freedom from negligence shall be on the carrier," cast upon the respondents the burden of proof in point of substantive law; that is to say, if, when all the evidence is in, the tribunal of fact has not been satisfied upon the point, but is left in a state of real doubt as to negligence or no negligence (negligence here, of course, means negligence causing the damage in respect of which the claim is made), then the issue must be decided against the respondents.

The respondents are, of course, in a vastly more favourable position as touching knowledge and means of ascertaining facts bearing upon this issue than the appellants; and that is a circumstance which may very materially affect the decision of the question whether, on any given state of the evidence, the respondents are entitled to ask the court to hold that the evidence produced is sufficient to support a conclusion that the accident was not due to a failure on the part of their servants to exercise proper care in relation to the sufficiency of the company's cars or equipment or the working of their railway. It is, perhaps, needless to say that the respondents, in order to bring themselves within this exception, are not required to shew how the accident was brought about. They are not obliged to demonstrate "freedom from negligence." (*Evans* v.

Astley (1). It is sufficient if they produce evidence reasonably satisfying the tribunal of fact that all proper precautions have been taken in order to provide against risks which might reasonably be anticipated.

These, then, were the issues which it devolved upon the learned trial judge to deal with on the evidence. The judgment of the learned judge, holding the respondents responsible, was based upon a finding of fact which is expressed by him in these words:

> There is evidence for me, sitting as a jury to act upon in the admittedly defective condition of the car flooring from which I draw the inference that the accident happened by reason of this giving way suddenly—thus setting up the oscillation observed by Wilson and in consequence, the wreck.

It is sufficiently clear from other passages in the judgment, that by this the learned trial judge means that the armature broke through the floor in a downward direction, and this he ascribes to

> negligence in supplying a car unsuitable for the purpose for which it was intended and dangerous for a heavy load by reason of the defective condition of the floor or deck.

The learned judge appears to assume that the semi-circular body of metal which constituted the load was sustained by the wooden deck or flooring of the car, two and a quarter inches thick, and that it was so placed that if this wooden deck or floor proved in itself to be insufficient to support the weight concentrated in the spaces occupied by the two feet of this semicircular arc, the accident which resulted must be ascribed to the negligence of the respondents in supplying a car with such a floor.

Now if the armature in fact was loaded in such a way that a wooden floor, two and a quarter inches thick, was required to support, unaided, such a strain, then we should have thought that, however flawless the condition of the floor, *prima facie* any accident resulting from the load breaking through in consequence of the floor being insufficient to stand the strain put upon it by the weight of the load must be ascribed to the negligence of the persons who acted so foolishly as to place such a weight upon a support so manifestly insufficient. If that were the true account of what occurred, we should have said that the respondents' case was complete, for, as already mentioned, it is

(1) [1911] A.C. 678.

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sufficient for the respondents in this case to shew that the accident or default of the shipper was in part the direct cause of the accident.

But this rather easy way of disposing of the litigation is, when the facts are taken into account, inadmissible.

It was not seriously argued here on either side that the load was so placed as to make the support of the ends of the metal arc dependent upon the strength and rigidity of the wooden floor. The real support for the load was the metal frame of the car upon which those parts of the floor rested which were occupied by the feet of the arc. The wooden frame was subjected to forces of compression, but, if the bolts and the blocking held, not to any breaking strain, and the learned judge's account of the manner in which the accident happened must clearly be rejected.

The learned judge also finds that the wooden blocks, which were screwed up against the frame of the car by bolts passing through the feet of the armature for the purpose of steadying the load by receiving any strain due to oscillation or swaying, were sufficient for their purpose; but we cannot escape the impression that the learned judge was under a misapprehension as to the disposition of these blocks of wood and the exact purpose they were designed to serve, for, if he had appreciated the manner in which the feet of the armature were supported and secured, we do not think he could have reached the conclusion expressed in the finding just discussed.

The learned judge also expressed a view that the appellants had not satisfied the onus resting upon them of disproving negligence. The language of the learned judge, however, lends itself to the interpretation that the respondents, in order to acquit themselves of this onus, must in some way identify the cause of the collapse of the car, and shew that this was a cause for which they are not answerable under the stipulations of the contract.

On the two cardinal issues—on the one hand whether the accident was caused, in whole or in part, by the default of the appellants in performance of their duty to exercise proper care in loading the car; and, on the other, whether the accident was due to some defect in the car or railway or some act or neglect in the working of the railway, for which the respondents are answerable; the judgment of

the learned trial judge does not disclose findings which can properly be made the basis of a decision.

We have carefully considered the judgments in the Appellate Division but we have come to the conclusion that the issues of fact involved in this case cannot satisfactorily be decided by an appellate court, deprived of the means which a trial judge has at his command of estimating and testing the value of expert and other evidence in the course of its development, and without the assistance of findings on the relevant issues by a trial judge, and that there should be a new trial. We have accordingly refrained from discussing the points in controversy further than seemed absolutely necessary. There should be a new trial, and all costs, including the costs of the abortive trial, should abide the event.

Appeal allowed. New trial ordered.

Solicitors for the appellant: *Gibson, Levy, Scott & Inch.*
Solicitors for the respondent: *MacMurchy & Spence.*

BANK OF MONTREAL (PLAINTIFF).....APPELLANT;

AND

O. NORMANDIN (DEFENDANT).....RESPONDENT.

1925
*May 27.
*June 18.

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

Promissory note—Bank and banking—Composition between creditor and debtor—Note endorsed by third party to guarantee payments—Transfer by debtor to creditor for general collateral security—Knowledge of creditor—Holder in due course.

H. being indebted to a bank for $74,327.49 proposed to T., representing the bank, to settle the indebtedness by paying one half of the debt by monthly payments of $1,000 each and to give security for the other half. The last ten monthly payments were to be guaranteed to the bank's satisfaction. This proposal was accepted by the bank and a formal deed of composition was entered into. With the view of fulfilling his obligation, H. obtained the respondent's endorsements to five notes of $500 drawn in favour of the bank and payable on certain dates coinciding with five of the last ten monthly payments, but he was unable to obtain security for the balance of the $10,000. When H. had made only three of the monthly payments, T., acting for the bank apparently not considering H. to be in default, demanded and obtained from H. the transfer of the respondent's notes with a letter hypothecating the notes "as a general and continuing collateral

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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security for the due payment of all advances made or to be made to" H by the bank. T., at the time of the transfer, knew that the purpose of the respondent's endorsements was to secure in part the last ten payments under the deed of composition and also knew that H. had failed to obtain security for the balance of the last ten monthly payments.

Held that, as T. knew that H. had no right to hypothecate generally the respondent's notes and to convert what was a specific security into a general security, which was a breach of faith towards the respondent, the bank had no right of recovery as not having taken the notes in good faith and therefore not being a holder in due course.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and dismissing the appellant's action for $2,010.16, amount of four promissory notes endorsed by respondent.

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

Hague K.C. for the appellant.

Lafleur K.C. and *J. C. Lamothe K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of King's Bench reversing, Greenshields and Guerin JJ. *dissentientibus,* the judgment of the Superior Court, Archer J., which had maintained the appellant's action.

The facts which gave rise to the litigation may be briefly stated.

In February, 1921, the commercial firm Hoerner, Williamson & Co., furriers of Montreal, were heavily indebted to The Merchants Bank of Canada, so much so that the bank had decided to force them into liquidation unless they furnished additional security. For that purpose Mr. Thompson, who was in charge of the discount accounts of the bank, and who throughout acted for the bank, sent Mr. Hart, an authorized trustee under the Bankruptcy Act, to see them, and Mr. Hart, finding that they were hopelessly insolvent, and that a forced liquidation would not realize more than a few cents on the dollar, advised the bank not to put them into bankruptcy, but rather to make a composition with them. He then submitted to the bank, through Mr. Thompson, a proposition

on behalf of the firm in the form of a letter signed by the latter. This letter made an offer of composition on the basis of fifty cents on the dollar. The firm's indebtedness to the bank was then $74,327.49, and the proposal was that the firm would pay one-half of this sum by instalments of $1,000 monthly, with interest at five per cent, the last ten payments to be guaranteed to the bank's satisfaction. Instead of paying the balance, Hoerner and Williamson were to furnish the bank with life insurance policies for $25,000 each, running for twenty years, the premiums of which they obliged themselves to pay. They were also to hypothecate properties belonging to them in Montreal and Winnipeg, and they agreed that failure on their part to make these payments and to pay the insurance premiums would give the bank the right to demand immediate payment of their full indebtedness. The bank was to continue to discount the approved trade paper of the firm. After some negotiations, the bank accepted this proposition, which was put in the shape of a notarial agreement, dated the 23rd of February, 1921.

With the view of fulfilling their obligation to guarantee to the bank's satisfaction the last ten monthly payments of $1,000 each, Hoerner, Williamson & Company obtained the respondent's endorsement to five notes of $500 each, drawn in favour of the bank, and payable respectively on June 12, August 12, September 12, November 12, 1923, and January 12, 1924, the due date of which coincided with five of these last ten monthly payments. Notwithstanding their efforts, however, Hoerner, Williamson & Company were unable to obtain further endorsements, so that to the extent of $7,500 these last ten payments were never guaranteed. Of the fact that the respondent had endorsed these five notes to carry out the undertaking of Hoerner, Williamson & Company to guarantee to the bank's satisfaction the last ten monthly payments, as well as of the inability of the firm to obtain security for the balance of these payments, the bank was fully advised.

When the respondent endorsed these five notes, he stipulated with Hoerner, Williamson & Company that they would not use his endorsement or hand over the notes to the bank unless and until they had obtained security or endorsement from other parties for the balance of the last

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ten monthly payments. The learned trial judge found that the bank had no knowledge of this condition.

Hoerner, Williamson & Company made only three of the monthly payments, and apparently they were not considered by the bank to be in default when, on June 15, 1921, after several demands, the bank obtained from the firm the transfer of the notes which the respondent had endorsed. These notes were transferred to the bank by a letter of hypothecation signed by the firm, which hypothecated the notes,

as a general and continuing collateral security for the due payment of all advances made or to be made to us (the firm) by the said bank (and all legal expenses incurred by the said bank in relation to our account or advance), and to be realized by them in such manner as may seem to them advisable in the event of any default in the payment of said advance.

In May, 1922, Hoerner, Williamson & Company went into bankruptcy, being still heavily indebted to the bank. The appellant having acquired all the assets, subject to liabilities, of the Merchants Bank, brought action against the respondent claiming payment of four of these notes, which had then matured. At the hearing in this court, the appellant's counsel admitted that the appellant was not in a better position to demand payment of the notes than the Merchants Bank would have been, so that the right of action, if any, of the latter is the sole subject of the controversy.

The question to be determined, briefly stated, is therefore whether the Merchants Bank under these circumstances could claim payment from the respondent of the notes endorsed by him.

The evidence does not show that the bank was aware of the condition stipulated by the respondent that the notes endorsed by him would not be handed over to the bank until Hoerner, Williamson & Company had succeeded in having the balance of the last ten monthly payments fully guaranteed by other endorsers. On the other hand, it appears clear that in handing these notes to the bank on its demand, and more particularly in transferring them as a general and continuing collateral security for all advances made or to be made by the bank, Hoerner, Williamson & Company were guilty of a breach of faith towards the respondent. There is no doubt that Thompson knew

that the respondent had endorsed these notes in order to guarantee, *pro tanto,* the last ten payments. He so admits.

As above stated, the learned trial judge, finding that the bank had no notice of the condition stipulated by the respondent when he endorsed the notes, gave judgment in favour of the appellant. This judgment was set aside by the majority of the learned judges of the Court of King's Bench on the ground that Hoerner, Williamson & Company, in handing over the notes to the bank, had violated the promise they had made to the respondent, and had committed a breach of faith. They also held that the negotiation of the notes as a collateral security was a defective negotiation, *entachée d'un vice,* with the consequence that it was incumbent on the bank to show that it was a holder in due course, to wit, that it had taken these notes for value, in good faith, and in ignorance of the defect in Hoerner, Williamson & Company's title. The learned judges relied on sections 56, 58 and 74 of the Bills of Exchange Act.

The learned trial judge and, I think, the learned judges of the Court of King's Bench, were concerned chiefly with the question whether the bank had sufficient notice of the condition stipulated by the respondent that the notes endorsed by him would not be handed over to the bank unless and until Hoerner, Williamson & Company had completed the securing of the last ten payments.

It was for the respondent to prove this, and, as I read the evidence, there is nothing to show that Thompson was aware of this condition. He did know that Normandin had endorsed these notes as part of the security for the last ten payments, but, while both Hoerner and Williamson state that they informed Thompson (and he admits that he knew) that the endorsement was in partial fulfilment of their undertaking to secure the last ten payments, they do not pretend that they mentioned the special condition alleged by the respondent, and which they state they agreed to. So far, therefore, as this condition is concerned, and although the negotiation of the notes was a breach of this condition, the position of the bank has not been successfully assailed.

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On the other hand, Thompson knew that the purpose of the respondent's endorsement was to secure, in part, the last ten payments to be made under the deed of composition, but he took the notes under a letter of hypothecation, hypothecating them as a general and continuing collateral security for the due payment of all advances made or to be made to Hoerner, Williamson & Company. This would entitle the bank, in case the latter made these last ten payments, to retain the notes for any other advances made by it. Thompson knew that Hoerner, Williamson and Company had no right to thus hypothecate these notes, and he knew that converting what was a specific security into a general security was a breach of faith towards the respondent. It is true that the deed of composition was made for the whole indebtedness of the bank and that the last ten payments were a part of this indebtedness. But, as I have said, the letter of hypothecation goes much further than this. As effected, the transfer of these notes to the bank was to Thompson's knowledge made without right by the debtors of the bank.

Under these circumstances and for this reason I think the judgment appealed from can be sustained. It is quite an elementary proposition that a person who takes notes must, to be a holder in due course, take them in good faith. As stated by Lord Herschell in *London Joint Stock Bank* v. *Simmons* (1),

> regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further enquiry.

Here it was not merely a question of suspicion but of knowledge that Hoerner, Williamson & Company had no right to convert this specific security into a general security. Under all these circumstances the bank was not a holder in good faith and in due course, and has no right of recovery.

No argument was addressed to us on the point whether the bank, being the payee of these notes, could be considered as a holder in due course, and it is not intended to express any opinion on the abstract question. It suffices

(1) [1892] A.C. 201 at p. 221.

to hold that the bank did not take the notes in good faith and this of course is conclusive against it whether it be regarded as a holder of the notes or as a creditor under a contract of suretyship.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Lamothe, Gadbois & Charbonneau.*

COLUMBIA GRAMOPHONE COMPANY (DEFENDANT) ..... APPELLANT;

AND

A. RACINE (PLAINTIFF) ..... RESPONDENT.

1925
*June 8.
*Oct. 6.

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

Sheriff's sale—Lease—Effect—Transfer of the lease to the buyer—Right of the lessee to abandon premises. Art. 781 C.C.P. Arts. 1663, 2128 C.C.

Where, subsequently to the sheriff's sale of an immovable, the person on whom the property was sold transfers his rights in a lease to the buyer (adjudicataire) and the latter notifies the lessee that he can remain in possession of the immovable, the lessee has no right to abandon the premises and is not discharged from the obligations resulting from the lease.

Judgment of the Court of King's Bench (Q.R. 38 K.B. 17) affirmed.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1) reversing the judgment of the Superior Court at Montreal and maintaining the respondent's action.

The respondent was the adjudicataire of certain property sold by sheriff's sale. The sale took place on the twelfth day of October, 1923. The appellant was then one of the tenants in occupation of the property sold, under a lease from one dame Jennie Prokassoff. On the 15th October, 1923, dame Jennie Prokassoff before John Mulcair, notary public, assigned and transferred to respondent with

*PRESENT:—Anglin C.J.C. and Duff, Mignault and Newcombe JJ. and Tessier J. *ad hoc.*

(1) [1924] Q.R. 38 K.B. 17.

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subrogation, all her rights in the lease. The deed of transfer was served upon the appellant on the 27th October, 1923. On the 29th October, two days later, the appellant abandoned the leased premises and removed its effects therefrom. The present action was taken by the respondent on the 3rd November, 1923, accompanied by *saisie-gagerie par droit de suite* to enforce the covenants of the lease. The respondent claimed $20,333.13 from the appellant for rents due and to be due until the full expiration of the lease.

Angers for the appellant. The sheriff's sale has the effect not only of discharging the property from the lease, but of terminating the lease itself.

The transfer of the lease by the lessor to the buyer cannot thus revive it.

Perron K.C. and *Chipman K.C.* for the respondent. There is nothing in the law to the effect that a sheriff's sale cancels a lease.

In no judgments of our courts has any expression to that effect been necessary to decide the issue; these judgments were substantially based upon the view that there was no *lien de droit* between the adjudicataire and the occupier in the particular instances, none having arisen from the sheriff's sale, and none having been created by law.

The lease and the contractual rights and obligations persist, as well after the sheriff's sale as before, and where, as in the present case, the lessor and the adjudicataire, the person bound to give enjoyment and the person able to give enjoyment, have become one, a complete right of action exists against the tenant, who, not having suffered either a physical or a judicial disturbance, is not entitled to a release from his obligations.

The judgment of the court was delivered by

MIGNAULT J.—Une question intéressante se présente en cette cause. Le décret met-il fin au bail de telle sorte que malgré que l'adjudicataire ait, depuis la vente judiciaire, obtenu du bailleur une cession de ses droits au bail, et qu'il offre au locataire de le maintenir en la jouissance de l'immeuble loué, le locataire puisse abandonner l'immeuble et se libérer des obligations résultant du bail? Je dis que la question se pose ainsi, et il est important de le constater,

car en cela cette cause diffère essentiellement des arrêts que l'appelant invoque. Ainsi il ne s'agit nullement de déterminer si le bail est opposable à l'adjudicataire de l'immeuble loué. Il pourrait bien ne pas lui être opposable sans qu'il s'ensuive qu'il ne peut profiter du bail s'il en a obtenu la cession du locateur et s'il offre au locataire de le maintenir en possession de l'immeuble.

C'est bien ce qui est arrivé dans l'espèce. Le 26 mars, 1921, par un bail sous seing privé qui paraît avoir été enregistré, une dame Jennie Prokassoff louait à l'appelante un immeuble rue St-Denis, à Montréal, pour cinq ans à compter du 1er mai, 1921, à raison d'un loyer annuel de $8,000, par versements mensuels de $666.66 chacun, payables d'avance. L'appelante se mit en possession des lieux en vertu de ce bail et en avait la jouissance lorsque l'immeuble fut vendu par le shérif le 12 octobre, 1923, et l'intimé s'en porta adjudicataire. Le 15 octobre, 1923, l'intimé obtint de dame Prokassoff une cession de ses droits au bail qu'il fit signifier à l'appelante le 27 octobre. A la fin d'octobre, l'appelante abandonna l'immeuble, prétendant que le décret avait mis fin au bail. L'intimé prit alors une saisie-gagerie par droit de suite contre l'appelant, réclamant le loyer échu et à écheoir jusqu'à l'expiration du bail, tant comme loyer qu'à titre de dommages, soit $20,333.13. La cour supérieure, présidée par l'honorable juge-en-chef suppléant Martin, renvoya l'action, mais sur appel à la cour du Banc du Roi l'intimé obtint jugement pour $12,333.33. L'appelante nous demande maintenant d'infirmer ce jugement et de rétablir le jugement de la cour supérieure.

La seule question discutée à l'audition est la question de droit que j'ai formulée ci-dessus. Je me propose de lui donner la solution qui s'impose, sans avoir la prétention d'ailleurs de trancher d'autres points qui ont été discutés en cour d'appel et qui ne sont pas nécessaires pour la décision de la cause.

L'argumentation de l'appelante peut se résumer brièvement. Il a toujours été de principe dans l'ancien droit, dit-elle, que le bail prenait fin par le décret de l'immeuble loué. Le code civil a innové en adoptant les articles 1663 et 2128 qui ne se réfèrent qu'à la vente volontaire. Donc la

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doctrine de l'ancien droit est toujours restée en vigueur et le bail dont il s'agit n'existe plus.

Il convient de constater que dans la section VI du Titre *du Louage,* portant la rubrique *Comment se termine le contrat de louage des choses,* il n'est nullement question du décret. Cette omission est déjà significative, si comme l'appelante le prétend, les articles 1663 et 2128 C.C. ne s'appliquent pas à la vente forcée. Mais je ne veux pas fonder mon avis sur une simple omission.

Laissant de côté les autres causes de dissolution du bail, comme la perte de la chose, l'expropriation pour cause d'utilité publique, etc., la vente elle-même n'est envisagée que quant à ses effets à l'égard de l'acheteur. Il s'agit de savoir si après cette vente le bail est opposable à l'acheteur, en d'autres termes, si le locataire peut être expulsé par lui.

On ne peut dire que l'objet des articles 1663 et 2128 C.C. —il faut envisager ce dernier article, qui se trouve au Titre de *l'Enregistrement des droits réels,* avec l'article 1663 C.C., car les deux dispositions se complètent—soit de trancher la question de savoir si la vente met fin au bail. Au contraire, pour protéger le locataire, ces articles maintiennent le bail quand les conditions prescrites se rencontrent, et le rendent opposable au nouveau propriétaire. Et si ces dispositions ne peuvent être étendues à la vente forcée, point sur lequel il n'est pas nécessaire de se prononcer, il n'y a aucune disposition au code civil qui mette fin au bail lorsque l'immeuble loué a été vendu par autorité de justice.

On invoque l'article 781 du code de procédure civile qui déclare que, sauf certaines exceptions qui ne nous intéressent pas ici, le décret purge tous les droits réels non compris dans les conditions de la vente. Et on dit que si le bail conférait au locataire un droit réel, *jus in re,* dans l'immeuble qui en est l'objet, ce droit serait purgé par le décret, s'il n'était pas compris dans les conditions de la vente, et à plus forte raison en serait-il de même d'un droit purement personnel.

Mais il est clair qu'encore ici il s'agit du droit du locataire d'opposer son bail à l'adjudicataire. Et il est bon d'observer que le droit réel est purgé sans que le contrat qui l'a créé prenne nécessairement fin. Ainsi, dans le cas de l'hypothèque, le contrat subsiste toujours, mais le droit préférentiel

qu'il donne s'exerce non plus sur l'immeuble, mais sur le produit de la vente.

Donc, en tant qu'il s'agit des textes, on ne peut leur donner une portée plus absolue que de rendre le bail inopposable à l'adjudicataire. Ces textes ne mettent pas fin au bail en ce qui concerne le lien personnel qu'il crée entre le locateur et le locataire, cela soit dit tout en reconnaissant que si ce dernier ne peut, après le décret, jouir de l'immeuble loué, il ne devra plus payer loyer au locateur. Qu'on appelle cela une dissolution du bail, il importe peu, car il ne s'ensuit pas que l'adjudicataire ne peut obtenir du locateur une cession du bail et contraindre le locataire qu'il laisse en jouissance à lui en payer le loyer.

La jurisprudence que la cour supérieure invoque, sauf peut-être un seul arrêt, n'est pas plus concluante en faveur de la prétention de l'appelante que les textes. Je la passerai rapidement en revue.

McLaren v. *Kirkwood* (1), décision de juge Papineau. Il s'agissait d'une requête par un adjudicataire demandant un bref de possession pour l'expulsion d'un locataire du saisi qui lui disputait la possession de l'immeuble vendu sur décret. Il a été décidé que l'article 1663 C.C. ne s'applique pas à la vente d'un immeuble par le shérif et que le locataire de cet immeuble peut être expulsé, à la requête de l'adjudicataire, avant l'expiration de son bail. Donc l'arrêt décide seulement que le bail ne peut être opposé à l'adjudicataire.

Mowry v. *Bowen*, cour de revision (2). Il s'agissait de la demande d'un bref de possession par l'adjudicataire d'un immeuble vendu par le shérif contre le locataire qui lui opposait son bail. Quand les juges disent que le bail prend fin avec le décret, il faut entendre par là qu'il ne peut être opposé à l'adjudicataire, en d'autres termes qu'il est non avenu à son égard, car c'était là l'espèce qu'ils avaient à juger. Si les expressions dont on s'est servi dépassent la *ratio decidendi*, elles ne sont que des *obiter dicta*.

Standard Life Insurance Co. v. *Lamy* (3), Loranger J. Cet arrêt, tel que rapporté, paraît décider que le bail prend fin par le décret de l'immeuble loué, et que partant, à

(1) [1881] 25 L.C.J. 107.
(2) [1884] M.L.R. 3 S.C. 417.
(3) [1901] 7 R. de J. 320.

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compter du décret, la caution du locataire est libérée de l'obligation qu'elle avait assumée au bail. Il y avait dans l'espèce allégation que le locataire était resté en possession après la vente du shérif, mais le jugement ne dit pas si cette allégation avait été prouvée. Il est possible qu'on ait démontré que le locataire avait été privé de la jouissance de l'immeuble. Si cependant cette décision a une portée plus absolue, et si elle veut dire que le bail est anéanti par le décret, même lorsque l'adjudicataire adopte ce bail et laisse le locataire en possession, je suis respectueusement d'avis qu'elle est mal fondée.

McGee v. *Larochelle,* cour de revision (1). L'honorable juge-en-chef suppléant ne fait que mentionner cette cause qui ne se prononce pas sur la question en litige, sauf que le juge Casault dit, à la page 216, qu'en cas de vente le bail, dans les rapports de l'acquéreur avec le locataire, est réputé n'avoir pas d'existence, ce qui est la véritable doctrine quand les conditions prescrites par les articles 1663 et 2128 C.C. ne se rencontrent pas, et que l'acquéreur n'a pas adopté le bail.

Enfin le juge-en-chef suppléant cite l'opinion de mon regretté collègue, le juge Brodeur, dans *St. Charles* v. *Friedman* (2), où le savant juge dit que dans l'ancien droit le contrat de louage était terminé par la vente que le propriétaire faisait de la chose louée. Dans l'espèce, il s'agissait de savoir si, après la vente, l'acquéreur pouvait expulser le locataire, ce qui, je l'ai dit plusieurs fois, est une tout autre question.

Je ne crois donc pas que la jurisprudence citée par le juge-en-chef suppléant nous autoriserait à mettre de côté le jugement de la cour d'appel.

L'appelante invoque aussi la doctrine de l'ancien droit qui, suivant elle, est encore applicable lorsqu'il y a eu décret de l'immeuble loué. Cependant les auteurs qu'elle cite dans son mémoire envisagent la question quant au droit du nouveau propriétaire d'expulser le locataire lorsqu'il n'a pas assumé l'obligation de continuer le bail.

Ainsi Domat, éd.Rémy, tôme 1er, p. 208, dit:

Si le bailleur vend une maison ou un autre héritage qu'il avait loué ou baillé à ferme, le bail est rompu par ce changement de propriétaire, et

(1) [1891] 17 Q.L.R. 212.

(2) [1914] 62 Can. S.C.R. 186, at p. 208.

l'acheteur peut user et disposer de la chose comme bon lui semble, si ce n'est que le vendeur l'eût obligé à entretenir le bail. Mais si l'acheteur expulse le preneur, soit un fermier ou un locataire, le bailleur est tenu des dommages et intérêts que cette interruption du bail aura pu causer.

C'est toujours la même question. Le nouveau propriétaire peut expulser le locataire s'il ne s'est pas obligé à entretenir le bail. Donc dans ce dernier cas le bail continue, et quand le droit d'expulsion existe le locataire a un recours en dommages-intérêts contre son bailleur, ce qui fait bien voir que le lien du contrat entre le bailleur et le locataire n'est pas rompu.

De même Pothier, *Louage,* n° 101, dit:

Le conducteur d'un héritage ne peut opposer l'exception de garantie au nouveau propriétaire qui l'a acquis à titre singulier du locateur, si le locateur ne l'a pas chargé de l'entretien du bail.

Et au numéro 288 du même traité, également cité par l'appelante, Pothier dit:

Le locataire ou fermier n'ayant aucun droit dans l'héritage qui lui a été loué, si le locateur a vendu ou légué cet héritage à quelqu'un, sans le charger de l'entretien du bail qu'il en a fait, cet acheteur, ce légataire, ne seront point obligés de l'entretenir, à moins qu'ils ne l'aient approuvé au moins tacitement.

On le voit, au cas où le nouvel acquéreur a approuvé le bail, Pothier enseigne que les effets de ce bail subsistent entre lui et le locataire. C'est précisément ce que la cour d'appel a jugé en cette cause.

Enfin Laurent, tôme 25, n° 19, que l'appelante cite également, parlant de la doctrine de l'ancien droit, dit:

Le bailleur et le preneur ayant intérêt au maintien du bail, quoi de plus naturel que de stipuler dans le contrat de vente que l'acquéreur sera tenu de respecter le droit du preneur? La loi *Emptorem* indiquait elle-même cette voie aux parties intéressées: Imposez cette obligation à l'acheteur, dit-elle, et le bail sera maintenu.

On le voit, l'ancien droit, dans un cas comme celui-ci, reconnaissait que le bail subsistait malgré la vente. En tout cela, il n'est question que du droit d'expulsion qui appartient à l'acquéreur quand il ne s'est pas engagé à entretenir le bail. Ce serait dénaturer la pensée de ces auteurs que de dire que le lien personnel entre le locateur et le locataire est rompu par la vente, soit volontaire, soit judiciaire.

L'honorable juge-en-chef suppléant dit:—

I cannot imagine that the law can be construed as being so arbitrary and one-sided as to hold that the lease is at an end by reason of the sheriff's sale only at the option and pleasure of the adjudicataire and that, if he so elects, he can hold the lessee to the terms of the original lease, or, if he otherwise elects, he can expel him from the leased premises.

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Qu'il me soit permis d'opposer un respectueux *non sequitur* à cette objection. Le nouveau propriétaire n'est pas partie au contrat intervenu entre le bailleur et le locataire. Il peut donc à son gré méconnaître ce contrat. Mais il peut également, s'il le veut, approuver le bail, et alors, dit Pothier, il est obligé de l'entretenir. Tout cela est ce qu'il y a de plus naturel et de plus juridique.

J'ajoute qu'il n'est pas rare, même lorsqu'il s'agit des droits respectifs des parties à un même contrat, que l'une d'elles ait une action en rescision qui n'appartient pas à l'autre. Voy. l'art. 987 C.C. Toute la théorie des nullités relatives est basée sur cette distinction.

Je conclus donc que dans l'espèce l'intimé ayant obtenu la cession des droits du bailleur, et ayant assumé l'obligation d'entretenir le bail, l'appelante ne pouvait, par son abandon des lieux, échapper à l'obligation de payer le loyer pendant la durée du bail.

L'appel est mal fondé et doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Monty, Duranleau, Ross & Angers.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

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*June 1, 2.
*Oct. 6.

DAME MABEL KIERNAN (PLAINTIFF) ....APPELLANT;

AND

METROPOLITAN LIFE INSURANCE COMPANY (DEFENDANT) } RESPONDENT.

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

Insurance, Life—Application—Statements by insured—Non-disclosure—Materiality—Application attached to the policy—Arts. 7027 and 7028, ss. 1, 2 R.S.Q.—Arts. 992, 2485, 2487, 2489 C.C.

The late Dr. Bourgeois, the appellant's husband, was insured with the respondent company for $20,460 upon two policies applied for on the 29th November, 1918. He was operated on for cancer of the throat in March, 1919, and died of it on the 22nd December, 1919. His widow sued to enforce the policies. The respondent contested her claim on

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

grounds of concealment and misrepresentation by the assured. Dr. Bourgeois suffered from early in 1918 from persistent laryngitis accompanied by hoarseness and, at times, extinction of voice. He visited three doctors who were his friends. He was given treatments with nitrate of silver by one of these doctors upon the advice of another of them. In question 2 of part B of the application for insurance, the insured was required to answer whether he had ever suffered from any of some 47 specified complaints, one of them being "debilitation de la voix," although no mention was made of laryngitis. To this question, he answered "No." By question 8, the applicant was asked: Have you had any other complaint than that already mentioned? and he also answered "No." By question 4, he was asked to give the name and address of his regular (habituel) doctor and he answered "none." By question 9, he was asked: Have you consulted or have you been attended by any other doctor than the one above mentioned? If yes, when and what for? To this question, he replied with a dash.

Held that, in the circumstances of this case, the laryngitis, the extinction of voice and the hoarseness from which the insured was suffering, his visits to different doctors and his treatments with nitrate of silver were material facts which the insured was bound to disclose. Mignault and Rinfret JJ. dissenting.

Held, also, that, not only would disclosure of the facts so concealed have prevented the undertaking of the risk, but their suppression, however innocent, having regard to the questions propounded to the applicant, constituted misrepresentation which actually induced the insurer to enter into the contract. Mignault and Rinfret JJ. dissenting.

A photographic copy of the application, which contained the answers made by the insured and which was declared to form part of the contract had been attached by glue or paste to one of the inside pages of each of the policies sued upon.

Held that such attachment is a substantial compliance with the statutory requirement contained in s.s. 1 of art. 7028 R.S.Q. which enacts that all the terms or conditions of a contract of insurance shall be set forth in full on the face or back of the policy. Mignault and Rinfret JJ. expressing no opinion.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, at Three Rivers and dismissing the appellant's action to recover amounts of two policies of insurance issued by the respondent company on the life of appellant's husband.

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

Laflamme K.C. for the appellant.

Claxton K.C. and *St. Laurent K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff and Newcombe JJ.) was delivered by

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ANGLIN C.J.C.—The late Dr. Bourgeois was insured with the defendant-respondent company for $20,460 upon two policies applied for on the 29th of November, 1918, and issued on the 11th of December, 1918. He died of cancer of the throat on the 22nd of December, 1919. His widow sues to enforce these policies. Her claim is contested on grounds of misrepresentation and concealment by the assured:—(*a*) as to a prior application for insurance with the Canada Life Assurance Co., upon which a policy did not issue; (*b*) as to his health and medical history; and (*c*) as to previous medical attendance.

That these misrepresentations were of a fraudulent nature was averred. The charge of fraud, however, unanimously rejected in the provincial courts, was not pressed at bar. We find it unnecessary further to consider it.

If there was a prior application or proposal for insurance to the Canada Life Assurance Co., within the meaning of the questions put to the insured, the learned Chief Justice of Quebec was of the opinion that any misrepresentation or concealment in this connection was of such minor importance that it may be disregarded. In the view we take as to the other misrepresentations or concealments charged and their effect, we find it unnecessary to deal with this aspect of the case.

The question for decision may, therefore, be stated in these terms: Was there any misrepresentation, or concealment, by the insured in regard to his health, medical history or previous medical attendance, which, though made merely in error, was of a nature to diminish the appreciation of the risk and operated to induce the insurer to enter into the contract?

The misrepresentations or concealments relied upon are answers to questions contained in the declaration made by the appellant's husband on his medical examination, which is designated as Part B of the application for insurance. A photographic copy of the application, including this declaration, is attached by glue or paste to one of the inside pages of each of the policies sued upon. At the foot of Part B and immediately above the signature of the insured, is the following clause:

En outre, il est convenu et consenti que les déclarations et les réponses qui précèdent ainsi que les réponses données au médecin examinateur

sont rigoureusement correctes et entièrement vraies et qu'elles serviront de base du contrat d'assurance si une police est émise.

The policy itself contains on its second page the following provision:

Cette police et l'application en constituent le contrat complet entre les parties * * * Toutes déclarations faites par l'assuré, en l'absence de fraude, seront considérées comme des représentations et non pas comme garanties et telle déclaration n'annulera cette police ni ne servira de défense à une réclamation en vertu de cette police, à moins qu'elle ne se trouve dans l'application écrite dont copie est ci jointe parfaitement collée pour en faire partie, lors de l'émission.

Art. 7027 R.S.Q. directs that contracts of insurance

shall be construed according to the law of the province.

Subsection 2 of Art. 7028 R.S.Q. enacts that

nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract.

In our opinion, if the application of the assured be not excluded from its operation by this provision, the attachment of a photographic copy of it to the policy is a sufficient compliance with s.s. 1 of Art. 7028 R.S.Q., which makes it a condition of their validity and admissibility in evidence against the insured that all the terms or conditions of any contract of insurance evidenced by a written instrument shall be set forth on the face or back of such instrument. There was substantial compliance with this statutory requirement. But, if not, s.s. 2 would seem to preclude its application to statements made in the proposal or application of the insured. While such statements cannot in this case be regarded as warranties, they must be "considered with the contract" as representations of the insured contained in a document which the parties have agreed shall form an integral part of that contract.

Subsection 2 of Art. 7028 R.S.Q. further provides:

and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentations contained in the said application or proposal.

With the foregoing statutory provisions must be read Arts. 992, 2485, 2487, and 2489 of the Civil Code, which are as follows:

992. Error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is the object of the contract, or in some thing which is a principal consideration for making it.

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

2487. Misrepresentation or concealment, either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the

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object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.

Such appear to be the relevant provisions of the Quebec law upon the interpretation and application of which the disposition of this action depends. (Art. 7027 R.S.Q.)

The insurance was applied for on the 29th of November, 1918. In the spring of that year Dr. Bourgeois had developed a condition of laryngitis which produced marked hoarseness and, at times, extinction of voice. His wife testifies that owing to hoarseness he was unable to deliver a lecture early in 1918. In May he told his friend Dr. Dupont that he had suffered from extinction of voice while on a fishing trip to Lake Masketsy. His wife says that his hoarseness continued at intervals throughout that summer and autumn.

In June, Dr. MacTaggart, medical examiner for the Canada Life Assurance Co., met Dr. Bourgeois in the University Club, in Montreal, of which both were members, and then found him "remarkably hoarse." Being told by Dr. Bourgeois that he would shortly call upon him for medical examination in connection with an application for insurance in the Canada Life, Dr. MacTaggart advised him not to present himself for such examination until his laryngitis had disappeared.

Dr. Dupont met Dr. Bourgeois about this time en route to New York and says "il avait alors cette extinction de voix." Dr. Dupont again saw him in July in Montreal when, he says, "il avait une extinction de voix," and he then advised him "de ne plus fumer."

Dr. Lasalle, a throat specialist in Montreal, and a friend of Dr. Bourgeois, examined his throat early in June. He ordered him not to smoke and to refrain from talking. Dr. Bourgeois then complained of laryngitis. Dr. Lasalle appears to have seen him again later in June, or early in July, and found his condition much the same. He again saw the insured in September. On this occasion he once more examined his throat, renewed his advice against smoking and talking and recommended treatments with a solution of nitrate of silver to be administered with a stylet by a throat specialist, Dr. Panneton

of Three Rivers. Dr. Lasalle says that on each occasion when he saw Dr. Bourgeois "il avait la voix enrouée." Dr. Panneton, also a friend of the deceased, tells of having treated his throat with a solution of nitrate of silver several times during the summer and autumn of 1918 at irregular intervals. During this period Dr. Panneton made no examination of the insured's throat, understanding that he was merely carrying out treatment prescribed for Dr. Bourgeois by Dr. Lasalle. Late in the autumn, or about the beginning of the winter, however, Dr. Panneton did examine Dr. Bourgeois' throat. He found it in bad condition with a considerable growth on one of the vocal chords. It presented a very serious aspect. He advised that the treatments with a solution of nitrate of silver be discontinued as useless and that there should be a serious examination of Dr. Bourgeois' throat by another doctor. Dr. Panneton says that the condition of the insured's throat had not at all improved under the treatment he had administered. Unfortunately Dr. Panneton is very indefinite as to the date when he made the examination which disclosed the serious condition which he describes. The further examination which he then recommended was deferred by Dr. Bourgeois for "plusieurs semaines." It took place late in February, or early in March, and disclosed a cancer of the larynx so well developed that an immediate operation was ordered. Of the seriousness of the condition which Dr. Panneton's examination had revealed he leaves no doubt. He adds that it could not have arisen in one night, or one week—it might have taken either weeks or months of development to reach the stage at which he found it.

Dr. Hamilton, a throat specialist of 28 years' experience and a lecturer at McGill University, tells us that treatment with nitrate of silver is not usual in cases of acute or simple laryngitis, that it is one of the strong solutions used in cases of long duration that resist everything else.

He says a tumorous condition of the larynx is frequently mistakenly diagnosed as a mere laryngitis; that hoarseness may be the only symptom for months. He inclines to the view that the cancerous condition of Dr. Bourgeois' throat had been incipient before May, 1918. Dr. Cross, a partner of Dr. Bourgeois, says that no medical examiner allows a

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detail such as the possibility of cancer in a case of hoarseness to escape his notice, and that obstinate hoarseness is the most terrible symptom of a cancer of the throat. He concedes the wisdom of the Home Office, or a Medical Board, in suspending an applicant for insurance who has laryngitis.

The evidence leaves no doubt that from early in 1918 Dr. Bourgeois constantly suffered from a serious laryngitis accompanied by a marked hoarseness and, at times, by an extinction of voice; a laryngitis so persistent that it did not yield to treatment, but, on the contrary, led Dr. Panneton, who had considered it his duty merely to carry out the treatment recommended by Dr. Lasalle, eventually to make an independent examination which disclosed the existence of a condition of some standing which, on further examination, proved to be cancerous.

It is perhaps not sufficiently proven that this cancerous condition actually existed on the 29th of November, 1918, although, personally, I think the proper inference from the evidence would be that it did. But, in the view we take, it is not necessary to proceed on this footing (Art. 2487 C.C.) and we treat that fact as not established.

In question 2 of Part B of the application, the insured was required to answer whether he had ever suffered from any of some 47 specified complaints, one of them being "débilitation de la voix." To this question he answered: "Non." The evidence establishes beyond question that he suffered for some time previous to his examination from continued hoarseness accompanied at intervals with extinction of the voice. While laryngitis was not one of the complaints specified in question no. 2, by question no. 8 the applicant was asked: "Avez-vous eu d'autre maladie que celle ci-dessus mentionnée?" To this question he also answered: "Non." By question no. 4 he was asked to give the name and address of his regular (habituel) doctor, to which he answered, no doubt truthfully: "Aucun." But, by the 9th question, he was asked:

Avez-vous consulté ou avez-vous été soigné par un autre médecin que celui mentionné ci-dessus? Si oui, quand et pourquoi?

To this question he replied with a dash (——). While it is true that Drs. Dupont, Lasalle and Panneton seem to have regarded Dr. Bourgeois' visits rather as those of a

friend than as those of a patient, while they made no entry of any charge against him and kept no record of consultations or treatments, since Dr. Bourgeois was a friend and fellow-practitioner of these physicians we find nothing in these circumstances to justify his failure to disclose the facts above detailed in answer to the questions propounded in part B of his application for insurance.

In our opinion the persistent laryngitis, the recurrent extinction of voice, the constant hoarseness from which Dr. Bourgeois suffered, his visits to Drs. Dupont and Lasalle and his treatments by Dr. Panneton with nitrate of silver on the advice of Dr. Lasalle, were matters which the insured was bound to disclose. They were facts which bore upon the nature and extent of the risk to be undertaken by the insurer; their concealment tended to diminish the appreciation of that risk. The facts were not substantially as represented; the suppression amounted to material concealment. (Arts. 2485, 2487, 2489 C.C.) The result was error on the part of the insurer in regard to something which was a principal consideration for making the contract. (Art. 992 C.C.) The importance from the insurer's point of view of the disclosure of any laryngitis from which the applicant for insurance is suffering, or has recently suffered, admits of no doubt, so often is it the forerunner, a premonitory symptom or danger signal, of serious, if not fatal, throat affection. The testimony of Drs. MacTaggart, Thompson, Coolidge, Ricard, Hamilton, Cross and Lasalle, puts this beyond question; and their evidence is uncontroverted.

That there was material concealment—that it was of facts of a nature to diminish the appreciation of the risk—that not only would disclosure of the facts so concealed have prevented the undertaking of the risk, but that their suppression, however innocent, having regard to the questions propounded to the applicant on his medical examination, constituted misrepresentation which actually induced the insurer to enter into the contract, are conclusions which, we think, do not admit of serious controversy. Had the facts been disclosed, they must have led the company's officers as reasonable men to reject the risk, or at least to withhold the issue of the policies until the doubts as to the seriousness of the throat condition of Dr. Bourgeois,

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which knowledge of his persistent and continued laryngitis must have created, should have been entirely dispelled.

For these reasons we are of the opinion that the judgment of the Court of King's Bench dismissing this action was right and should be maintained.

The judgment of the dissenting judges (Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—This appeal is from a judgment of the Court of King's Bench, reversing, with two dissenting judges, the decision of the trial judge in an action taken by the appellant, the widow and universal legatee of the late Dr. Georges Bourgeois, in his lifetime physician and surgeon of Three Rivers, Que., against the respondent, a life insurance company, to recover $20,460, the amount of two insurance policies on the life of her husband. In its plea, the respondent disputed its liability on the ground of false representations and false answers to questions put to Dr. Bourgeois at his medical examination, which took place on the 29th of November, 1918. It also alleged fraud and intent to deceive on the part of the deceased, but at the hearing its counsel frankly admitted that he could not contend under the evidence that Dr. Bourgeois had been guilty of any such fraud or intent to deceive. This is moreover entirely in accord with the finding of the learned trial judge and with the opinion expressed by the learned Chief Justice of Quebec in concurring in the judgment appealed from. The liability of the respondent must therefore depend on the reply to be made to the question whether these contracts of insurance were induced by misrepresentations in the answers given by the deceased at his medical examination, assuming these answers to have been made in good faith.

At the outset, the provisions of article 7028 of the Quebec Revised Statutes should be considered. This article, which apparently was overlooked in the courts below, is in paragraph 18 of chapter III of title XI of the Revised Statutes, which paragraph contains general provisions applicable to all companies or associations. It reads as follows:—

7028. 1. Where an insurance contract made by any company or association, is evidenced by a written instrument, the company or association shall set out all the terms or conditions of the contract in full on

the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the tenth day of February, 1909, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

2. Nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

3. A mutual benefit or charitable association may, however, instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein, by particular references, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not inserted in the instrument of contract itself, and the association shall, at or before the delivery over of such instrument of contract, deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

Under the first paragraph of article 7028, no term or condition modifying the contract or impairing its effect can be invoked against the insured or beneficiary unless it be set out on the face or back of the instrument evidencing the contract. This rather sweeping enactment must however be read with the second paragraph of Art. 7028, which requires the court to consider the proposal or application of the insured with the contract in order to determine

how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

In this case, fraud being eliminated, there remains only the fact that it is alleged that Dr. Bourgeois gave false answers to certain questions put to him at his medical examination, due regard being had of course to the test of materiality just quoted from the statute.

I will state the pertinent facts with all possible brevity.

Dr. Bourgeois was a physician and surgeon in very active practice in Three Rivers where he had established a private hospital to which he was, at the time of the insurance, adding a new wing. In the month of May, 1918, he contracted a cold at a fishing excursion, and in June was suffering from what has been described as acute laryngitis, or catarrhal laryngitis. In June, he came to Montreal and met one of his friends, Dr. MacTaggart, at the University Club. Dr. MacTaggart was an examiner for the Canada Life Assurance, and it appears that Dr. Bourgeois spoke to him about an insurance on his life for $10,000 which he contemplated taking in that company. Dr. MacTaggart relates the incident as follows:—

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I was sitting in the club. Dr. Bourgeois came in, came over and sat down, and began to chat with me. Afterwards he said: "I want to come up for examination before you for life insurance." I remarked at the time that he was very hoarse, suffering evidently from laryngitis, and I told him. I asked him first of all: "What is the matter with your throat?" And he replied he had an attack of laryngitis. I told him to postpone that examination until the laryngitis disappeared.

Q. Did he ever call upon you again? Answer: No.

Elsewhere he says that he gathered from the statement made by Dr. Bourgeois that he had just an ordinary attack of laryngitis.

It was probably during this visit to Montreal—he was then leaving for New York with his wife on an automobile trip—that Dr. Bourgeois went to see Dr. Albert Lasalle, one of his intimate friends. Dr. Lasalle says that Dr. Bourgeois complained of hoarseness and of acute laryngitis, and he thinks he examined his throat with a small mirror. He advised him not to smoke (he was a cigarette smoker) and not to talk. His diagnostic was "une laryngite catarrhale aiguë," and not chronic laryngitis. He says he discovered no symptom which could indicate the presence or approach of any serious disease (*affection grave*). He saw Dr. Bourgeois again on his return from New York, found his condition about the same, and advised him, when at home, to have his throat treated with a solution of nitrate of silver by one of his friends, Dr. Panneton, of Three Rivers. He states that Dr. Bourgeois' general condition of health was good.

In July, 1918, Dr. Bourgeois visited in Montreal another of his intimate friends, Dr. Georges Dupont, who found that he had "une extinction de voix." He advised him not to smoke, but made no examination of his throat. Dr. Bourgeois appears to have called on both Dr. Lasalle and Dr. Dupont as friends, rather than as medical advisers, and probably considered that he had not been treated medically by them. I may add that in January, 1919, Dr. Dupont examined Dr. Bourgeois' blood, and he states that the result was negative.

Dr. Lasalle, as I have just said, advised Dr. Bourgeois, on his return to Three Rivers, to have another of his medical friends, Dr. Panneton, a specialist in throat diseases, treat his throat with nitrate of silver. Dr. Bourgeois followed this advice and Dr. Panneton says that, during the summer, he administered this remedy merely as a friend

and not as a medical adviser. His testimony as to the condition in which Dr. Bourgeois then was is extremely vague. He says he did not examine his throat at that time; he merely acted upon what Dr. Bourgeois told him as to Dr. Lasalle's diagnosis, that it was " une légère laryngite." Elsewhere he states:

Je me suis défendu d'y penser, d'autant plus qu'un confrère de plus d'expérience que moi avait déjà examiné le docteur.

There is evidently but little assistance to be derived from this testimony with respect to Dr. Bourgeois' condition during the summer months.

Another statement of Dr. Panneton's must however be noted. He examined Dr. Bourgeois' throat at a later period, and he says: " J'ai constaté que sa gorge n'était pas en bon état." He adds elsewhere:

ce qui m'a fait peur, c'est qu'il y avait une masse sur une des cordes vocales qui présentait un aspect très sérieux.

If the date of this examination could be fixed, it would have a very important bearing on the qusetion we have to decide, but Dr. Panneton cannot state when it occurred. He says

à l'automne, peut-être au commencement de l'hiver, très tard dans la neige,

and then adds: " je ne me rappelle pas la date du tout." In cross-examination, he hazards the statement: "ça devait être dans les environs du Jour de l'An": "je me rappelle de cela que c'était en hiver."

He advised Dr. Bourgeois to have his throat examined by another physician,

un médecin qui le verrait non pas comme un ami, comme je l'ai vu toujours, mais qui le verrait sérieusement.

Dr. Bourgeois followed this advice and, in February or March 1919, went to Montreal and had his throat examined by Dr. Lasalle and by Dr. Roy at the Hôtel-Dieu. It was then that a malignant tumour of an apparently cancerous character was first discovered. This was two or three months after the medical examination in connection with this insurance.

The rest of the story can be briefly told. Dr. Lasalle accompanied Dr. Bourgeois to New York in March, 1919, when an operation was performed by a specialist and the tumour removed. Nothing much is said of the following months. Evidently the cancerous growth returned, for Dr. Bourgeois died of cancer in the larynx on the 22nd of

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December, 1919. The medical evidence seems to show that this tumour was of very rapid growth, but it is not established that it existed at the time of the application for insurance.

The respondent bases its defence on certain answers made by Dr. Bourgeois in the application for insurance and the medical examination. It is to be observed that the application is divided into three parts:—1. The application proper called "partie A"; the medical examination proper, termed "partie B"; and the report of the medical examiner, or "partie C". The answers in the first two parts are in Dr. Bourgeois' handwriting. The blanks in part C are filled in by the medical examiner, Dr. Godin.

The respondent complains of the following answers to questions 15 and 16 of part A:—

Question 15. Avez-vous jamais postulé à aucune compagnie, ordre ou association sans recevoir le montant, ou le plan de l'assurance demandée, ou à votre âge véritable ou aux primes correspondantes?

The answer is "non."

Then follow certain headings:—

Compagnie, ordre ou association. De quelle manière diffère-t-elle de la police demandée. Refusé ou ajourné. Si vous n'avez pas été informé, dites-le.

Under the first heading, Dr. Bourgeois wrote "Aucune." There is nothing under the other headings.

Question 16. Avez-vous jamais fait application ou négocié, signé une application ou subi un examen médical pour l'assurance à quelque compagnie, ordre ou association, autres que celles déjà mentionnées dans les réponses? Si oui, donnez des détails.

The answer is "non."

The respondent also complains of the following answers in part B:

Question 2. Avez-vous jamais souffert de: (Répondez oui ou non pour chaque maladie, n'employez pas la marque "ditto" (*sic*).

Then follows a list of forty-seven diseases, opposite each of which Dr. Bourgeois wrote "non." It is significant that among them there is no mention of laryngitis, either acute or chronic. The last of all is "débilitation de la voix, de l'ouie ou de la vue," whatever that may signify. "Débilitation de la voix" may mean hoarseness or "une extinction de voix," as respondent contends, but if laryngitis was intended, it should certainly have been mentioned by its well known name.

Question 4. Nom et adresse de votre médecin habituel?

The answer is "aucun," and it is not shewn that Dr. Bourgeois ever had a "médecin habituel" before his last illness.

Question 5. A quelle époque et pour quelle maladie vous a-t-il donné des soins?

There is no answer to this, only a dash.

Question 6. Quand avez-vous été obligé de rester à la maison pour cause de maladie?

The answer is "mal de dents en 1916." There is no evidence that Dr. Bourgeois was ever confined to his house by sickness, outside the instance mentioned, up to the date of his medical examination. His laryngitis did not prevent him from being very actively engaged in the discharge of his professional duties, especially during the epidemic of Spanish flu in the fall of 1918.

Question 7. Donnez tous les détails de chaque maladie que vous avez eue depuis votre enfance, et le nom de chaque médecin qui vous a soigné ou donné des prescriptions?

Then there are the following headings with a space for the answer:

Affection. Nombre d'attaques. Date. Durée. Sévérité. Complications. Médecin consultant.

There is no answer to this question.

Question 8. Avez-vous eu d'autre maladie que celle ci-dessus mentionnée?

Answer: "Non."

Question 9. Avez-vous consulté ou avez-vous été soigné par un autre médecin que celui mentionné ci-dessus? Si oui, quand et pourquoi?

There is no answer, only a dash.

These are all the answers in part B of which the respondent complains.

Before dealing with them, some preliminary observations may be made.

In part A there is the general statement:

Il est convenu et consenti que les déclarations et les réponses qui précèdent, ainsi que les déclarations et réponses données au médecin examinateur, sont rigoureusement correctes et entièrement vraies, et qu'elles serviront de base du contrat d'assurance si une police est émise.

We also find in the policy the following condition:

Toutes déclarations faites par l'assuré, en l'absence de fraude, seront considérées comme des représentations et non pas comme garanties et telle déclaration n'annulera cette police ni ne servira de défense à une réclamation en vertu de cette police, à moins qu'elle ne se trouve dans l'application écrite dont copie est ci-jointe parfaitement collée pour en faire partie, lors de l'émission.

Reading these two clauses together, it does not seem possible in this case to give to the answers made by Dr. Bourgeois the effect of warranties; they are mere representa-

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tions and under the statute a mis-statement or a misrepresentation does not affect the validity of the policy unless it induced the insurer to enter into the contract, in other words unless it was as to a material fact.

There may be the further question whether a condition inserted in the application, even where as here a photographic copy of the application is attached or glued to the policy, is a sufficient compliance with the requirement of the statute that all the terms or conditions of the contract be set out on the face or back of the instrument forming or evidencing the contract. A decision on this point might have a far-reaching effect, and inasmuch as article 7028 was called to the attention of appellant's counsel by the court and not mentioned by him, I do not feel that the question has been sufficiently argued to warrant us in deciding it, unless it be absolutely necessary to do so in order to dispose of this case. As I read the two clauses, they do not make the strict accuracy of the answers of the insured a condition of validity of the policy unless these answers induced the contract. That is the real question we have to decide and it is unnecessary therefore to express any opinion on the point to which I have referred.

Coming now to the merits of the appeal on the facts disclosed by the testimony, the misrepresentations relied on in connection with the answers given to questions 15 and 16 of part A, are in respect of an application for insurance which Dr. Bourgeois is said to have made in June, 1918, to the Canada Life Assurance Company. The application itself was not produced, but what is called an application data slip is in the record. Assuming that the respondent was entitled to adduce secondary evidence of this application—and it is strenuously contended that the loss of the original has not been satisfactorily proved, and that moreover no witness can state of his own knowledge that the application data slip was compared with the original application,—it does not appear, on a reasonable construction of questions 15 and 16, that any real misrepresentation by Dr. Bourgeois has been established. The evidence, if at all admissible, is that Dr. Bourgeois gave to an agent of the Canada Life Assurance Co. an application for $10,000 of life insurance. A medical examination of the applicant by Dr. MacTaggart was to have followed,

but it never took place, Dr. MacTaggart explaining that he advised Dr. Bourgeois to wait until his laryngitis had disappeared. Questions 15 and 16, in my opinion, refer to an application which was at least considered, if not acted upon, by the insurance company. The alleged application was never considered, or acted upon by the Canada Life Assurance Co.; it was clearly incomplete, for it was accompanied by no medical examination, and it contained no statement by Dr. Bourgeois as to his condition of health. It may be conceded that the respondent had an interest to know whether Dr. Bourgeois had been refused insurance by another insurance company, but no such refusal has been established, and Dr. Bourgeois was entitled to assume that the application which he gave to the agent, if it be sufficiently proved that he gave such an application, did not come within the scope of the questions put to him. I would further think that no materiality within the intendment of article 7028 has been made out in respect of the answers to question 15 and 16 of part A.

Coming now to the answers given, or to the failure to answer certain questions, in part B of the application, the onus clearly was on the respondent to shew that Dr. Bourgeois misrepresented material facts. The misrepresentations relied on are that Dr. Bourgeois failed to disclose that he had suffered from laryngitis, and that he had consulted physicians and had been treated by them in connection therewith.

The learned trial judge found on the evidence that

le docteur Bourgeois avait alors une laryngite et qu'il ne l'a pas mentionnée, mais que cette laryngite n'était qu'une laryngite simple, catarrhale ou banale, comme le déclarent les témoins entendus, n'ayant aucune gravité et n'affectant en aucune manière la santé du Docteur Bourgeois.

The learned trial judge also expressed the opinion that

le docteur Bourgeois n'était tenu de déclarer que les maladies graves pouvant affecter son état de santé; que la laryngite qu'il avait alors n'exerçait aucune influence sur son état de santé, non plus que sur le risque en matière d'assurance, et que dans ces circonstances le docteur Bourgeois ne s'est pas rendu coupable de réticence ou de fausse déclaration en ne mentionnant pas ce fait banal.

The finding of the learned trial judge may be construed as meaning that Dr. Bourgeois had not misrepresented or concealed

a fact of a nature to diminish the appreciation of the risk or to change the object of it

(art. 2487 C.C.), or a fact which induced the insurer to enter into the contract.

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The *considérants* of the judgment of the Court of King's Bench shew that the plaintiff's action was dismissed because the answers given by Dr. Bourgeois to questions 15 and 16 of part A and to question 8 of part B were untrue "annulant les dites polices d'assurance." This is not satisfactory, for unless the answers were as to a material fact, their mere untruth would not be a reason to set aside the contract.

We are therefore forced to carefully examine all the evidence in order to determine whether there was, in the answers given in part B, a misrepresentation of a material fact. In other words, was the laryngitis from which Dr. Bourgeois undoubtedly suffered a material fact which he should have disclosed, the onus being on the respondent to establish that it was?

It is very extraordinary that the respondent, having called as its witness Dr. Godin, its medical examiner, who examined Dr. Bourgeois for this insurance, was content merely with having him state that Dr. Bourgeois made the answers and signed the application in question. A part of this application is part C which contains the declaration by Dr. Godin that in his opinion the chances of life of the applicant were excellent and that he recommended the risk. And not a single question was put by the respondent to Dr. Godin, who was still, at the date of the trial, one of its medical examiners, to challenge this statement.

If the laryngitis in question was a "fait banal," if it had no effect on the state of health of Dr. Bourgeois, as found by the trial judge, the test of materiality would not appear to be satisfied. Such a "fait banal," without effect on the state of health of the insured, would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium: *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1). The question now is whether this finding is justified by the evidence.

In my recital of the pertinent facts, I have sufficiently stated the effect of the evidence given by the medical witnesses, doctors Lasalle, Dupont and Panneton, called by the respondent to prove the laryngitis from which Dr.

(1) [1925] A.C. 344.

Bourgeois is alleged to have suffered. This is the only evidence on which we can rely to determine what appears to be the issue on the testimony, whether or not, as found by the learned trial judge, this laryngitis was

un fait banal, n'ayant aucune gravité et n'affectant en aucune manière la santé du Dr. Bourgeois.

In my opinion, this evidence supports the finding at the trial, and there is no testimony to contradict it. Dr. Lasalle, who examined Dr. Bourgeois' throat in June, 1918, and subsequently in February or March, 1919, when a cancerous growth was discovered, is emphatic in declaring, as the result of his examination, that the condition he observed in June, 1918, had not brought about the condition he found in March, 1919. I quote from the closing part of his cross-examination:

Q. Alors, docteur, en résumé, vous n'avez établi aucun lien de parenté ou causalité entre ce que vous avez constaté au mois de juin, 1918, et ce que vous avez constaté au mois de mars, 1919?

R. Non.

That the hoarseness or "extinction de voix" of Dr. Bourgeois, in 1918, had no apparent effect on his general condition of health is also affirmed by the physicians who saw him, and is further stated by the witnesses called by the plaintiff in rebuttal: Dr. C. Ernest Cross, the associate of Dr. Bourgeois, in his hospital; Mr. C. R. Whitehead, manufacturer, of Three Rivers, who advised him to take this insurance; Miss Fernande Genest, his stenographer, who says that, in December, 1918, she spoke to Dr. Bourgeois over the telephone from Montreal, and understood him very well; and the plaintiff herself, who states that the hoarseness of her husband was occasional and intermittent. To this we must add the positive declaration of Dr. Godin, the respondent's medical examiner, in part C of the medical examination, that in his opinion Dr. Bourgeois' chances of life were excellent and that he recommended the risk. As I have said, not a question was put to Dr. Godin by the respondent, on whom the onus lay, to contradict or challenge this statement.

Under these circumstances, it would seem to me a rash proceeding to substitute our own opinions for those of all these witnesses, and for the finding of the learned trial judge, and to infer that the laryngitis in question was more serious than they imagined, and that it was a fact, material

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in its effect on the health of the insured, the non-disclosure of which induced the respondent to enter into the contract. If the laryngitis was more than "un fait banal," no one would have been more aware of it than Dr. Bourgeois, who specialized in these diseases, and he would have been guilty of fraud in concealing it. But the respondent's counsel frankly admitted at the hearing that no fraud on the part of Dr. Bourgeois had been established. One perhaps cannot help feeling some doubt in reading the medical evidence, and I have said that the testimony of Dr. Panneton is unsatisfactory and is possibly open to the suggestion that he closed his eyes to something which, had he observed it, might have assisted us in deciding this case. It is however the evidence adduced by the respondent, on whom the onus lay to prove material misrepresentation, and there is nothing in the circumstances of this case to shift the burden. To enable us to conclude that the laryngitis described by the witnesses was not "un fait banal," a trivial matter, there should at least be some evidence on which we could base such a conclusion, and there is none. I certainly would not assume that because a cancerous growth was discovered in March, 1919, cancer existed in November, 1918, at the date of the medical examination. There is so much unsolved mystery about the origin and cause of cancer, and its growth is often so rapid, that the existence of cancer at a stated period cannot be relied on to show that it was present three months before. The question of materiality is a question of fact to be established by the respondent, and after carefully reading the testimony of all the medical witnesses, I am not in a position to firmly conclude that the laryngitis of 1918 had any effect whatever on the health of the insured.

I cannot help thinking that the learned judges who formed the majority of the Court of King's Bench applied to this case a severer test, that of the absolute truth of the answers of the insured, than the statute calls for. Their decision possibly might have been different if the provisions of this statute had been called to their attention.

I would allow the appeal and restore the judgment of the trial court, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Martel & Martel.*
Solicitors for the respondent: *Claxton & Claxton.*

SUSIE SMITH .....APPELLANT;

AND

CHARLES T. NEVINS AND OTHERS...RESPONDENT.

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*Feb. 7, 8, 11, 12.

*Apr. 22.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Will—Probate—Appeal from probate judge—Burden of proof—Weight of evidence—"The Probate Courts Act," N.B.S., 5 Geo. V, c. 23, s. 113.

The general rule of legal procedure that the burden of proof is on the party who asserts the affirmative of the issue applies in the case of a will offered for probate.

The Judge of Probate having refused to admit the will to probate on the ground that the execution of it had not been established by satisfactory evidence, his judgment was affirmed by the Appeal Division of the Supreme Court, who held affirmatively that the will was a forgery.

Held, reversing the Appeal Division, Duff J. dissenting, that the weight of evidence was in favour of the validity of the will, which should be admitted to probate.

Per Duff J.: The onus was upon the party propounding the will to establish its execution, and remained upon him throughout, and it was the duty of the trial judge to pronounce against the will if, after considering the whole of the admissible evidence adduced, he was not judicially satisfied that the will had been duly executed; and that there was no sufficient reason for reversing the concurrent findings of the trial judge and the Appeal Division that the testimony of the proponent and of the attesting witnesses was not credible.

A New Brunswick statute provides that "the Supreme Court (on appeal) shall decide questions of fact from the evidence sent up on appeal notwithstanding the finding of the judge in the court below."

Held, per Duff J., that this provision does not authorize the Supreme Court to deal with an appeal as if it were the court of original jurisdiction but it must proceed as on a re-hearing.

Judgment of the Appeal Division (51 N.B. Rep. 1) reversed, Duff J. dissenting.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (51 N.B. Rep. 1) affirming the ruling of a Judge of Probate who refused probate of the will offered by the appellant. The matters of law to be dealt with on the appeal are indicated in the above head-note.

J. F. H. Teed for the appellant.

Daniel Mullin K.C. for the respondent.

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

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THE CHIEF JUSTICE.—This is an appeal arising out of an application made by the executors to the probate judge of St. John N.B. for proof in solemn form of the last will of the late Charles Nevins of that city.

The learned judge heard a great deal of evidence, some of it very much in point, and some, I say it with deference, not so. He reached the conclusion that the persons setting up the will "had failed to establish its authenticity."

From that judgment an appeal was taken to the Appellate Division of the Supreme Court of New Brunswick. That court was composed of the Chief Justice of New Brunswick, the Chief Justice of the King's Bench Division and Mr. Justice Grimmer. Their judgments differed in their conclusions.

The Chief Justice of New Brunswick held that the signature to the will alleged to be that of Charles Nevins, the testator, was a forgery. The Chief Justice of the King's Bench held that the signature was the genuine signature of the testator, and Grimmer J. held that he was not disposed to differ from the finding or conclusion of the probate judge, but that he would concur with him that the parties setting up the will had "failed to establish its authenticity." He also agreed with the judgment of the learned Chief Justice of New Brunswick.

From this judgment of the Appellate Division of the Supreme Court of New Brunswick an appeal was brought to this court.

At the conclusion of the argument I inclined strongly to the opinion that the appeal should be allowed. Since this I have read over most assiduously all the evidence pertaining to the main question—whether the will was a forgery or not—and I have reached the conclusion and the firm conviction that the will in question is the genuine will and that the signature thereto is the genuine signature of the testator Charles Nevins.

There is not to my mind any ground for contending that the instructions proved to have been given to Mr. Kerr for the drawing up of his will by Charles Nevins were not correctly understood by Mr. Kerr and dictated to his stenographer, Miss Tobin, and properly transcribed by her. Miss Tobin made several copies of this will, all of which have been accounted for. The will propounded by Messrs.

King and Kerr as being the last will of Charles Nevins was stated by Miss Tobin on examination to be one of the copies of the will which had been dictated to her by Mr. Kerr. She recognized the paper on which it was copied as being the same as used in Mr. Kerr's office, and the style of type as that of the particular make of machine which she used there.

That particular copy was taken by the testator from the office of Mr. Kerr some days after his instructions had been carried out. It is quite clear to me that the testator signed that will and that his signature thereto was witnessed by Messrs. Mowatt and Cox.

I have had the advantage of reading the judgments prepared in this case by my brethren Idington and Mignault JJ. and as I do not differ with them on any of the salient points on which they have based their judgments, I do not think it necessary or useful to repeat their reasons here.

I have, therefore, come to the clear conclusion that this appeal should be allowed and that petition for probate in solemn form of the propounded will of the testator should have been granted by the probate judge.

As to costs, I am of opinion that all costs as between solicitor and client up to the time of the filing of the first allegations should be paid out of the estate. Subsequent costs, including the costs in this court and the appellate division should be borne by the respondents, except the stenographer's bill which it was agreed should be paid out of the estate.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick which upheld the judgment of the judge of the St. John Probate Court, refusing to grant probate of the alleged last will and testament of the late Charles Nevins who had lived many years in St. John and carried on the business of a commission broker dealing in metals, coal and lumber.

He was about sixty-eight years of age at the time of his death, had been a widower for many years and in later years had lived with his widowed sister, Mrs. Givan, who was his only near relative, and he had known the appellant for nine years or more and intimately for five or more years.

He and appellant had many monetary dealings in these

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later years. They met accidentally on the street in St. John when she told him she was going to see Mr. Kerr, a solicitor, on some business, and he said he would go there with her. When there he said he wished to give Mr. Kerr instructions to draw a will for him, the now deceased.

Mr. Kerr took notes of his instructions and when they got to a point where appellant's monetary dealings with deceased were being developed, whereby he was instructing said solicitor to bequeath to her certain sums due her for money lent, she produced her bank book, pointed out therein the items and the solicitor marked same with an "X."

She then retired into the stenographer's room and awaited deceased ending his instructions.

These items of borrowed money, amounting together to $3,452, above referred to, with interest from dates named, and another item of Victory Bonds, to the amount of $2,000, which the deceased bought for her with her own money, as explained to the solicitor, were kept in a bank safety deposit box.

The will, according to said instructions, was to bequeath to her said sums of borrowed money and interest thereon, and said bonds, and as drawn did bequeath same.

The deceased also explained to the solicitor that he and appellant were engaged to be married and that circumstance was also set forth in the will, which was dictated by Mr. Kerr same day to his stenographer, Miss Tobin, who, by her typewriter, wrote accordingly the will now in question strictly in accordance with the said and other instructions given.

It turned out that the stenographer's room was rather cold and she and appellant moved into a warmer room used jointly by Mr. Kerr and one Linton, then therein.

They were able to hear what was going on if inclined to listen.

The said solicitor, his stenographer, appellant and Mr. Linton, all testify to what they each knew of the making of said will, and their proof thereof is so conclusive that no serious question can be raised as to its being, in respect to the items specifically referred to above, and in all other respects, exactly what the deceased intended as his will.

He called a day or two later, and got from said solicitor the copy evidently intended for execution, but, instead of executing it then and there, took it away with him to read and consider.

The deceased was on very intimate terms with one Mowatt, a druggist, where appellant had been an assistant clerk as bookkeeper and otherwise for nine years previously.

The said will provided amongst other minor items a legacy of one thousand dollars to said Mowatt and, by paragraphs 10 to 13 inclusive, as follows:—

10. Save as aforesaid I give and bequeath to my sister Mrs. Mary Givan all my personal property on the following conditions, namely:—the principal of my said estate covered by this section is to be kept intact and I hereby instruct my executors to pay over to my said sister, Mary Givan, the income arising therefrom for her sole use and support. In case, by any extraordinary circumstance, the income becomes insufficient to properly support my said sister I hereby authorize my executors to use their best judgment in disposing of or realizing on such portion of the principal sufficient to meet such extraordinary circumstance.

11. On the death of my said sister I give and bequeath all my estate to the said Susie Smith.

12. I nominate, constitute and appoint my life long friend George King of Chipman and Francis Kerr, barrister-at-law, of the city of Saint John, executors of this my Last Will and Testament.

13. It is my wish and desire that my executors, and particularly my friend George King, in case I should die before my intended marriage to the said Susie Smith, that she shall be carefully considered by them and protected by them. She has worked hard, is not in good health and I wish her to live the remainder of her days in as much ease and comfort as possible.

On the 3rd of March, 1921, the deceased called on the said Mowatt at his said drug shop, and, in a store room back of the shop, was assisting him in checking over some goods, as he was accustomed to do there, when one Cox, a partner in the drug business, but carrying it on in another shop in same town, called and passed through the first-mentioned shop to see Mowatt on some business, and shortly afterwards, whilst all three were there alone, deceased pulled out of his pocket a paper which he said was his will and asked them if they would witness it for him.

There was no very suitable place for such purpose, or anything but a rough table or counter of uneven surface used for the handling of goods upon. Enough space on that was cleared off on which to do the signing which had to be done standing up or leaning over, for there was no

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chair to sit upon, and the table or counter was only about four feet in height.

Both Mowatt and Cox swear deceased pulled a fountain pen out of his pocket and signed his name and they signed as witnesses, and he took the will away with him.

The testator died suddenly a week or so later. No signed or unsigned will, such as deceased had put in his pocket at Kerr's office, could then be found, it is alleged.

It turned out that in the previous autumn deceased had bought, for a hundred dollars, a safe which had formerly been the property of a well-known lawyer, who had been, previous to the said sale to the deceased, appointed to the bench, and had no longer use for it.

It seems to me most conclusively proven by most respectable people, that not only was the said safe so bought by deceased, but also that a small room on the ground floor of the rear part of the dwelling where the appellant lived and which had been very much out of repair, had been repaired for the special purpose of having said safe put there by deceased, or those he employed for the purpose, and that it was accordingly moved and placed there some time before the will was made.

It seems quite clearly proven also that the deceased and appellant were preparing for the occupation of part of the dwelling house where she had lived for many years and observant friends understood what such movement of the said safe meant. She had fallen ill just after this and hence progress was delayed.

Unfortunately the search made for deceased's will after his death was misdirected. They discovered from Mr. Kerr that such a will had been drawn by him, but could not find the copy taken away for consideration, and probable execution. Manifestly those concerned in such pursuit did not direct their efforts very well, or they would have gone further, discovered the contents and traced up the people named in the will as beneficiaries and, assisted thereby, have made further progress.

Mr. King, an old friend of deceased, and named as one of the executors of the will, lived at some distance from the city and had only occasional chances for doing so, and yet he seems to have been selected as the person who should have to make an application for letters of adminis-

tration to the deceased's estate, called on appellant and told her of having discovered that a will had been drawn, but that it never was executed.

I respectfully submit he was too hasty.

Much has been made of appellant's statement, after he left, to men working there, when she seemed enraged at the declaration that no will had been executed.

It seems she was somewhat dull of hearing, and throughout no regard is paid to that. Perhaps she misunderstood the real effect of what was told her for evidently she may have had in mind an attempt to beat her out of her money lent, and bonds as well, and then have concluded they were trying to beat her.

On that occasion or the next, Mrs. King going upstairs with the appellant, noticed the safe, where placed as related above, and was told by appellant then and there that it belonged to deceased, but no further remarks then ensued about it.

However, it seems to have occurred to Mrs. King either as a feature by itself, or in connection with the missing will, as something worth thinking over.

Mr. King puffed that aside as unworthy of consideration for he answered "Nevins could have no use for a safe," and so, apparently other wise heads also conceived, and so it was argued before us, despite what followed.

I was tempted to inquire from counsel what the cost annually was of a safety deposit box, in the bank vault, such as he had, and was told at least five dollars a year.

Why should he not have at his home a safe he could get costing only a hundred dollars, or about the same annual cost, and have it on hand for everything?

Such a thought seems never to have occurred to those pretending to search for the will—the missing will or even the copy if never signed—for it was not returned to Kerr. Nor was it ever seen again unless that be it which was executed, as sworn to by the said witnesses.

It does not seem to have occurred to appellant at first that the safe should be looked into, but later, thinking it over, she seems to have suggested that. She swears she had on several occasions said to those concerned in the search for the will, to look into the safety box and the safe, and, getting no response, at last said to Mr. King, that if

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the safe was looked into it might open some people's eyes. That led to due and proper search and the discovery of the will in said safe under such circumstances as satisfy me that it was placed in said safe by deceased after its due execution as sworn to by the witnesses thereto.

There is abundantly clear evidence that appellant could not tell the combination of the lock by which it was closed. She says that deceased had told her, but she could not remember it. Indeed it would have been a remarkable thing if she could having no experience in its use. The first number of the combination she thought was 28, but the next two numbers she failed to recall. This was told to a party of three of Mr. King's friends who went to see appellant, and the safe.

Better experts than she in said party, tried but failed and they and Mr. King agreed to get an expert named Iddiols to put him to open it next day.

He managed to do so after an hour and a half working at it but, in accordance with his instructions, did not open it or even turn the bolts back.

Mr. Sanford then acting for Mr. King and under his instructions tells what then happened, after hearing this over the phone from Iddiols, as follows:—

Mr. MacRae and I went down. Miss Smith let us in and took us downstairs. Mr. Iddiols said he got the combination to work. He said he had not opened the door and had not even turned the bolts back. In the presence of us four he opened the door and pulled the bolts back. There was nothing in any of the compartments as far as you could see in looking in. There was a little cash box in the centre, and he pulled that out and I looked in and found a plain, white envelope. This white envelope was tied with what is known as baby ribbon, very narrow white ribbon. It was tied lengthwise and around and knotted and in the loop of the ribbon there was a plain gold ring. I untied the ribbon and opened the envelope and took out the document which has been spoken of in court as the will of Charles Nevins.

Q. Was Miss Susie Smith present?

A. Yes. I brought it down to the office and telephoned or wrote Mr. King that we had found the will and at his convenience we would apply for probate. He came down some few days after that, and we presented the will for probate to Your Honour, and it was proved on the evidence of Mr. Cox, one of the witnesses. I think Mr. King still has the envelope with the ribbon and the ring.

That will having thus been discovered and thereafter presented by the executors thereof for probate there ensued this litigation. For Mrs. Givan, after the death of her brother, had made a will of her own and died, long before

this discovery, and thereby had practically bequeathed, on the assumption that her brother had died intestate, both estates to be distributed in such a way as directed amongst respondents herein.

The respondents herein are Charles T. Nevins, the executor of said last mentioned will, and a number of legatees thereunder.

There is one of these, I rather think the executor of said last mentioned will, who had been for many years, though a cousin of deceased Charles Nevins, on unfriendly terms with him.

Hence, possibly, this savage piece of litigation.

The will now in question was being proved in solemn form and in course thereof allegations of forgery and undue influence were set up. At first the latter seems to have been withdrawn, or not relied upon, but long afterwards resorted to again, probably in despair, for there is nothing to support it.

I see not the slightest reason for relying upon such allegation of undue influence, and submit that the only issue herein is forgery or not.

The respondents procured the evidence of one Hazen, an expert of some six years' experience, from Montreal, which, at first blush, might have some consideration given it.

But upon reading the evidence of Mr. Hingston of Boston an expert of a lifetime and very prominent in his profession, I must say he sweeps aside by the reasons he gives any value to be attached to the evidence of Mr. Hazen.

He seems to me to have had much more ample material, secured no doubt at his suggestion, in the way of specimens of the handwriting of deceased upon which he could rely for the conclusions he came to.

Moreover the first named expert upon being recalled in rebuttal has to admit that in giving his testimony on his first examination he had made a serious mistake in claiming to have been an expert witness in a noted case in Newfoundland, which Hingston, who was there, denied. To his credit, however, he frankly admits he was mistaken, and had confused some of his first studies as an expert in studying that case in Montreal with his actual presence in Newfoundland at the trial there.

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That circumstance of making such a mistake must in weighing their respective evidence as between them, go a long way to deciding in favour of accepting that of Hingston, as I do. In short there is, when their evidence is compared, nothing left for respondent to rely upon in regard to the question of comparison of handwriting except the appearance of the signature of the testator in the abbreviated form he used for his Christian name. He usually wrote it "Chas.," and in the signature to the will in question one may be led to read it as if spelled "Ches."

Assuming so, and, as Hingston frankly admits it is capable of being so read, how can that help when we are shown a number of cases wherein undoubtedly his signature looks as if the abbreviation were "Ches." instead of "Chas."?

More than that—is the rough table or counter upon which the signing of the will was done, without a chair or stool to sit upon, and the need for having to stoop down or lean to one side, not to be considered?

But above all, to my mind, the suggestion of a witness being a wilful forger and making and leaving there a misspelt name, is too absurd for my acceptance.

And when we are asked to find that two respectable citizens have signed as witnesses their signatures at the wrong side, where no professional will forger would ever have directed them to sign, the accusation seems rather ridiculous.

No one has attempted to compare the handwriting of these signatures of the witnesses with that of the testator. If they did they would find it impossible for either of them ever to have attempted to forge that of the testator.

To accuse two respectable citizens, long friends of the testator, of such a crime seems to me only to have been begotten of hatred and malice such as one may be permitted to suspect from the evidence originated on the part of some one of the cousins despised by the deceased.

And that brings up another side aspect of the case for the respondents launched into a campaign of vile slander against his affianced which sets him down, if true, as a fool which I do not think he was. Nor do I think his old friend George H. King thought he was.

I am glad to find that the last-named gentleman and

Mr. Kerr stand aside and take no part herein, but simply hold the stakes.

Now what the respondents stress most in alleging somebody, they do not say or point to whom exactly or in what way, as bringing about such a conspiracy as produced this alleged forgery, is the omission of Mowatt to tell of having witnessed such a will of his friend Nevins.

I have already pointed out wherein I think the executors to the will were rather remiss in their search for its discovery and now I submit these respondents ought to have been fair in such reflections.

The executors were simply ordinary human beings and were, like others of same kind, engaged with their own business. So also were the witnesses. Mowatt had gone on a fishing trip which occupied some of his time, and he was, in any event, a silent, reticent, reserved man, unlikely to speak.

He simply says that from March to May slipped by and he saw no call on him to consider such a subject, especially, I submit, if on a fishing expedition meanwhile.

He frankly says he did not realize time was so passing. Why should he? It is not shown, or until recently, that before this litigation he had any interest in the will. Why should he bother about it?

I am afraid I have already spent too much time on a rather absurd ground for forgery and perjury.

In connection with this Mowatt incident I must not overlook the peculiar circumstances that King tells of a phone message from Mowatt that he wanted to see him on business and he responded by going to Mowatt's store and talking there about Nevins, the deceased, but came away without hearing of any business, or asking Mowatt what the business was that he wanted to see him about. Mowatt denies this phone. But how can the pot call the kettle black in that incident? Why did King not ask what he was phoned for?

What about Cox? The slanderers who pretend that he was party to a forgery, and perjury, have nothing to rest upon except that he, a most respectable witness, as attested by the learned trial judge, had, they allege, years ago used money entrusted to him in a way he should not have done.

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If his story is correct, and there is nothing to correct it by but his own version and according to that he acted within his absolute rights, advised the party entitled to said money of what he was doing with it and got his assent, and continued to the time of the trial to act under same power of attorney. Nothing but a campaign of wilful slander can account for the production of such evidence as a basis for the pretension set up of his being not only capable of forgery and perjury, but an actual forger and perjurer.

The respondents failed to call the man who had given the power of attorney so acted upon and, unless they were prepared to do so, I submit they ought never to have tendered such evidence or have been allowed to do so.

Decent treatment of witnesses is a most essential element in the due administration of justice.

Cox never had anything to do with the testator's estate, or interest therein, or reason for joining in any conspiracy involving a forgery. Why should he commit perjury? He was well acquainted with the testator and could not be mistaken as has, I imagine, been the basis of attack in such sort of cases.

Then there is the evidence of Roy McCollum, a drug clerk in the Mowatt shop for a year—from some time in September, 1920, to October, 1921. He testifies to seeing the deceased Nevins there so frequently that he became well acquainted with him and his habit of helping Mowatt in the back shop, which he calls the paint shop. And on one occasion, shortly before his death, the deceased came in, asked him for Mowatt, and was told that he was in the back shop, and he passed through to see him and stayed there. An hour or so later, Roy had occasion to go out to the back shop to consult Mowatt about some of the front shop business, and found Mowatt, Cox and Nevins all together, and no one else there.

This is strong corroborative evidence of what Mowatt and Cox tell, and none the less so, seeing he was not in Mowatt's employment when giving it, and never had any interest in the questions now raised herein.

There is much made of the rough way the date—March 3rd—is inserted, and doubt sought to be cast thereon.

The typewriter had written in type the usual words:

In Witness Whereof I have hereunto set my hand and seal at the city of St. John aforesaid the day of A.D. 1921.

Then, whenever it was executed or forged, the words "March 3rd" were written in the blank space between the words "day of" and "A.D. 1921" instead of in the two blank spaces respectively the word "third" and "March".

Can anyone imagine a professional forger, or any other kind of forger, finishing up his work thus? I cannot. But I can conceive of the testator writing in such an uneasy position thus hurrying up the finishing of his work.

And I have no doubt the testator did it. And its present aspect confirms that as anyone forging would be particular to leave no ground for suspicion.

And I am the more convinced when I find the witnesses accused of forgery and perjury make no pretence of having actually seen the testator write the date but quite properly assume he did so.

Forgers, or conspirators to a forgery, would have been quite prepared to swear to anything. Nor do I think they would have put a ring or ribbon round the envelope in which the will was found.

When he took the will, unsigned, from the solicitor's office his last words there were a joke on his longevity and apparently he was in excellent health and vigor, and just as likely to play a practical joke on wife thereby when married and a new will would be needed.

When, I may ask, did this conspiracy to forge a will take place, and how was it brought about?

It surely could not have been until after the death of the testator, and if so how and why should the 3rd of March be recalled as the date to be inserted?

There was an attempt made by the respondents to suggest that the safe in question had been bought by appellant because she had at some time preceding its purchase made inquiries from some persons who were offering a second-hand safe for sale.

She denies ever needing or inquiring about a safe for herself, but on an occasion when some one or other safe was offered for sale, she and Mr. Mowatt had some conversation as to the desirability of his shop being supplied

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with one and incidentally she did, on his behalf, ask prices thereof. He concluded then that for all his business it was not worth his while to so invest, and the matter stopped.

He also swears to the truth of that explanation if such be needed in face of the overwhelming evidence of others concerned in the sale of the safe, already referred to as being bought by Nevins the deceased.

Turning to the accusation of conspiracy as against appellant who, it is insinuated by counsel for respondents, formed one of the conspirators to forge the will produced, because there are so many witnesses who have contradicted her (for the most part on matters entirely foreign to this alleged forgery) I submit her conduct throughout is quite inconsistent with having been a party to such a conspiracy as alleged.

She was informed by Mr. King at an early date that a will had been found, but that it had never been executed. At first blush, if the evidence of those she spoke to after Mr. King had so told her is to be taken in another sense than I have indicated above, she may not have accepted the view of Mr. King as correct, but soon after seems to have supposed it was, for she at many times after that, had referred to the will as not being signed. And no less than five witnesses are brought to testify that on as many different occasions, she had referred to it as not being signed, and bemoaning the fact. And up to the time of its discovery that seems to have been her attitude. And she had even got one of the copies made and sent it, immediately before the finding, to a cousin of deceased living in England, telling the same story.

Surely all this is quite inconsistent with her ever having been a party to any conspiracy to forge a will. On the contrary her conduct seems to have been quite inconsistent with any such conception and enures, or should enure, to her benefit.

She swears repeatedly to having told those concerned, when discussing where to look for the executed will, that search should be made in the safety deposit box in the bank, and in the safe.

Some statements are made by Miss Maxwell as to what she said in her presence, but anything material relative to the will is flatly contradicted by appellant.

Her moral character is attacked in a way that, I submit, ought not to have been permitted, seeing the high esteem in which she evidently was held by the deceased Nevins who had such ample opportunity of knowing all about her character for so many years.

He seems to have been a man of good character, quite unlikely to have held her fit to be his wife if any foundation for the stories and insinuations made, and improperly permitted I submit, in evidence as traceable back to an incident of ruffianism many years previously by some mischievous person inserting an alleged marriage notice in a St. John newspaper, evidently designed to set the gossiping people in said city talking.

Miss Maxwell, who seems to have had a rather lively imagination and a reckless way of speaking, tells a rather improbable story of Nevins, the deceased, having told his sister that he would never make a will, and then adds, she has heard him say this hundreds of times, apparently within the few weeks she was nursing his said sister.

The fact is that he had made a will some years before as Mr. King knows and tells us of without disclosing the contents.

That fact alone renders that part of her story as highly improbable. And the statement added thereto that she had heard him repeat it a hundred times stamps her to my mind as an unreliable witness.

Again she attempts to say that he had denied that he would ever marry, though on the face of it no one but some very imaginative person could take it as other than a joke, or a jocular way of speaking.

Again her highly improbable story of what Mr. Mowatt said when he called to see Nevins, of whose illness he had heard, and was told that he had died, is contradicted by Mowatt. I would prefer either his evidence or appellant's to anything she testifies to and wherein she is contradicted by them, or either of them, or any other respectable witness. Indeed there is not one of the witnesses testifying to anything material herein that has impressed me so unfavourably as Miss Maxwell of whom I know nothing but what appears in this case. There is presented the argument that she is interested in the result and some other facts to her detriment, but I see no need for dwelling thereon.

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In setting forth so much as I have done relative to her stories I am sorry counsel for respondents saw fit to put her improbable stories in the forefront of his factum and thereby render it necessary for me to deal so lengthily with the facts in order to explain why I refuse to accept her obviously unreliable version.

The rather peculiar requirement of the New Brunswick statute, 5 Geo. V, 1915, c. 23, s. 113 that "the Supreme Court (on appeal) shall decide questions of fact from the evidence sent up on appeal notwithstanding the finding of the judge in the court below" has induced me to read the entire evidence and consider same quite independently of the findings of the learned trial judge, and all the other material in the three volume case presented to us.

I cannot agree with the reasons assigned by the learned Chief Justice Sir Douglas Hazen.

I agree in the main with the reasoning of Chief Justice McKeown, but Mr. Justice Grimmer seems to accept the findings of the learned trial judge without reading the evidence.

I do not, seeing I agree with the reasoning of Chief Justice McKeown, save as to the jurisprudence of New Brunswick as to expert evidence, think it necessary to review the judicial decisions he cites. I so except, for the reason that I am not familiar with that part of it, and in my view need not consider it.

I cannot agree with the view taken by the learned trial judge of the law. Indeed, with all due respect, I submit that it is owing to his erroneous conception of the law relative to suspicion that so much evidence based on old-time scandals has been improperly admitted.

But, as the sole question to be decided is one of fact and that fact is whether or not this will was executed by the deceased, or is a forgery as contended for by the respondents, I do not think we can be very much helped by decisions in other cases further than to correct the misapprehension of law just referred to, and that, I think, Chief Justice McKeown has done so well that I need not repeat same here.

For there is, I repeat, no case made of undue influence or want of understanding on the part of the testator. The will is inherently unassailable on the facts presented and

by the provision for testator's sister in priority to his intended and then the residue to her on the sister's death, seems to be a will in which there is nothing to complain about.

I have had the opportunity of reading the notes of my brother Mignault and, agreeing therewith as I do, if there is any question of fact in either his judgment or that of Chief Justice McKeown which I have failed to mention herein, I accept their respective holdings as correct.

Having, for the reasons aforesaid, come to the conclusion that the will as presented to the Probate Court was the last will and testament of the late Charles Nevins, I am of the opinion that this appeal should be allowed with costs to the appellant and all parties supporting the will here and in the courts below incurred from and after the filing of the allegation opposing the proof of the will in solemn form, to be paid by the respondents.

The costs of all parties in the application to prove the will in common form as well as the costs of proving the same in solemn form up to the time of filing the allegations, to be paid out of the estate.

Thus far, I think, would be the usual judgment in such a case as this if the majority of the court agree in the result my brother Mignault and I have come to. But I see that Hazen C.J., and McKeown C.J., in the court below, agree in finding, although arriving at opposite conclusions as to the disposition of the appeal there, that there was an agreement between counsel for all parties, although denied by Mullin, that the stenographer's costs should come out of the estate.

They each refer to some affidavits which I do not find any reference to in the printed case before us except this from said judge's notes of judgment.

If they are right in said finding I should think it ought to prevail here and the stenographer's work, said to amount to a thousand dollars, or thereabout, should be, as they directed, paid out of the estate; that is the entire estate of Charles Nevins, unimpaired by anything that has happened since this litigation arising out of the allegations giving rise to it.

Since writing the foregoing I have found the affidavits in question as to payment of stenographer's expenses out

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of the estate, and have no doubt the judgment should, in that respect, be the same as in the Court of Appeal.

DUFF J. (dissenting).—This is an appeal arising out of proceedings in the Probate Court of St. John, N.B., which were instituted by the petition of George King and Francis Kerr for proof in solemn form of an instrument alleged to be the last will and testament of the late Charles Nevins, in which they were named as executors.

From the pleadings and the evidence adduced at the hearing, there emerges one and only one issue, an issue of fact, and that is whether the document put forward by the petitioners was in fact executed by Charles Nevins as his last will and testament. The judge of the Probate Court decided adversely to the petition and his judgment was sustained by the Supreme Court of New Brunswick by a majority of two to one. From this judgment the appellant, the principal beneficiary under the terms of the instrument, appeals.

Before proceeding to discuss the evidence, it is of some little importance to state unambiguously the rules governing the burden of proof and to ascertain the principles by which the Supreme Court of New Brunswick, on an appeal from a judgment of the judge of the Probate Court, in a proceeding taken to establish a will, must be guided in dealing with issues of fact. By s. 113 of the New Brunswick statute, 5 Geo. V, 1915, c. 23, it is enacted that upon the hearing of such an appeal,

> the Supreme Court shall decide questions of fact from the evidence sent up on appeal, notwithstanding the finding of the judge in the court below.

Hazen, C. J., in the court below calls attention to the fact that in the statute as originally enacted, instead of the word "notwithstanding," the word "irrespective" appeared; and the Supreme Court of New Brunswick in 1881 held that under that reading it was the duty of that court on appeal entirely to disregard the finding of the judge of the Probate Court and "to give to it no weight whatever". In the present case the Supreme Court has apparently acted upon the view that the change by substituting "notwithstanding" for "irrespective" did not in any way alter the sense of the words or the effect of the enactment. With, I need hardly say, the greatest respect for the views of the judges of the Supreme Court of New Brunswick, especially

in relation to the construction of a New Brunswick statute, I am unable to agree with this. The change, made as it was after the deliverance of the Supreme Court in 1881 in the case cited by the Chief Justice, *Alexander v. Ferguson* (1), is in my opinion significant; and I am unable to escape the conclusion that it was made with the deliberate intention of declaring the law in a sense different from the rule laid down on that occasion. The statute, as it now stands, requires the Supreme Court to deal with an appeal as on a re-hearing, and also requires the court, when it has arrived at its conclusion, to give effect to the conclusion, notwithstanding the judgment of the trial judge. In effect it appears to me that the rule thus laid down does not materially differ from that which governs a court of appeal in deciding questions of fact on appeal from a judge who has tried the issues without a jury. The language is similar to that considered by the Privy Council in *Ruddy* v. *Toronto Eastern Railway Co.* (2), in which s. 209 of the Railway Act came up for construction. By that section the court is directed upon appeal from arbitrators, "to decide any question of fact upon the evidence taken before the arbitrators, as in the case of original jurisdiction." I do not think the effect of these words would be altered by the addition of the phrase, "notwithstanding the finding of the arbitrators," because obviously the Court of Appeal, having come to a conclusion, is to give effect to its conclusion, notwithstanding the sense of the judgment appealed from.

This, however, is not to say that in reaching a conclusion, the court charged with the duty of deciding the appeal is to proceed in entire disregard of the views and findings of the tribunal of first instance. As Lord Buckmaster, in delivering the judgment of the Judicial Committee in *Ruddy's Case* (2) says (pp. 193-4), such a statute

> places the awards of arbitrators * * * in a position similar to that of the judgment of a trial judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

(1) 21 N.B. Rep. 71.

(2) 33 D.L.R. 193.

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As touching the burden of proof, there are some general principles which it seems desirable to restate. The first is accurately expressed in paragraph 605 of the Treaties on Evidence written by Mr. Hume Williams and Mr. Phipson in Lord Halsbury's collection in these words:

> In legal proceedings the general rule is that he who asserts must prove—a proposition sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.
>
> This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.
>
> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.

This rule is quite consistent with another rule, in which the burden of proof is used in a different sense—a sense sometimes described as the minor, or secondary, sense—and in this sense the burden of proof does shift in the course of the trial according as the evidence preponderates on one side or the other, as well as in obedience to certain presumptions. The burden of proof in this sense is said at any stage in the progress of the trial to rest upon the party who would fail if no further evidence were given.

It is pertinent to observe, in view of the discussion which has occurred in this case, that the party on whom the burden of proof rests in substantive law, the party whose duty it is, in order to succeed, to establish the affirmative of the issue, must fail if, when all the evidence is produced, the minds of the jury or other tribunal of fact, are in a state of real doubt as to the effect of the evidence. The subject is most elaborately and ably developed in c. 9 of the late Professor Thayer's Preliminary Treatise on Evidence at the Common Law; and the point is put with succinctness and precision by the late Master of the Rolls in *Abrath* v. *North Eastern Railways Co.* (1), in these words:

(1) 11 Q.B.D. 440.

It is contended (I think fallaciously) that if the plaintiff has given *prima facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention appears to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the proposition ought to be stated thus: the plainiff may give *prima facie* evidence which, unless it be answered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider, upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. * * * Then comes the difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

As might be expected, these principles have been applied in litigation arising in connection with disputed wills, and in such proceedings the rule by which the courts are governed is strictly in accordance with the general principle. It is accurately stated and applied by Sir John Nicholl in *Saph* v. *Atkinson* (1), and is fully expounded in the judgment delivered by Baron Parke on behalf of the Judicial Committee of the Privy Council (Sir John Nicholl sitting as a member of the Board) in *Baker* v. *Batt*, (2):

The case is of some importance to the parties, as it relates to property considerable in amount; but not, as was strongly contended at the bar, as involving a novel principle of decision upon conflicting evidence, by which the necessity of expressly deciding upon the truth or falsehood of particular testimony is avoided. No rule has been acted upon in the court below which has not been long observed, not only in Ecclesiastical Courts, but those of Common Law.

For if the party upon whom the burden of proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal which is to decide of the truth of the proposition which he has to maintain, he must fail in his suit. And thus in a Court of Probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate. And it may frequently happen that this may be the result of an inquiry (in cases of doubtful competence in particular) without the imputation of wilful perjury on either side; or it may be, the judge may

(1) 1 Addams, 162. (2) 2 Moore P.C. at pp. 319-20.

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not be satisfied on which side the perjury is committed, or whether it certainly exists.

In *Harwood* v. *Baker* (1), the Judicial Committee dismissed an appeal from a judgment of the Prerogative Court of Canterbury pronouncing against a will on the ground that

> the party propounding the will had not satisfactorily proved, as he was bound to do, that the paper in question did contain the last will and testament of the deceased.

Cresswell J., in delivering the judgment of the Court of Common Bench in *Sutton* v. *Sadler* (2), speaking for a court which included Willes J., referring to the last mentioned decision, said:

> The result must be the same where the party propounding does not rely on a *prima facie* case, but gives the whole of his proofs in the first instance. The onus remains on him throughout; and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given; and, if it does not satisfy them that the will is valid, they ought to pronounce against it.

It is argued, indeed, that these principles have no application where no question of competence is involved and the issue is the simple issue of the execution or non-execution of the instrument. But in truth, in this last mentioned case the conclusion follows *a fortiori* from the considerations upon which the principle rests. A simple issue of fact as to whether an alleged testator, A, has or has not penned the words which purport to be his signature is one which, in point of law, is quite incapable of being decomposed into a series of secondary issues; although, of course, logically and as a matter of reasoning, the decision upon that issue may turn upon the view of the tribunal as to the weight to be attached to some particular part of the evidence.

Some facts are not seriously disputed. Nevins had been on very friendly relations with the appellant for some time, and his attentions to her had given currency to a rumour among his friends that he was to be married to her. And it must, I think, be taken as established that he did give instructions to Kerr, one of the executors named in the disputed instrument, for the preparation of a will, and that the document now propounded was in consequence of those instructions prepared by Kerr and in due course delivered to Nevins. The instrument, it is important to

(1) 3 Moore P.C. 282. (2) 3 C.B., N.S. 87.

notice, contains, first of all, an acknowledgment of an engagement to marry between the appellant and Nevins, and contains, moreover, a declaration of trust in respect of certain Victory Bonds which, I conclude from the evidence of the appellant, were not bought for her, although she says he told her that he had purchased some Victory Bonds in her name.

Although the fact that this document was prepared seems to be established, it seems to be equally clear that among those of Nevins' friends who might have been supposed to know of the execution of a will, and particularly of this document prepared by Kerr, there was a belief that the instrument so prepared had not been executed. The evidence is overwhelming that the appellant herself—she admits it, indeed, quite unreservedly—fully believed that Nevins, although intending to make her his testamentary beneficiary, had died before carrying his intention into effect. Again, although the fact that this document had been prepared was made known to Mr. King shortly after the death of Nevins, and although he informed Mowat of the preparation of the document and of the fact that he was named as a legatee in it, and although later he informed Mowat that since no will had been found, at the request of Nevins' sister he was about to apply for letters of administration, neither Mowat nor Cox, the other attesting witness, disclosed either to Mr. King or Mr. Kerr the fact that a will had been executed until after the lapse of something like ten weeks from the death of the supposed testator. The alleged signature, while it bears a general resemblance to the undisputed specimens produced, is in some respects strikingly different from them. Undeniably there is an appearance of care and elaboration in the production of it which presents a striking contrast to the free sweep of the writing in the enlarged authentic specimens. Moreover, it is clear that in all the admittedly authentic specimens submitted, the third letter in "Chas." is written as an "a," while the corresponding letter in the disputed signature presents all the appearance of an "e"; and I think the two handwriting experts are right in agreeing that they can give no explanation of this discrepancy, upon the assumption that the writer of the genuine signatures was the author of the disputed one.

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Not a single specimen of the handwriting of Nevins is produced in which this third letter is formed as in the signature attached to the will, without a break or a sign of arrest in the progress of the stroke indicating an intention to form an "a," and it may fairly be assumed that no such specimen could be found. I may say at once that from a comparison of the disputed signature with the genuine specimens produced, and considering the evidence of the two experts and of Mr. King, who was very familiar with Nevins' handwriting, I should conclude with little hesitation, if the case turned upon the evidence as to handwriting alone, that the signature in question was not the signature of Nevins.

The trial judge and the majority of the judges of the Supreme Court have considered that these facts in themselves present very serious obstacles in the appellant's way. And undeniably the failure of Mowatt to disclose the fact of the execution of the will to Mr. King or Mr. Kerr was a very significant omission, and I must say in my opinion an omission which is left quite without explanation. The will, according to the evidence, was executed on the third of March. Mowatt must have known that the appellant, as well as the executors named in the will, being aware of the fact of its preparation, were deeply concerned upon the question whether Nevins had died without executing it; and yet, with so many reasons and occasions for speech, he remained silent.

Mowatt's alleged failure to make any disclosure to the appellant on the subject is accounted for by her counsel by reference to the circumstance that neither Mowatt nor Cox read the document or was informed of the contents of it at the time of execution. This circumstance can have little or no weight, in view of the fact which the evidence demonstrates, that the appellant herself was fully aware of the contents of the document as prepared, and discussed the contents of it freely with others; and it is quite incredible that Mowatt had not become aware of what these contents were.

Then there is the evidence of Miss Maxwell, who says that both the appellant and Mowatt, on hearing of the death of Nevins, in addition to such manifestations of grief as might have been expected, spontaneously ex-

pressed, in words quite unmistakable, their disappointment in not having procured Nevins' signature to some paper which it was very important he should sign. The learned trial judge says he has no reason to disbelieve Miss Maxwell, and although his language upon the point might have been more explicit, it is quite evident, I think, that he accepted her evidence as against that of Mowatt, who at first confined himself to asserting that he did not remember the occurrence related by her; while it is quite plain that he has no hesitation as between Miss Maxwell and the appellant in rejecting the appellant's denial. The importance of Miss Maxwell's evidence is brought into relief by the evidence of the appellant and Mowatt. It might have been said that such expressions had reference to some document other than the will prepared by Kerr, but no such explanation was given, and if the denials of Mowatt and the appellant be rejected, it is impossible to say that the inference suggested by the respondents is not a reasonable one.

The appellant's knowledge of the preparation of the document, and her belief that Nevins had died before executing it, supply a very natural explanation of the expressions she used, if it was this document to which she referred; and no other explanation is forthcoming, nor is there any explanation of the language attributed to Mowatt. If Miss Maxwell is to be believed, the circumstances point rather directly to the conclusion that it was the document prepared by Kerr of which they were both thinking. That is the inference drawn by Hazen C.J., and if the inference is a valid one, it is obviously fatal to the appellant's case.

At this point the question naturally suggests itself whether, considering the relations between Mowatt and the appellant, and the appellant's distress over the non-execution of what she called "the will," as shown by the evidence of many witnesses, it is not improbable that he would have refrained from setting her mind at rest.

No little importance attaches to the circumstances connected with the discovery and the production of the document. Nevins had a safety-deposit box where he was in the habit of keeping his securities and other important papers. The will propounded was not found in this box,

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nor was any memorandum discovered there pointing to the existence of it. Neither Mr. King nor Mr. Kerr, the executors named in the disputed document, was informed that a will had been executed. Nevins' sister, Mrs. Givan, who died after Nevins and very shortly before the discovery of the document, was left in ignorance of the execution of it; so, also, was the appellant, who, if she is to be believed, saw Nevins more than once between the time of the execution of the will and his death. Mr. King, besides having been named as executor, was on terms of personal intimacy with him, and their business relations had lasted a great many years. The will was found in a safe which stood in a room in the house occupied by the appellant. There was a good deal of dispute as to whether this safe was the property of the appellant or of Nevins. There is evidence that Nevins had bought and paid for the safe, but considering the relations of the parties, and in view of the fact that the appellant had some time before been looking for a safe to purchase, there is nothing in this inconsistent with the contention put forward by the respondents that the safe really was the appellant's. I think the balance of probability inclines in that direction. In any case, admittedly the safe contained nothing but the disputed will. It is quite obvious that Nevins had never used it as a repository for his own papers. The appellant herself admits that Nevins had given her the combination; she says she had forgotten it. As I have already said, the learned trial judge has, on what I believe to be adequate grounds, pronounced the appellant an unreliable witness; and my view, after carefully weighing all the evidence as to this safe, is that the great weight of probability favours the conclusion that the appellant knew the combination and had access to it.

If that is so, it is difficult, if not impossible, to reconcile the conduct of the appellant with the hypothesis that her claim is an honest one. Instead of opening the safe and informing the executors what was there, she pretends ignorance, and suggests that a search in it might possibly lead to the discovery of a will; and this not until ten weeks had elapsed after Nevins' death, after letters of administration had been granted and Mrs. Givan, the grantee of a life-interest under the document, had died. I agree with

Hazen C.J., and the judge of the Probate Court that the condition in which the will was found, with the ribbon and the wedding-ring, is most probably accounted for upon the hypothesis that the appellant had access to the safe.

As against all this there is the testimony of the two attesting witnesses, Mowatt and Cox; and in weighing the value of their testimony it is, of course, very important not to forget that if the disputed signature is not that of Nevins, then Mowatt and Cox must have committed deliberate perjury. The learned trial judge does not in explicit terms find that these witnesses committed perjury. The expression he uses, however, satisfies me that he put no faith in their testimony. His words are:

> Though, because not driven to it, I am unwilling to find that either Mowatt or Cox did not tell the truth, the evidence of Mowatt especially was far from satisfactory;

and the conclusion at which he arrived was that the weight to be attached to their testimony was not sufficient to overcome the improbabilities arising from the facts proved with which the appellant's case was beset.

It is undeniable that apart from these improbabilities, circumstances were disclosed seriously reflecting upon the credit attaching to Mowatt and Cox as witnesses. The majority of the Court of Appeal have concurred with the trial judge in declining to give effect to their evidence.

With great respect for the view taken by others, I cannot help thinking that, to use the phrase of Lord Haldane in his judgment in *Nocton* v. *Ashburton* (1) it would be "a rash proceeding" to reverse the decision of the two New Brunswick courts upon this issue of fact with which, for so many obvious reasons, they were peculiarly qualified to deal, in the absence of some consideration of overwhelming weight demonstrating that in some definite way they have fallen into error.

As regards Cox, he, it must be admitted, assumes, in the light of his own evidence, a somewhat ambiguous character. A man of punctilious rectitude would not have used his friend's power of attorney for the purpose of providing money for his own needs, out of his friend's bank account, without first obtaining his friend's explicit permission; and

(1) [1914] A.C. 932.

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his admission that he did so is calculated to shake one's confidence in his explanations, which it was not open to the respondents to contradict, and to reflect a little upon that "irreproachable business standing" which McKeown, C.J., ascribes to Mowatt, who benefited by Cox's irregularity, and who, as an experienced business man, ought to have realized the grave nature of the impropriety Cox was committing.

As regards Mowatt, without discussing the subject in detail, it is sufficient to say that his relations with appellant were relations of indefinite possibilities. Then there is the extraordinary fact, which must not be overlooked, that Mowatt, after the issue had been joined, begged the appellant to discontinue the struggle. The reason assigned, that the scandal was injuring his business, would seem to be a trivial one, in face of the fact that, if his evidence is to be accepted, he, an honest man, with some reputation for business rectitude, was unjustly being charged with serious crime.

The learned trial judge and the majority of the Court of Appeal, as already observed, have held that the appellant has not acquitted herself of the onus resting upon her to prove that the alleged will was executed by Nevins. Two criticisms of some importance are directed against the judgment of the learned judge of the Probate Court. First it is said that he misdirected himself in laying down the rule that he must find against the will unless all suspicions arising out of the circumstances were removed by the appellant. I think this objection fails to do justice to the judgment of the learned trial judge. It is quite true he uses this form of expression, but it is sufficiently evident from his judgment, when examined as a whole, that by "suspicion" he means suspicion of that grave character legitimately arising from the facts proved, which would make it impossible for him to say that he was judicially satisfied that the affirmative of the issue had been established. It was very vigorously pressed upon us in argument that the trial judge could not decline to give effect to the evidence of Mowat and Cox without satisfying himself that they were committing perjury. Strictly, such a proposition cannot be maintained. The proposition that a

given witness is to be believed is an allegation of fact, and the party whose case depends upon the evidence being accepted must fail if the tribunal of fact has not sufficient confidence in the evidence of the witness to accept it as establishing the facts sworn to. No competent tribunal of fact, of course, rejects the sworn testimony of a witness from mere capricious or fanciful reasons; but it is, in point of law, quite unsound to say that once a witness has testified to the state of facts upon the existence of which the affirmative of an issue depends, the party calling him must succeed unless the other party disproves the testimony so given. He may equally succeed by so shaking the weight of the testimony as to bring the mind of the tribunal into a state of genuine doubt as to whether the testimony can be accepted as sufficient for the purpose for which it is offered. In the case before us, no tribunal of fact having the duty cast upon it to weigh the evidence of Mowatt and Cox could fail to take into consideration a feature of cardinal importance in this case, namely, that if the disputed signature was not the genuine signature of Nevins, then Mowatt and Cox were guilty of perjury. But this is a very different thing from saying that the plaintiff must succeed unless the tribunal is prepared to affirm that Mowatt and Cox were guilty of perjury. The trial judge was entirely right in asserting that he was not driven into that corner. It was sufficient for him if, all the circumstances considered, the considerations in favour of the conclusion that the signature was not a genuine one were as weighty as those in favour of the view that Mowatt and Cox were credible witnesses; if, in other words, he was not satisfied that they were not guilty of perjury. But it must be observed, and here I come to the point raised by the second objection, that the learned trial judge does not, nevertheless, leave us entirely in the dark as to his view in relation to the credibility of the witnesses heard by him. He expressly states, in respect of the evidence of Miss Maxwell, that he sees no reason to disbelieve her, and it is sufficiently evident, I think, as I have already said, that he accepts her evidence with regard to the important incidents above mentioned as against that of the appellant and Mowatt. I have already quoted his remark upon the criti-

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cal question of the general veracity of Mowatt and Cox, and, as I have said, he leaves no doubt upon the point that in his opinion the appellant is not a credible witness.

The appellant's argument does not convince me that the judgment of the New Brunswick courts can be reversed consistently with the principles which have governed this court in appeals from judgments upon issues of fact in which two courts below have concurred. But further, I am convinced that those judgments are well founded. Mowatt's silence, when his inclination, as well as his duty to everybody, would seem to have called upon him to speak; the belief of everybody, including the appellant, who might be expected to know, that no will had been executed; the place in which the will was found and the circumstances connected with the disclosure of its presence there; the conduct of the appellant and Mowatt on learning of Nevins' death pointing to a belief on the part of Mowatt, as well as of the appellant, that no will had been executed; Mowatt's desire, after the will had been impeached as a forgery, to give up the contest while resting under the imputation necessarily resulting from such a course; the character of the handwriting; all these circumstances, coupled with the relations of the appellant and Mowatt and of Mowatt and Cox, were before the trial judge and the Court of Appeal; and in view of them I think they were right in the conclusion that the evidence of Mowatt and Cox was not of sufficient weight to establish the validity of the will propounded.

The appeal should be dismissed with costs.

MIGNAULT J.—This is rather an extraordinary case. It began by proceedings by Geo. H. King and Francis Kerr for the probate in solemn form of the will of the late Charles Nevins, in his lifetime a broker of the city of St. John, New Brunswick, under which they were named executors. These proceedings were taken under chapter 23 of the New Brunswick statutes for 1915, section 48 of which directs that the probate judge shall first hear sufficient evidence to establish *prima facie* the validity of the will, and if such validity is established the judge shall so pronounce. Then if any party cited to appear before the court shall make request to have a witness examined, it

shall be the duty of the judge to hear any witnesses that may be in attendance upon the court or are produced by parties opposed to the will, not exceeding two, to be selected by the judge, and afterwards any person opposing probate may file allegations of the grounds on which he proposes to contest probate of the will, and upon such allegations being filed the judge shall hear the evidence adduced by any and all parties and decide the matter.

The course indicated by the statute was followed and the probate judge pronounced the *prima facie* validity of the will after the attesting witnesses had been heard. Then, at the request of counsel representing the respondents, two witnesses were called, and afterwards allegations were filed by the respondents and an inquiry commenced which is remarkable as well for its very great length as for the triviality of some of the matters inquired into. Out of this mass of relevant and irrelevant detail, which at great expense has been printed in the three volumes of the appeal book, I will extract the pertinent facts stating them as far as possible in chronological order.

Charles Nevins, the testator, had for many years lived in St. John. He was a widower, and, according to his own statement in the will, was engaged to be married to Susie Smith, the appellant, a spinster also residing in St. John and employed in a drug store kept by James Howard Johnson Mowatt. She also had some houses at Gondola Point, near St. John, which were rented to summer cottagers. Mowatt was an intimate friend of Charles Nevins as was also Mr. George H. King of Chipman, N.B., a member of the New Brunswick Legislature, and one of the executors. Another acquaintance of Nevins, and a business associate of Mowatt in another drug store, was one George E. Cox. Nevins resided with a widowed sister, Mrs. Givan, who died a couple of months after him. The estate of Nevins is valued at $16,000 or $17,000.

The recital of the pertinent facts may begin with a visit, some time in February, 1921, of Nevins and the appellant to the office of the latter's solicitor, Francis Kerr, of St. John, with whom Nevins was well acquainted. The appellant and Nevins had casually met on the street and when they reached the solicitor's office, Nevins told Mr. Kerr that he wished to give him instructions for the preparation

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of his will. Among other things he desired to acknowledge indebtedness to the appellant in some sums of money borrowed from her, and these amounts were checked off by Kerr in her bank book. Nevins had some Victory Bonds belonging to the appellant and he wished to acknowledge her ownership in these bonds. He therefore gave Kerr instructions for his will, the appellant being a part of the time in the outer office with Kerr's stenographer, Miss Alice Tobin. Kerr took note of Nevins' instructions and it was arranged that he would draft the will and Nevins and the appellant left the office together. Kerr then dictated the will to Miss Tobin who typed two or three copies. A few days afterwards Nevins returned, got a draft of the will, and, in answer to Kerr's inquiry whether he would then execute it, answered: "No, I don't look like a man that is going to die. I am good for fifty years yet, and I will take it away with me." He put it in his pocket and left Kerr's office. According to all the evidence, Nevins was then apparently in good health. His age is stated to have been about sixty-five years.

The draft will prepared by Kerr on Nevins' instructions made several bequests, viz:—$1,000 to the Provincial Memorial Home for Children of St. John; $1,000 to Howard Mowatt; his watch fob and stick pin to George King; all his interest in the Ashburn Lake Fishing Club to George King, Howard Mowatt and Francis Kerr; his gold watch to Charles Nevins, Jr.; to the appellant his diamond ring, a hand painted umbrella rack, a satin quilt and any pieces or articles she might want. Clauses 8, 10, 11 and 13 were as follows:

8. I direct my executors hereinafter named to hand over to Miss Susie Smith (who I am engaged to marry) two thousand dollars ($2,000) in Victory Bonds now in my safety deposit box in said Royal Bank of Canada, this city. These Victory Bonds are the property of Miss Smith purchased by herself with her own money and at her request held by me for safe keeping for reasons which I have explained to Mr. Kerr. I also direct my said executors to re-pay to the said Miss Susie Smith the sum of three thousand four hundred and fifty-three dollars ($3,453) which I borrowed from her on the following dates, viz: $2,000 with interest at 7 per cent on the fifteenth day of January, 1920; $1,300 with interest at 5 per cent on the fourth day of September, 1920, and $153 on the eighteenth day of January, 1921. I have gone over Miss Smith's bank books and had Mr. Kerr mark these different amounts with an "X."

* * *

10. Save as aforesaid I give and bequeath to my sister Mrs. Mary Givan all my personal property on the following conditions namely:

the principal of my said estate covered by this section is to be kept intact and I hereby instruct my executors to pay over to my said sister, Mary Givan, the income arising therefrom for her sole use and support. In case by any extraordinary circumstance, the income becomes insufficient to properly support my said sister I hereby authorize my executors to use their best judgment in disposing of or realizing on such portion of the principal sufficient to meet such extraordinary circumstance.

11. On the death of my said sister I give and bequeath all my estate to the said Susie Smith.

* * *

13. It is my wish and desire that my executors and particularly my friend George King, in case I should die before my intended marriage to the said Susie Smith, that she shall be carefully considered by them and protected by them. She has worked hard, is not in good health and I wish her to live the remainder of her days in as much ease and comfort as possible.

Finally the draft will appointed as executors George King and Francis Kerr.

Some time afterwards, which I take to be in the beginning of March, Mowatt was in a room leading from the back of his store called the paint shop, used for unpacking goods. It contained no chairs or other furniture, but only a table with a rough top. Charles Nevins was there with Mowatt helping him to check goods. While they were both in the paint shop Cox came in as he frequently did and about a half hour afterwards Nevins took a paper out of his pocket and told Mowatt and Cox that it was his will and asked them to sign it as witnesses. Nevins signed first with a fountain pen, leaning against the table, and then Mowatt and Cox signed as witnesses, this being done in the presence of the three of them. Neither Mowatt nor Cox knew anything, they state, of the contents of the will, but they both identify the document which they signed and which Nevins signed in their presence. After it was executed Nevins put it back in his pocket and Cox left shortly afterwards. A few days later Nevins had an attack of heart trouble and died quite suddenly early on the morning of the ninth of March.

This is in short the statement of Mowatt and Cox as to the signing of the will, and although Cox was excluded from the room while Mowatt gave his testimony, there is no discrepancy in what they say in connection with the signing of the will.

When Nevins died, the fact that he had instructed Kerr to prepare a draft will was disclosed. So far as Kerr and

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the appellant knew, this will had not been executed by Nevins. George H. King, Nevins' friend, was apprised of the preparation of the draft will and so far as he also knew it had not been executed.

George King, when he learned about this draft will, consulted Mr. Charles F. Sanford, K.C., of St. John. This was shortly after the funeral of Nevins and King told Mr. Sanford that a will had been drawn by Kerr of which he had a copy but that it had not been signed. He also told Mowatt that a draft will had been found under which he was a beneficiary to the extent of $1,000, but that it had not been signed by Nevins, on which and on the further information that King was taking out letters of administration of Nevins' estate Mowatt made no comment.

I may say here that the failure of Mowatt to disclose that he had witnessed a will for Charles Nevins—he only disclosed it to King a day or so before the will was found —is strongly relied on by the respondents as a ground for discrediting his testimony that he witnessed this will. It is said in extenuation that Mowatt was a silent and reticent man. Mowatt himself candidly admitted at a later period that this silence might appear strange, but it did not then seem so to him, for he thought that if Nevins had not destroyed the will it would be found among his papers. The respondents are no doubt entitled to any inference which may be drawn from Mowatt's failure to say anything about the will when he knew that letters of administration had been taken out, but my opinion is nevertheless that the silence or stupidity of testamentary witnesses should not militate against a will which the court believes was really executed by the testator. Moreover, Cox was never questioned about the draft will or Nevins' estate and no reticence on the subject is charged against him.

King looked among the papers Nevins had left in his safety deposit box at the Royal Bank and in Mrs. Givan's house and, finding no executed will, applied for letters of administration. He had also several conversations with the appellant to whom he had mentioned that an unsigned draft will had been found in Kerr's office. At one time the appellant showed Mrs. King a safe in a kind of outbuilding connected with the house in which she resided, which she said belonged to Nevins, but when told of this

by his wife King answered that he did not believe Nevins had a safe for he had no need of one. And he made no further investigations.

King was in St. John on Sunday, May 22, a week after Mrs. Givan's death, and Mowatt asked him by telephone to call at the drug store. He went there but says there was only general conversation as to Nevins, but apparently he did not ask Mowatt why he had telephoned for him. Mrs. King was with him, and went over to the appellant's house where King joined her and, according to his story, the appellant told him that if the safe were opened some people would get their eyes opened. The next day Mowatt said to King, who had stopped at the store: "Mr. King, Mr. Nevins left a will and I witnessed it." Mr. King asked him why he had not given him this information before he had been sworn in as administrator of the estate, and Mowatt's answer was that he didn't care to say anything about it.

That same day King called on the appellant with Mr. Sanford. The appellant stated to them that perhaps they might find a will in Nevins' safe above referred to. She said she did not know the combination, although Nevins had once mentioned it to her, but she thought the first number was 28. Sanford tried to open the safe and succeeded in finding the second number but could not discover the third, so he had a locksmith come the next day, the 24th of May, and the latter found the full combination but did not open the safe until Mr. Sanford arrived.

When the safe was opened an envelope was found in one of the drawers tied up with ribbon such as is used on candy boxes, and on the ribbon was a wedding ring. This envelope contained the will signed by Mowatt and Cox as witnesses and, according to their testimony, by Nevins. King and Kerr, who were named executors of this will, then initiated these proceedings for probate.

It is well to say here that the first allegations filed on behalf of the respondents on February 22, 1922, were to the effect that the signature of Charles Nevins was a forgery. Subsequently, on March 25, 1922, they filed additional allegations, to wit, that the alleged will was obtained by fraud, that at the time of the execution of the will the deceased did not know or approve of its contents,

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and that the execution of the said will was obtained by undue influence on the part of Susie Smith, chief beneficiary thereunder. Mr. Mullin at the hearing before this court abandoned these additional allegations as he had abandoned them before the appellate court.

The issue therefore is whether the will in question was executed by Charles Nevins, or, to the same effect, whether or not it is a forgery. Notwithstanding the opinion entertained by the probate judge that without pronouncing the will a forgery, and he did not find it such, he could refuse probate on the ground of suspicion, my view is that, unless we come to the conclusion that the propounded will is a forgery, the judgment of the probate judge cannot be supported. The will is either a genuine will, or it is a forged one with the consequence that Mowatt and Cox were guilty of perjury and conspiracy. I may add that Chief Justice Hazen and Chief Justice McKeown in the appellate court were also of the opinion that such is the issue in this case, for the former decided that the signature of Charles Nevins was a forgery and the latter that it was not. Mr. Justice Grimmer apparently shared the view of the probate judge who, if I may say so with deference, misdirected himself as to the question he had to decide, with the result that he made no finding upon the vital issue raised by these proceedings.

The factums of the parties discuss at length the question of the onus incumbent on a person propounding a will for probate. Granting that he must prove the authenticity of the will, and satisfy the conscience of the court that it was really executed by the testator, the question here is whether this proof has been made. Mere suspicions which do not bear on the fact of the execution of the will are in my opinion totally irrelevant, for that fact only, and not the question whether the testator knowingly and freely disposed of his estate by this will, is in issue here.

The testimony of Mowatt and Cox is direct and positive evidence that Nevins executed the will in their presence. Unless this testimony can be rejected or should be disbelieved, the factum of the will must be held to be established.

When the very voluminous testimony adduced on be-

half of the respondents is read, it would seem that it was imagined that the appellant was on trial. It is true that she is the chief beneficiary under the will, but again the issue is not whether the will was induced by undue influence but whether it was in fact executed. The probate judge may have been prevented from excluding much of this testimony—although I think he gave too great latitude to the respondents—for allegations of undue influence had been filed. But as these allegations are now withdrawn it is clear that evidence as to the character and conduct of the appellant is of no assistance. The fact that the appellant may have been discredited, does not prove that the will was never executed, for the factum of the will does not rest on her testimony. Moreover there are other legatees, such as the Provincial Memorial Home for children, and where the sole question is as to the execution of the will, they should not be prejudiced by an attack on the character of the appellant.

If the positive testimony of Mowatt and Cox that Nevins signed this will in their presence is believed, the will must be held to have been duly executed.

Whatever doubts may exist as to the testimony of Mowatt—and I will discuss these doubts in a moment—I am of the opinion that no reason exists for rejecting Cox's testimony. The probate judge says that Cox, whilst on the stand, impressed him rather favourably, a bit dull at times, but apparently not desiring to hold anything back. The only attack on Cox's testimony is that when he and Mowatt purchased a drug store on equal shares, as Mowatt was unable to pay up his whole share, Cox used some moneys belonging to a friend of his named Stewart for whom he held a power of attorney. This, Cox swore, was done with Stewart's full approval afterwards given, and Cox has returned him the whole amount taken by him. Cox still holds Stewart's power of attorney and enjoys, so far as appears, his entire confidence. He further says that Stewart had allowed him to make use of this money if he needed it, and there is no contradiction of his statement. I am of opinion that this attack on Cox's testimony entirely fails.

Mowatt perhaps is not in so favourable a position. I

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have referred to his reticence as to his having witnessed Nevins' will, although he knew that King proposed to apply for letters of administration of the estate. It was sought to prove that he, a married man, had entertained improper relations with the appellant, which both deny. Much evidence was adduced to contradict these denials. Mowatt also was often content to say "I do not remember," instead of answering yes or no, when questioned on matters which might have a discrediting effect on his testimony. But still he is unshaken as to the execution of the will in his presence, and is corroborated by Cox whose testimony cannot be rejected. If I were to hold that Mowatt falsely stated that Charles Nevins executed the will in his presence I would have to decide that Cox perjured himself when he also swore that the will was signed by Nevins in presence both of himself and Mowatt. This I cannot do. The testator, who has fulfilled all the formalities required by law, is entitled to the protection of the court. And many genuine wills would be rejected were it possible to defeat them by an enquiry into the past history of the testamentary witnesses often chosen by the testator somewhat at random. The question is whether I believe, whether my conscience is satisfied that Nevins really executed this will, and on the whole evidence I do believe that he did.

I have not overlooked the testimony of Miss Lillian Maxwell, which I cannot help thinking bears traces of evident exaggeration. She tells a somewhat extraordinary story, denied by Mowatt, that the latter, whom she had never seen before, said to her when he called at Mrs. Givan's house on the morning of Nevins' death, that he had a very important paper which he desired Nevins to sign and he had no idea he was so sick, and wished he had come sooner to get him to sign it. To say the least, it seems extraordinary that a man proved to be very reticent and silent, should have made such a statement to an utter stranger. Miss Maxwell would also have us believe that Nevins scouted the idea of marrying the appellant, and against this we have Nevins' statement, in the instructions given by him to Kerr for his will, that he was engaged to her. Miss Maxwell, who relates a great deal of similar gossip, is not without interest in Nevins' estate, for she is a

legatee under Mrs. Givan's will and if there were an intestacy this estate would go to Mrs. Givan's legatees. If I have to choose between Miss Maxwell's testimony, which only very indirectly bears on the factum of Nevins' will, and the positive statements of Cox and Mowatt as to its execution, I have no hesitation whatever in accepting the latter.

Moreover it cannot be disputed, without rejecting the testimony of Kerr who has been in no way discredited, that Nevins intended to dispose of his property as stated in this will. And Miss Tobin, being shown the will, says it was done on their typewriter and it is her paper. Moreover Roy McCollum, a youth employed, at that time but not at the time of the trial, in Mowatt's drug store, stated that one afternoon, some time before Nevins' death, Nevins and Mowatt were in the paint shop together, and that Cox came and joined them there and that the three of them remained about an hour. This is some corroboration of the testimony of Cox and Mowatt if it requires corroboration.

I confess that I am not much concerned about the expert evidence as to Nevins' signature on the will, for if the attesting witnesses are to be believed, opinion evidence cannot prevail against their positive testimony that Nevins signed the will in their presence.

Much was made of the fact that the will was found in a safe in an outbuilding of the appellant's residence, and that a wedding ring was fastened to the ribbon with which the envelope was tied. The safe was proved to be the property of Charles Nevins purchased by him from Kerr some months before his death. The reason why a wedding ring was left there can only be a matter of conjecture, but it could have been done only by a person having access to the safe and no one is shewn to have known the combination save Nevins and Kerr. The natural assumption is that Nevins placed the ring where it was found, his motive for so doing being obscure.

The date of the will, "March 3," which is written by hand, is another circumstance which was considered very suspicious. Mowatt and Cox say they did not write it or notice it when they witnessed the will. The opinion has been expressed that it is not in Nevins' writing, but only one of the exhibits written by him contains the word

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"March" and it affords a slender basis for the comparison of handwriting. This word however is in the will and whether or not it was written by Nevins, it is covered by his signature.

I have given the whole case my very best consideration, for it is one of considerable difficulty. It does not seem possible to return, as the probate judge did, a Scotch verdict of "not proven," leaving the case open for reconsideration should fresh evidence be discovered. What possibility is there of finding other more cogent evidence, if the positive testimony of the attesting witnesses does not suffice to turn the balance in favour of the will? My opinion is that the probate judge had no sufficient reason for disregarding the evidence of Mowatt and Cox as to the execution of the will. Whatever doubts or suspicions there may be, these doubts and suspicions do not bear upon the fact of the execution of the will, nor would they justify me in rejecting the testimony of the attesting witnesses.

I would therefore allow the appeal and declare that the will offered for probate was duly executed by Charles Nevins. I would order all costs, as between solicitor and client, of the probate proceedings to be paid out of the estate up to the filing of the respondents' first allegations, the costs subsequent to these allegations to be paid by the respondents who must also pay the appellant's costs in the appellate court and in this court. I think, however, on account of the consent of the parties as shewn by the affidavits filed, that the stenographer's bill should be paid out of the estate.

MALOUIN J.—I concur with Mr. Justice Mignault. I would allow this appeal and declare that the will offered for probate was duly executed by Charles Nevins. I would order all costs of the probate proceedings to be paid out of the estate up to the filing of the respondent's caveat including the costs of the stenographer who reported the proceedings in the probate court, on account of the agreement to that effect by the parties. The costs subsequent to the respondent's caveat, except the costs of the stenographer in the probate court aforesaid, to be paid by the respondents in this court.

Appeal allowed with costs.

W. F. LINGLE AND OTHER (PLAINTIFFS) ....APPELLANTS;

AND

KNOX BROTHERS LIMITED (DEFENDANT) ..... } RESPONDENT.

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*June 4.
*Oct. 6.

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

Practice and procedure—Judgment from other province—Suit for declaratory judgment—Absence of plea—Cross-demand—Principal action and cross demand to be heard at same time—Arts. 211, 212, 217 C.C.P.

A suit was instituted in the province of Quebec by the appellants for the purpose of having declared executory a judgment from British Columbia awarding them $12,476.07 for timber sold and delivered under contract. The respondent did not deliver any plea (Arts. 211, 212 C.C.P.), but filed a cross-demand claiming $38,788.52 for breach of the terms of the contract and asking that the amount of the judgment be compensated *pro tanto*. The appellants inscribed the case *ex parte* for judgment on the principal demand and the trial judge gave judgment accordingly.

Held, affirming the judgment of the Court of King's Bench (Q.R. 38 K.B. 325), that, as the claim under the terms of the cross-demand arises "out of the same causes as the principal demand," article 217 C.C.P. prescribes the procedure to be followed and that adjudication must be made at the same time upon the original demand and the cross-demand.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, at Montreal, which had maintained the appellants' action and sending the parties back to the Superior Court in order that adjudication should be made at the same time upon the principal action and the cross-demand.

Lafleur K.C. and *Maclaire* for the appellants. This case must be decided according to arts. 211 and 212 C.C.P. and the appellants have the right to rely on the principle of intenational comity and public policy which those articles express.

These articles are absolute and should not be gratified by and read together with art. 217 C.C.P.

A cross-demand based on a contract between the parties do not arise "out of the same cause" as an action

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Q.R. 38 K.B. 325.

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based on an exemplification of a final judgment obtained in another province.

Chipman K.C. for the respondent. The cross-demand set up a claim arising out of the same causes as the principal demand which the respondent could not plead by defence; and accordingly, art. 217 C.C.P. applies.

The cross-demand should have been adjudicated upon by the trial judge concurrently with the appellants' claim.

The judgment of the court was delivered by

DUFF J.—This appeal turns upon the effect of art. 217 of the Code of Civil Procedure of Quebec, which is in these words:—

> Art. 217. The defendant may set up by cross-demand any claim arising out of the same causes as the principal demand, and which he cannot plead by defence.
>
> When the principal demand is for the payment of a sum of money, the defendant may also make a cross-demand for any claim for money arising out of other causes; but such cross-demand is distinct from and cannot retard the principal action.
>
> The court, whenever it renders judgment upon both demands at the same time, may declare that there is compensation.

The question arises in this way: The appellants, as plaintiffs, declared upon a judgment of the Supreme Court of British Columbia of the 26th of November, 1923, awarding to the plaintiffs judgment against the defendant for the sum of twelve thousand odd dollars. The defendant, by cross-demand upon the allegation that the judgment was based upon a contract for the sale of lumber between the plaintiffs and the defendant, under which certain quantities of lumber were delivered, claimed certain sums by way of damages for breach of the terms of the contract. One of these claims is embodied in pars. 6 and 7 of the cross-demand, which read as follows:—

> 6. That of the entire quantity of lumber purchased under the said contract, the cross defendants were short in their deliveries to the extent of 1,985,901 feet, which lumber they actually disposed of according to their own admission in their statement of claim in the British Columbia action filed in this case by the cross defendants.
>
> 7. That the cross plaintiffs suffered a loss on this head of at least $15 per thousand, being the difference between the contract price and the market price, amounting in all to the sum of twenty-nine thousand, seven hundred and eighty-eight dollars and fifty-two cents ($29,788.52), for which sum cross plaintiffs also counter-claim in this action.

The claim, thus stated, could not have been set up as a defence in the original action: it could only have been

put forward in a separate action or by way of counter-claim. It would appear, therefore, that to it, art. 212 of the Code of Civil Procedure has no application; and the question arises whether it falls within the scope of the rule laid down by art. 217. The Court of King's Bench has taken the view that the claim under these paragraphs arises out of the same "causes" as the principal demand, and that art. 217 therefore prescribes the procedure to be followed. The language of that article might be more precise, but it seems clearly to be open to the interpretation adopted by the Court of King's Bench; and on the whole there appears to be no very solid ground for differing from this view.

This is sufficient to dispose of the appeal. A question may arise whether the claim under par. 5 of the cross-demand is not one which, in substance (as a claim in respect of diminution in value resulting from breach of the contract of sale), might, on the principle of *Mondel* v. *Steele* (1), have been set up, in whole or in part, as a defence to the British Columbia action; see *Bow McLachlan & Co.* v. *The Ship "Camosun,"* (2). From this point of view, the relevancy of art. 212, as respects this claim, may have to be considered; but it seems more convenient that any such question should be reserved for the trial.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Lafleur, MacDougall, Macfarlane & Barclay.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

(1) [1841] 8 M. & W. 858. (2) [1909] A.C. 597, at pp. 610-611.

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*Mar. 10.
*May. 13.

MARY NUTSON AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS.

AND

WILLIAM A. HANRAHAN AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF ONTARIO

Statute of Limitations—Mortgaged lands—Possession by first mortgagee—Acknowledgment of title—Lease by party in possession—Joinder by second mortgagee—R.S.O. [1914] c. 75, ss. 20 and 24.

Lands in Ontario were twice mortgaged and the first mortgagee entered into possession occupying the lands and receiving the rents and profits for sufficient time to acquire title under the Statute of Limitations. During this period leases were executed by the mortgagee in possession and by the second mortgagee as third party. The leases contained no express acknowledgment by the lessors of title in the second mortgagee but contained this clause: "The parties of the third part hereby consent and agree to the within lease."

Held, affirming the judgment of the Appellate Division (53 Ont. L.R. 99) that this clause acknowledged the authority of the lessors to execute the lease but did not imply an acknowledgment by them of any title in the second mortgagee.

Held also that the second mortgagee had no status to maintain the action; all her rights under her mortgage and her interest in the lands having become extinguished at the expiration of the statutory period.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the respondents.

The facts are stated in the above head-note.

J. A. Ritchie, K.C. for the appellant.

H. J. Scott, K.C. for the respondent.

IDINGTON, J.—Accepting, as this court is accustomed to do, the finding of fact by two concurrent courts below, unless some strong reason put forward for doubting the accuracy thereof, I have considered the relevant law applicable thereto, and see no reason for doubting the accurate apprehension thereof as presented by the learned trial judge and the learned judges in the Court of Appeal, with whom

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

*Sir Louis Davies C.J. was present at the hearing but died before judgment was pronounced.

(1) 53 Ont. L.R. 99.

I fully agree, I think this appeal should be dismissed with costs.

They seem to me to have covered the entire ground and I see no useful purpose to be served by repeating same here.

DUFF, J.—The appellants as the second mortgagees and purchaser under an alleged mortgage sale respectively brought the action out of which the appeal arises, asserting a right of redemption against the respondents, who are respectively first mortgagees and purchaser from them.

In 1894, one H. W. Wherry was the owner of the lands the subject of the action, and in that year executed a mortgage in favour of Victoria Taylor, of Montreal, under the Short Forms Act, to secure the sum of $5,500, payable in five years. The land was, on 26th April, 1897, conveyed, subject to the mortgage, to Annie Odette, and on the same day she and her husband executed the mortgage which is the second mortgage above mentioned, to the appellant Mary Nutson, for $1,700, payable 26th April, 1902. Victoria Taylor having died, her estate is represented by the respondents Hanrahan, Hardie and Elliott.

In March, 1898, by conveyance from Annie Odette, one Frederick John Holton became the owner of the equity of redemption, subject to the above mentioned mortgages. Default having occurred under both mortgages, Victoria Taylor, by her agent Dougall, took possession of the mortgaged property and remained in possession or in receipt of the rents and profits until the death of Dougall, in 1910. From that time Messrs. Bartlett & Bartlett were in possession or in receipt of the rents and profits for the Taylor trustees until the sale to the Raymonds, in 1920.

The property was leased from time to time by Dougall, and afterwards by Messrs. Bartlett & Bartlett, as agents of the Taylor estate, and as such they received the rents and accounted for them to the estate.

In 1920, the Taylor estate having agreed to sell to the Raymonds, a question of title arose as to the interest purchased by Holton, and that was bought in by the Raymonds in that year.

The appellants contend that when Dougall took possession (as above mentioned), he did so under the terms of

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Duff J.

a proposed agreement set out in a document produced in evidence, which, it is argued, constituted him trustee for all parties interested in the property—mortgagees under both mortgages, as well as the owner of the equity of redemption. Dougall actually received all the rents from 1897 until his death, and since then they have been received by Messrs. Bartlett and Bartlett.

The appellant Mary Nutson received nothing on account of the moneys due under her mortgage after the years 1901.

In 1908 a lease of the premises was executed by the trustees of the Taylor estate in favour of the Peabody Company, which Mary Nutson also executed as a party of the third part; and in 1912 the premises were leased by the trustees to McNee & Sons, and as in the preceding lease, Mary Nutson joined as party of the third part. The rents under both these leases were collected by the agent of the trustees, and no part of them was paid to Mary Nutson.

The Appellate Division held that, first, the respondents had been in possession for sufficient time to give them a title under s. 20 of the Limitations Act; and that by s. 24, any right of Mary Nutson in the property has become extinguished, and with it all right and status to maintain an action of redemption.

As to the first point, the judgment is attacked on two grounds: The leases of 1908 and 1912 are said to constitute an acknowledgment of the respondents' title within the meaning of the statute; and further that by the agreement above mentioned, under which Dougall first took possession, a trust was constituted which affects the Taylor estate and precludes the estate from setting up the statute as against the appellants.

The leases relied upon as constituting an acknowledgment contain no express acknowledgment; the demise and the covenants are by the trustees of the Taylor estate, and a clause is added in these terms:

"The parties of the third part hereby consent and agree to the within lease."

There seems to be an acknowledgment of the authority of the trustees to execute a lease, but I see no implication

of an acknowledgment by them of any title in the second mortgages.

As to the alleged agreement with Dougall, the trial judge has found against it, and his finding has been affirmed unanimously by the Court of Appeal. I think these findings are supported by the evidence.

I agree also that the respondents are entitled to succeed upon the ground that the appellants have no status to maintain this action. By s. 24, R.S.O. c. 75, the right of Mary Nutson to enforce her mortgage and with it her interest in the land became extinguished after the expiration of ten years after the last payment on account of the mortgage having been received by her, which was in the year 1901. *In re Hazeltine's Trusts* (1); *In re Fox* (2).

I agree also that the claim based upon the alleged sale of the equity of redemption in 1902 under the second mortgage fails. I concur in the findings of the courts below that this alleged sale was never legally operative.

The appeal should be dismissed with costs.

MIGNAULT, J.—I would dismiss the appeal with costs for the reasons stated by my brother Duff.

MACLEAN, J.—I agree that the appeal should be dismissed.

I am of the opinion, that the finding of the trial judge affirmed by the Appeal Division, in respect of the pleaded agreement with Dougall was warranted by the evidence and should not be disturbed. I also agree that the respondents' contention, that any claim the plaintiffs, Mary Nutson and Annie M. Murphy, ever had in the lands mortgaged to Mary Nutson, has been barred by the Limitations Act, c. 75, s. 24 R.S.O. must prevail.

Appeal dismissed with costs.

Solicitors for the appellants: *Sheppard & Sheppard.*

Solicitors for respondents: *Hanrahan, Hardie and Elliott, Bartlet, Bartlet & Barnes.*

Solicitors for other respondents: *Kenning & Cleary.*

(1) [1908] 1 Ch. 24.

(2) [1913] 2 Ch. 75.

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*May 28, 29.
*June 18.

NATIONAL BREWERIES, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

A. PARADIS (PLAINTIFF) ..... RESPONDENT.

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

Copyright—Infringement—Damages—Penalties—"With intent to evade the law"—Copyright Act, (1906) c. 70, s. 39; (D) 1921, c. 24.

The respondent sued to recover penalties under s. 39 of the *Copyright Act* (R.S.C. 1906, c. 70) for alleged infringements by the appellant of his copyright in a highway map of the province of Quebec. Under that section, four cases are penalized: (*a*) the copying of the entire map, and (*b*) the copying of a part thereof, in either case in its integrity (*sans aucune altération*), or, at least without change in the main design; (*c*) the copying of the entire map, and (*d*) the copying of a part of the map, again in either case, with an alteration in the main design.

Held that a plaintiff seeking to enforce this section in any of these four cases cannot succeed if the court is satisfied that in committing the act or the acts charged as an infringement of copyright the defendant did not act "with intent to evade the law."

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, maintaining the respondent's action and condemning the appellant to pay $19,893.60, half to the Crown and half to the respondent, with costs.

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

L. A. Cannon K.C. and *Buchanan* for the appellant.

Lafleur K.C. and *Larue K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff sues to recover penalties under s. 39 of the Copyright Act (R.S.C. 1906, c. 70) for alleged infringements by the defendant of his copyright in a highway map of the province of Quebec. The action was dismissed in the Superior Court (Gibsone J.) (1), but was maintained in the Court of King's Bench and judgment was entered for $19,893, to be paid one-half to His Majesty

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] 1 D.L.R. 1082.

and one-half to the plaintiff; Lafontaine C.J.Q. and Greenshields J. dissenting.

The copyright was obtained in 1922 and the alleged infringements occurred prior to the 19th of January, 1923. Accordingly the Revised Statute of 1906 applies, the Copyright Act, 1921 (c. 24), having come into force by proclamation only on the first of January, 1924.

The copyrighted map is published in booklet form and consists of 26 distinct charts or sheets, each of them drawn on a scale of 4 miles to an inch and shewing in detail the highways and connecting roads in one of the 26 districts (covering approximately 1,500 square miles apiece), into which the plaintiff divided the settled portion of the province which his maps cover. With these 26 sheets is a Tableau d'Assemblage, or index map, drawn on a scale of 40 miles to an inch. This index map shews the outline of the counties, without naming them, and the main highways in the province. It is said to be a map prepared by one of the public departments. Superimposed are black lines indicating the 26 districts in rectangular blocks, 1 inch by $^{15}/_{16}$ of an inch each, and numbered 1 to 26 in heavy black type, corresponding to the numbers borne by the 26 district maps. There are also shewn on the map, in heavy and light black lines respectively, the improved and unimproved principal highways.

This index map seems to serve a double purpose. It indicates the general outlines and main directions of the principal highways and also enables the tourist or traveller readily to find the district or sectional map which he may require for immediate use. It is only of this index map that infringement is alleged, consisting in its use, with some variations, additions and omissions, as the background for an advertising calendar for the year 1923 issued by the defendant company.

The plaintiff's map was published, under an arrangement with him, by the provincial department of roads. Five thousand impressions were printed of which he received 3,500 for his own use and the department 1,500 for free distribution. The Minister of Roads appears to have sent one of these latter copies to Mr. Dawes, the president of the defendant company.

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From the judgment of Mr. Justice Gibsone, who tried the action, I take the following passages, which are fully warranted by the evidence.

As it happened the defendants were at this very time considering their advertising plans for 1923, they had tentatively decided to bring out a calendar with a map of the province, with a picture of one of their beer bottles printed on the map and a legend to the effect that this beer had the backing of the province.

When Dawes saw the index map in the booklet which Perron had given him, it struck him that, as it covered the settled and industrial parts of the province, and nothing more, it would be suitable for the calendar they had in mind, and he handed it to the lithographers as the type of map which defendants desired as the back ground for their advertising matter.

The lithographers thereupon took the index map, made the additions and omissions which I will detail in a moment, added the picture of the beer bottle and the advertising matter, and reproduced the result to become the heading of a monthly page of a calendar. Some 16,578 calendars were distributed, each with 12 such monthly sheets, so that 198,936 reproductions of the map were printed and distributed.

I use the word "reproduced" to describe the operation executed by the lithographers. The lithographers were not called to testify how exactly the reproduction was effected; witnesses for the plaintiff incline to the opinion that it was by photographic process and I am satisfied that that is the right view.

Now the noticeable additions and omissions made to it before reproducing were these: The county names and a few others were printed in; the index squares and the index numbers were left out, as also was the title "Index map to sections, 40 miles to one inch"; the legend indicating how improved and unimproved roads were shewn was retained but in slightly different form.

There is also this difference between the original and the reproduction; that the reproduction is larger, noticeably larger, but not, so far as can be seen, in any definite or intended proportion. A consequence of this circumstance is that the scale of the original 40 miles to one inch is not applicable to the reproduction and that in fact the reproduction is not a plan to scale.

When plaintiff became aware of the publication and distribution of those calendars he took suit claiming $10,000 damages of which $3,000 for violation of his right of copyright and $7,000 for loss of profits; the action was tried by me and my judgment was in effect the following:—

(*a*) That reproduction of plaintiff's work constituted a violation of his right and entitled him, as for vindication of his right, to condemnation of the defendant to a certain sum in money; (*b*) that the violation entitled plaintiff also to a judgment for the loss and damages caused to him by such violation; (*c*) that the facts shewed the violation to have been technical rather than real, the publication to have been made in good faith and without intention to violate plaintiff's rights, in ignorance that plaintiff had any rights (though this ignorance was inexcusable in law under the circumstances shewn), also that the calendar did not in any way compete with the plaintiff's booklet, that it was not utilizable as a road guide, its distribution did not interfere in any way with the plaintiff's sales and did not in fact cause him any damage whatsoever. I felt obliged however to grant to plaintiff vindication of his violated right

and on that ground I maintained the action for $100. The damage action ended there, the defendant paid the condemnation, and straightway plaintiff instituted the present penal action.

As the second action is submitted on the same evidence as served in the first, I need not say that my findings of fact will be those I arrived at in the first action. My only duty then is to say whether on those findings of fact the penalty enacted by s. 39 has been incurred.

Mr. Dawes deposed that he was unaware that the plaintiff's map was copyrighted and had no idea that he was invading any of his rights. The learned judge found that any infringement there may have been was unintentional; that the road lines on the map—the distinctive feature of it reproduced by the defendant—were immaterial to the use to which it put the map; that the map without these road lines, in which the plaintiff had no property rights, would have served the defendant's purpose equally well; and that the publication of the defendant's calendar in no way competed with or affected the sale of the plaintiff's map. He concluded that on the defendant's part there had not been "any attempt to evade the law."

We do not understand these findings to be impugned in the judgments of the learned judges of the Court of King's Bench—with the possible exception of that of Mr. Justice Rivard. They appear to be supported by the evidence, and, having due regard to the circumstance that the learned judge saw and heard Mr. Dawes give his evidence, we assume them to be correct. Is the plaintiff, in view of the facts so found, entitled to recover?

Several objections were suggested to the constitution of this action: notably that the plaintiff sues to recover the entire penalty for himself and that he claims only the minimum penalty of ten cents for each copy of the map published by the defendant, thus probably precluding the court from awarding a greater penalty, up to one dollar per copy, to which it might consider the defendant liable, and in the recovery of which the Crown would have a one-half interest. Whatever view should be taken of these objections, were it necessary to consider them, we accede to the suggestion of counsel for the defendant, that the appeal should, if possible, be disposed of on the merits, or demerits, of the plaintiff's claim.

Section 39 of the *Copyright Act* (R.S.C. 1906 c. 70) reads in part as follows:

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39. Every person who, without the consent of the proprietor of the copyright first obtained,—(*a*) after the registering of any * * * map according to the provisions of this Act, and within the term or terms limited by this Act, * * * copies, or causes to be * * * * copied, * * * any such * * * map * * * or any part thereof, either as a whole or by varying, adding to or diminishing the main design (*dessin ou motif principal*) with intent to evade the law.

(*b*) * * *.

(*c*) * * *.

shall forfeit the plate or plates on which such map * * * has been copied, and also every sheet thereof, so copied or printed as aforesaid, to the proprietor of the copyright thereof; and shall also forfeit, for every sheet of such * * * map found in his possession, printed or published or exposed for sale, contrary to this Act, such sum not exceeding one dollar and not less than ten cents, as the court determines, which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction.

2. A moiety of such sum shall belong to His Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright.

It will be observed that four cases are penalized:

(*a*) the copying of the entire map, and

(*b*) the copying of a part thereof; in either case in its integrity (*sans aucune altération*), or, at least, without change in the main design; and

(*c*) the copying of the entire map, and

(*d*) the copying of a part of the map; again in either case, with an alteration in the main design.

There was considerable discussion at bar as to whether the applicability of the words "with intent to evade the law" should be extended to all four cases or should be restricted to the two last mentioned. While there is not a little to be said for the latter view as a matter of grammatical construction, it is difficult to conceive of Parliament having meant to penalize a reproduction as a whole for some innocent purpose and quite without any "*mens rea*" either of an entire map or of a part thereof. Having regard to the penal nature of the enactment, we incline to the view that the better construction is that which requires that a plaintiff seeking to enforce this section shall in every case be required to satisfy the court that in committing the act or acts charged as an infringement of copyright the defendant acted "with intent to evade the law." Being satisfied that the finding of absence of that intent made by the learned trial judge should be upheld, it follows that the plaintiff has not made out a case which entitles him to judgment for the penalties claimed.

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For these reasons, with respect, we allow this appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, & Taschereau.*

Solicitors for the respondent: *Francoeur, Vien & Larue.*

ARMSTRONG *v.* MUTUAL LIFE ASSURANCE COMPANY OF CANADA

1925

*May 13.
*May 20.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale, land—Representation by vendor—"Good arable land"—Weight of evidence.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge and maintaining the respondent's action.

The action was for specific performance of an agreement for sale of a quarter section of land and to recover the balance of the purchase price. The appellant set up as a defence that he was induced to enter into the contract by the representation of the respondent to the effect that "there were from 90 to 100 acres of good arable land on the quarter," and that such representation was false, and asked for the rescission of the contract and the return of the purchase money paid, with interest.

On the appeal by the defendant to the Supreme Court of Canada, the court dismissed the appeal and the concluding paragraph of the judgment of the court, as delivered by Anglin C.J.C., was as follows:

"After full consideration we see no reason to differ from the view taken by the Court of Appeal that the defendant had failed to establish the misrepresentation on which he relied."

Appeal dismissed with costs.

G. N. Gordon K.C. for the appellant.
Gregory K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] 3 W.W.R. 659.

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*May 14.
*June 18.

PATRICK D. BOWLEN (PLAINTIFF).....APPELLANT;

AND

THE CANADA PERMANENT TRUST COMPANY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Sale of land—Joint purchase—Speculation purposes—Title in the name of one—Failure to transfer title to other—Right to repudiate—Return of moneys.

The appellant acquired an interest in land purchased by H. for purposes of speculation. H. agreed to transfer to the appellant, free from encumbrances, an undivided quarter interest, and he professed to make this transfer by an instrument subsequently executed, in which, moreover, H. agreed, upon demand, to execute such further transfers, assignments and other documents as should protect the interest of the appellant.

Held that the latter instrument left nothing outstanding between the parties except the undertaking for further assurance, which is an independent covenant, and that delay in the performance of it was not a cause for rescission of the executed conveyance and recovery of the purchase money.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge, Walsh J. (1), and dismissing the appellant's action.

The material facts of the case are fully stated in the judgment now reported.

C. J. Ford K.C. for the appellant.

Lafleur K.C. and *McL. Sinclair K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The appellant (plaintiff) alleges an agreement of sale made orally, about 1st April, 1913, with the late Michael Healy, deceased, whereby the latter agreed to sell to the appellant, for $9,500, an undivided quarter interest in three parcels of land at Medicine Hat, each containing two lots, and particularly described as:

Lots twenty-nine (29) and thirty (30), block twenty-four (24), plan 1491, lots one (1) and two (2), block eighty-nine (89), plan 656-m, and

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] 2 W.W.R. 327.

lots five (5) and six (6), block "D," plan 32,380, all in the city of Medicine Hat in the province of Alberta.

The appellant alleges that he paid the purchase money but failed, notwithstanding repeated demands, to obtain a conveyance of the title, wherefore he repudiated the agreement, and he claims repayment of the money with interest. By the defence the allegations upon which the action is founded are specifically denied.

The appellant testifies to the oral agreement and to the payment of the consideration money in the manner which he describes. He produces a document, dated 1st April, 1913, signed by Mr. Healy, which reads as follows:

I, Michael Healy, contractor, of the city of Toronto, province of Ontario, hereby declare that Mr. P. D. Bowlen, of Elbow, Saskatchewan, owns one-quarter interest in the under-noted lots being: subject to deferred payments of $2,600—twenty-six hundred dollars on lots 1 and 2, block 89, lots 5 and 6, block D. Herald * * *.
and lots 1 and 2, block 89, plan 636m, all in the city of Medicine Hat, Alberta.

This declaration, owing to some confusion, mentions only four of the lots and two of them are named twice, but nothing turns upon this fact. The property remained in the possession of Mr. Healy, who continued to have the management of it. The appellant's cross-examination began as follows:

Q. I think the arrangement you had with Mr. Healy was that using the language of the real estate market he was going to let you in on a quarter interest of the property he had bought in Medicine Hat, wasn't he?

A. Well, he gave me the impression that I was getting a pretty good deal, a good bargain.

Q. I do not want your impressions, but what the result was. I am not going in to what led you or induced you to go into it but what actually was the arrangement; he had bought or was about to buy this property in Medicine Hat. He had bought it?

A. Yes, I understand he had.

Q. And you were discussing it?

A. Yes.

Q. And he said he would let you in on a quarter and you pay a proportion of what it cost him and he was not making any profit on the deal?

A. Well a very small profit.

Q. He was letting you in to the extent of a quarter interest in his deal?

A. Yes.

Two agreements were introduced by the appellant. The first is dated 12th April, 1916, between the appellant as party of the first part, and Mr. Healy as party of the second part, and it contains the following recitals:

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Whereas the party of the first part is indebted to the party of the second part in the sum of four thousand five hundred and ninety-three ($4,593.69) dollars and sixty-nine cents and interest thereon from the 20th day of December, A.D. 1915, at the rate of eight (8) per cent per annum under and by virtue of a certain promissory note for four thousand five hundred and ninety-three ($4,593.69) dollars and sixty-nine cents now deposited in the Union Bank of Canada, Toronto, Ontario;

And whereas the said indebtedness is now over due and entirely unpaid;

And whereas the said party of the second part has demanded payment of the said indebtedness;

And whereas the said party of the first part is unable to make payment of the said indebtedness;

And whereas the said party of the first part is the owner of the northeast quarter of section thirty-one (31), in township twenty-two (22), in range nine (9), west of the third meridian, in the province of Saskatchewan, free from all encumbrances and will be the owner of a one-quarter undivided interest in a certain three parcels purchased by himself and Michael Healy in the city of Medicine Hat, in the province of Alberta, if the payments herein provided for are made in the manner herein provided for;

And whereas the party of the first part has agreed to give as security a transfer of the said northeast quarter of the said section thirty-one (31) upon the terms and conditions hereinafter set forth;

This agreement proceeds to witness that in consideration of the premises the appellant agrees to transfer to Mr. Healy the northeast quarter of section 31, mentioned in the recital, to be held in trust by the latter as security for the recited indebtedness and interest, and that Mr. Healy is to retransfer upon payment to him by the appellant, on or before 1st February, 1917, of the sum of $4,593.69 and interest from 20th December, 1915, at 8 per cent, being the amount of the indebtedness due from the appellant to Mr. Healy; the agreement also provides that:

The party of the first part further agrees that upon default being made in the payment of the amount of the said indebtedness on the said first day of February, A.D. 1917, that he will release and hereby releases all his right, title and interest in certain properties in the city of Medicine Hat, in the province of Alberta, being three parcels in which the said party of the first part has a one-quarter undivided interest with the said party of the second part, and hereby for that purpose releases and quit claims all his right, title and interest in the said parcels, and agrees to execute upon request by the party of the second part, any further quit claim deed or other instrument required to vest the said parcels in the party of the second part for his sole use and benefit but such request by the party of the second part shall in no way be construed as an acknowledgment by the said party of the second part that the said party of the first part has any further interest in the said property after the said first day of February, A.D. 1917.

It is, however, agreed between the parties hereto that should the party of the first part pay to the party of the second part on or before the first day of February, A.D. 1917, a sum equal to the difference between

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the sum of $4,593.69 and interest thereon from the 20th day of December, A.D. 1915 at eight per cent per annum and the sum of $3,200 being the agreed value of the said quarter-section, then and in such case the party of the first part shall receive a one-quarter undivided interest in the said parcels situate in the city of Medicine Hat, in the province of Alberta, and such said payment of the said difference shall be payment in full for his one-quarter undivided interest in the said property.

It appears, according to the appellant's evidence, that the promissory note for $4,593.69 was paid by credit of $3,200 for the northeast quarter of section 31, and the balance by the appellant's cheque, which was paid through Mr. Trainor, his solicitor.

Subsequently another agreement, dated 10th March, 1917, was made between Mr. Healy and the appellant, the material provisions of which are as follows:

Whereas the party of the first part is the registered owner of three parcels of land in the city of Medicine Hat in the province of Alberta free from all encumbrances.

And whereas the party of the second part has at different times paid different sums of money to the party of the first part for an equitable interest, which the party of the second part holds in the said three parcels of property.

And whereas the party of the second part was owing the party of the first part a further sum of money in respect of the said three parcels of property in the city of Medicine Hat, Alberta.

And whereas the party of the first part and the party of the second part entered into an agreement dated the 12th day of April, 1916, whereby an agreement was reached with respect to the amount owing by the party of the second part to the party of the first part on the three parcels of land in Medicine Hat.

And whereas in pursuance of the agreement entered into between the parties hereto on the 12th day of April, 1916, the party of the second part did transfer to the party of the first part the northeast quarter of section thirty-one (31), township twenty-two (22), range (9), west of the third meridian.

And whereas according to the terms of the agreement dated the 12th day of April, 1916, entered into between the parties hereto, there was due as to the 1st day of February, 1917, to the party of the first part, the sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80).

And whereas the said amount of money has been paid by the party of the second part to the party of the first part.

And whereas it was agreed that on the payment of the said sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80) the party of the first part would transfer to the party of the second part an undivided one-quarter interest free from all encumbrances in the three parcels of land now held by the party of the first part in his own name in the city of Medicine Hat.

Now therefore in consideration of the premises and the sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80) now paid by the party of the second part to the party of the first part (the receipt whereof is hereby acknowledged), the party of the first part transfers, assigns and sets over to the party of the second part free from all encumbrances an undivided one-quarter interest in the three parcels of pro-

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perty in the city of Medicine Hat in the province of Alberta now standing in the name of the party of the first part.

And the party of the first part agrees upon demand to execute such further transfers, assignments and other documents as shall protect the interest of the party of the second part.

After the execution of the latter agreement Mr. Healy, on 27th October, 1917, wrote to Mr. Trainor, stating that he would be in Calgary on 8th November and would like to meet the appellant at the solicitor's office

in connection with a transfer he made of a quarter section of land;

but on 1st November Mr. Healy wrote the solicitor that his trip would be postponed for the present. A series of letters followed between the appellant's solicitor on the one hand and Mr. Healy's solicitors on the other, in which the appellant urged that the title of the Medicine Hat property should be transferred to him. No objection was stated on behalf of Mr. Healy. In a letter of 28th December, 1917, his solicitors said:

Mr. Healy has instructed us to prepare a transfer to Mr. Bowlen of his interest in this property.

It appeared however that Mr. Healy had lost or mislaid the duplicate certificate of title to two of the parcels and that this caused some delay; then Mr. Healy went to California; the duplicate certificate was found with his solicitors at Toronto, but could not be handed over without an order from Mr. Healy; there was also a mortgage to be discharged, which covered one of the parcels. Mr. Healy's solicitors wrote on 15th June, 1920, that although they had written him several times in order to have the matter adjusted, they had received no instructions for nearly a year and a half, but that they were writing him again, and, on 19th June following, they wrote that they had received a letter from Mr. Healy to the effect that he expected to be at Calgary the following week and would see them in connection with the matter; but he did not see them, and here ends the correspondence which took place in Mr. Healy's lifetime. The appellant however tells of a conversation between him and Mr. Healy in the fall of 1921. He says:

A. I went there to see him. I went to Swift Current where I thought I would find him, that is where he made his home.

Q. What was your object in going to Swift Current?

A. My object in going to Swift Current was to meet Mr. Healy and talk this matter over with him.

Q. Talk it over for what purpose?

A. For the purpose of getting my transfer or getting my money back. That was in 1921.

Q. You did not see him in Swift Current?

A. No, I did not see him at Swift Current but I came back then to Gull Lake and went out to his farm and saw him there.

Q. What discussion did you have with Mr. Healy on that occasion?—A. Well I talked this matter over with him and I told him I had gone to a lot of expense and trouble and I am sure I wrote a lot of letters or had a lot of letters written.

Q. Your solicitor had been acting for you?

A. Yes.

Q. He will give that evidence.

A. And I told him, well I do not remember just exactly what I told him, but I told him I was down there for the purpose of getting my transfer or getting my money back, that I had put a lot of confidence in him and I had waited on him a number of years to get the transfer, words to that effect, that is the impression that I gave him, that I was there and I had gone to a lot of expense and a lot of trouble and I was disappointed. I told him I wanted my transfer or my money back.

Q. What did he say?

A. He said he would come to Calgary in a short time and would arrange matters with me satisfactorily. We talked the matter over.

Q. And that is the way you left it?

A. Yes, I told him I was disappointed.

Q. You left it as you have stated, that he would come to Calgary?

A. Yes.

Q. Did he come to Calgary?

A. No.

Q. The court: You did not see him? He may have come?

A. No, I did not see him.

Q. Mr. Ford: Did he interview you later at Calgary?

A. I never saw him afterwards.

Mr. Healy died on 31st January, 1923. The respondents are his executors. On 29th May, 1923, the appellant's solicitor wrote them, enclosing copy of the agreement of 10th March, 1917, and saying:

this agreement is repudiated by me and return of the moneys paid demanded, which, with interest, amount approximately to $11,743.

On 30th July, 1923, the solicitor wrote again to the respondent company, asking what they were prepared to do, and saying that unless the claim were admitted he would have to take action. On 16th August, 1923, he wrote again urging a settlement. The manager of the company said in reply that the estate could not recognize responsibility for the claim, and that the case was in the hands of their solicitors. Finally, on 11th October, 1923, the appellant wrote the respondents as follows:

I hereby repudiate the agreement in writing entered into between myself and the late Michael Healy, which agreement was dated the 10th day of March, A.D. 1917.

I repudiate the said agreement on the grounds that the late Michael Healy had undertaken therein to deliver to me a one-quarter undivided interest free from all encumbrances in the three parcels of property in

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the city of Medicine Hat, Alberta, but both the late Michael Healy and you, as executors, have failed to deliver such title free from all encumbrances.

The learned trial judge found, and it was not disputed, that the title to two of the lots had been in Mr. Healy's name since November, 1912; to two others, since May, 1914, and to the remaining two, since July, 1914, also that the two latter were, when Mr. Healy acquired them, subject to a mortgage which was discharged in 1917, although the discharge was not registered until 1923. The mines and minerals in two of the lots were by the grant from the Crown reserved, but no question arises as to this, and, subject to a claim for taxes, it was found that Mr. Healy had, since the dates of the respective certificates, the title in fee simple. The conclusion at the trial was that the plaintiff had effectively repudiated the contract, and was entitled to recover the various sums paid by him to Mr. Healy, with interest at the contract rate of 8 per cent from the dates of the respective payments. In this disposition of the case the judge was influenced by the decision of this court in *Simson* v. *Young* (1), which he thought could not be distinguished. In that case there was a purchase of land in a speculative market. A part of the purchase money was paid at the time of the execution of the contract and the balance, $1,600, was to be paid on a fixed date one year later. Time was declared to be of the essence of the contract. When the time for payment of the balance arrived, the vendor, who lived in Ireland, was not ready with her conveyance and there was a long period of delay in the preparation of it, by reason of which it was held that she could not have specific performance, and, moreover, that the purchasers were entitled to rescind, either because time continued to be of the essence of the contract, or because, in view of the special circumstances of the case, the purchasers were entitled to be placed in the same position as if they had given notice of intention to rescind conditional upon the vendor not delivering the conveyance within a named reasonable time. It is unnecessary further to review the facts, which are very fully explained in the report; a perusal of them serves to convince me that *Simson's*

(1) [1918] 56 Can. S.C.R. 388.

Case (1) differs from the present one in every particular which is contested, or might be thought to create a difficulty in the latter.

Upon appeal it was considered that the testimony and exhibits did not evidence a sale and purchase, but were more consistent with the view that the transaction was in reality a joint purchase; that the property was bought for purposes of speculation with the intention that Mr. Healy should hold the title until a profit could be realized, a purpose which was defeated owing to the war and the depression which ensued. The judgment was pronounced by the Chief Justice, the other members of the court concurring, except Stuart J., who would have preferred to adopt the reasoning of the trial judge, but did not dissent.

From the foregoing relation it is apparent that the appellant encounters formidable difficulties. The transaction was oral, the writings produced do not necessarily point to a sale; it is a remarkable fact that neither the declaration of 1st April, 1913, nor the agreements of 12th April, 1916, and of 10th March, 1917, contain any statement or recital of a sale by Mr. Healy to the appellant. By the declaration it is said that the appellant owns one quarter interest in the lots. By the agreement of 1916 it is recited that the appellant is indebted to Mr. Healy, and provision is made looking to the discharge of the indebtedness, and, in the event of default, that the appellant will release his interest in the Medicine Hat properties, which are described as three parcels in which the appellant has a one-quarter undivided interest with Mr. Healy, while on the other hand it is stipulated that, if the indebtedness be paid, the appellant shall receive a one-quarter undivided interest; Mr. Healy thus recognizing merely that the appellant has or shall receive that interest upon payment of the indebtedness as provided. Then, finally, by the agreement of 1917, whereby Mr. Healy is admitted to be the registered owner of the three parcels, subject to an equitable interest for which the respondent has paid, the former acknowledges the payment and his obligation to transfer an undivided one-quarter interest free from encumbrances. Upon these

(1) [1918] 56 Can S.C.R. 388.

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recitals, and in consideration of the payments, Mr. Healy in the words of the agreement,

> transfers, assigns and sets over to the party of the second part (the appellant) free from all encumbrances, an undivided one-quarter interest in the three parcels now standing in the name of the party of the first part.

The covenant for further assurance follows. Consideration of these documents in the light of the oral testimony in my opinion justifies the conclusion that the latter agreement was intended to satisfy Mr. Healy's obligations to the appellant, except as to the covenant for further assurance. The appellant acquired the equitable title, and the covenant was meant to provide for any more particular description, if necessary, and as well for conveyance of the legal title, if required; the agreement thus operated as a settlement between the parties, leaving nothing outstanding in the transaction except the undertaking for further assurance, to be performed according to its terms upon demand. But this is an independent covenant, and delay in the performance of it, which is really the only ground upon which the action rests, is not a cause for rescission of the executed conveyance and recovery of the purchase money. *Gibson* v. *Goldsmid* (1). This conclusion is decisive of the case, but I would add the following observations.

The property was speculative, consisting of building lots at Medicine Hat, some of which were built upon and occupied, others vacant. It was the admitted understanding that Mr. Healy was to manage the properties, collect the rents and pay the taxes. The appellant had a ranch at Cochrane and he lived there, except when he was at Calgary. His occupation was ranching. These facts suggest the improbability that he was acquiring an undivided interest in city lots at Medicine Hat otherwise than for purposes of speculation. The original oral arrangement was made in 1913. The war intervened; this would not unnaturally render hopeless or would interfere with any project of speedy sale, and when the appellant had succeeded in discharging his commitments to Mr. Healy, as evidenced by the agreement of 1917, it would seem that the provisions of that agreement were naturally responsive to the situation in which the parties found themselves, with speculative property in hand, which they had acquired

(1) [1854] 5 DeG. M. & G. 757.

jointly, and opportunity for realization postponed. Then there is the appellant's testimony at the trial, to which I have referred, which articulates with the circumstantial evidence. It must be remembered too that Mr. Healy in his lifetime was never faced with any demand on the part of the appellant which pointed to the sale of an undivided interest as distinguished from a joint enterprise in which the parties were mutually concerned. This statement I think need not be qualified by reason of the conversation at Gull Lake in 1921, according to the evidence of which the appellant told Mr. Healy that he had come for the purpose of getting a transfer or a return of his money. Moreover, the case was carefully considered by the learned judges of the Appellate Division who came to a conclusion, which is not shown to be wrong; and of course, in view of Mr. Healy's death, and the fact that the action is against his executors, who have no knowledge of the transaction except as derived from the documents and the appellant's version, the proof ought to be very closely scrutinized.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Trainor & McGee.*

Solicitors for the respondent: *Lougheed, McLaws, Sinclair & Redman.*

1925

*June 5.
*June 8.

CANADIAN NATIONAL RAILWAYS *v.* DELAGE

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

Negligence—Damages—Orchard—Fire—Quantum of damages.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge and maintaining the respondent's action for damages.

The respondent was the owner of a farm at St. Hilaire, county of Rouville, comprising approximately sixty-six acres of land, of which thirty acres was in orchard, six acres in sugar bush and thirty acres in cultivation.

On or about the 26th of April, 1923, a fire which had been started on the appellant's right of way overran a part of the respondent's farm, and destroyed the orchard and sugar bush. At the trial the appellant declared that it would not contest the fact that the fire had been set by its employees and that the question to be decided was the quantum of damages suffered by the respondent.

The trial judge awarded to the respondent the sum of $10,000 as damages, and this judgment was affirmed by the Court of King's Bench, Howard J. dissenting.

On the appeal to the Supreme Court of Canada, the judgment of the appellate court was varied by reducing the amount of the damages from $10,000 to $7,826.

Appeal allowed with costs.

Perron K.C. and *Jacques Perron* for the appellant.
Monty K.C. and *Delage K.C.* for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

GALIBERT *v.* LA SOCIETE D'ADMINISTRATION GENERALE AND LA BANQUE NATIONALE AND LA CIE GENERALE D'ENTREPRISES PUBLIQUES.

1925
*June 5.
*June 8.

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

Company—Bonds—Transfer—General security—Insolvency—Fraud—Evidence.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The appellant, a judgment creditor of La Compagnie Générale d'Entreprises Publiques took action to set aside as fraudulent as against him a transfer by it to the Banque Nationale, as general collateral, of $150,000 of its bonds secured by a trust mortgage upon all its assets. In order to succeed the appellant had to establish by satisfactory proof that at the time the transfer of the bonds was made the debtor was insolvent in fact and was so to the knowledge of the bank.

On appeal to the Supreme Court of Canada, the appeal was dismissed with costs, the court, in its judgment, as delivered by Anglin C.J.C., stating that it had "been unable to find in the record any evidence which would warrant overruling the unanimous judgments of the provincial courts that on neither point is the contention of the appellant established."

Appeal dismissed with costs.

Perron K.C. and *Genest K.C.* for the appellant.

Laurendeau K.C. and *Garneau* for the respondent La Banque Nationale.

*PRESENT:—Anglin C.J.C. and Duff, Mignault and Newcombe JJ. and Tessier J. *ad hoc*.

1925

*June 4.
*June 8.

THE KING *v.* ARCHER

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Value of land—Expert witnesses—Evidence.

APPEAL from the judgment of the Exchequer Court of Canada, Audette J. fixing the indemnity to be paid to the respondents for the expropriation of certain lands in the city of Quebec required for the enlarging of the terminals of the Canadian National Railways in that city.

The indemnity had first been fixed by a judgment of the Exchequer Court of Canada on the 21st December, 1923, at $135,153.30. Upon appeal to this court, the case was referred back to the Exchequer Court of Canada for reconsideration, on the 27th May, 1924, as it was open to doubt whether a piece of land which the trial judge had excluded from a certain property sold to respondents was not comprised in that sale. The Exchequer Court of Canada, on the 12th January, 1925, fixed the indemnity at $135,011.30, or $142 less than had been formerly awarded.

On this appeal to the Supreme Court of Canada, the court allowed the appeal with costs. Finding that there was error in the second judgment of the Exchequer Court of Canada and that there should be a reduction of $18,714.54 in the valuation made by the judgment of the trial judge, the court held that the total compensation should be $116,438.76.

Appeal allowed with costs.

Roy K.C. for the appellant.

St. Laurent K.C. for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault and Newcombe JJ. and Tessier J. *ad hoc*.

BORROWMAN *v.* THE PERMUTIT COMPANY

1925

*Feb. 9, 10.
*May 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Judgment reversed—Patent—Weight of evidence—Review and re-weighing.

APPEAL from the judgment of the Exchequer Court of Canada, Audette J. (1) maintaining the respondent's action and dismissing the appellant's counter-claim, and thus determining priority between two conflicting applications for patents.

The applications concern the use of glauconite or greensand in the softening of hard water. On behalf of the appellant it was charged that the respondent's application was the result of the discovery by it that glauconite was the material used by the appellant.

The trial judge upheld the respondent company's contentions; but, on the appeal by the appellant to the Supreme Court of Canada, the court allowed the appeal, dismissing the action and maintaining the counter-claim.

The concluding paragraph of the judgment of the court as delivered by Duff J. was as follows:

"This appears to be one of those cases in which the reasons given by the trial judge in themselves shew that he has misunderstood the evidence and overlooked the weight and importance of facts either undisputed or indisputably established, by documents or otherwise. In such circumstances it is the duty of the appellate tribunal to review the findings in light of the whole evidence."

Appeal allowed with costs.

Tilley K.C. and *W. L. Scott K.C.* for the appellant.

Lafleur K.C., *R. S. Smart* and *J. L. McDougall* for the respondent.

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*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 8.

1925

*June 2.
*June 18.

NAPOLEON JOBIN (PLAINTIFF).....APPELLANT;

AND

THE CITY OF THETFORD MINES (DEFENDANT) ..... } RESPONDENT.

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

Municipal corporation—Action in damages—Statutory notice before suit —Sufficiency—(Q.) 13 Geo. V, c. 65, s. 611

The appellant took an action to recover damages to his mill property caused by flooding alleged to be due to an obstruction of the natural flow of the waters of the River Bécancourt by the piers of a bridge constructed by the respondent corporation. Section 5684 of the Revised Statutes of Quebec (now 13 Geo. V, c. 65, s. 611) prescribes that a person who would recover damages from a municipal corporation for injury caused to his property shall within 30 days from the date of the occurrence of such injury give notice in writing to the clerk of the municipality "containing the particulars of his claim." The day after the flooding of which he complains, the appellant caused a letter to be written by his attorney to the secretary-treasurer of the respondent corporation informing it of his claim for damages exceeding $2,000 suffered by him "*dans son moulin.*"

Held, that the notice given by the appellant was a sufficient compliance with the statute as to damages caused by the flooding to the mill property itself and to its appurtenances.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court by reducing the amount of damages awarded to the appellant from $979.45 to $689.

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

F. Roy K.C. for the appellant.

Galipault K.C. and *A. Girouard* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This is an action to recover damages to the plaintiff's mill property caused by flooding alleged to be due to an obstruction of the natural flow of the waters of the River Bécancourt by the piers of a bridge constructed by the defendant corporation. The plaintiff claimed $4,000. In the Superior Court he recovered judgment for $979.45. The defendants appealed denying their liability; the plaintiff also appealed claiming the award to be insufficient. By

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

a majority judgment the Court of King's Bench reduced the plaintiff's recovery to $689. From this judgment both parties appealed independently to this court. On motion the defendant's appeal was quashed for want of jurisdiction. The plaintiff's appeal, in which he now demands that the judgment in his favour be increased to $2,816.42, was heard.

The finding of the Superior Court that the flooding was due to a narrowing of the river channel by the piers of the bridge constructed by the defendant, affirmed unanimously by the Court of King's Bench, appears to be supported by sufficient evidence to put interference with it by this court out of the question. The sufficiency of the amount allowed for damages is, therefore, the only matter to be considered.

Section 5684 of the Revised Statutes of Quebec (13 Geo. V, c. 65, s. 611) prescribes that a person who would recover damages from a municipal corporation for injury caused to his property shall within 30 days from the date of the occurrence of such injury give notice in writing to the clerk of the municipality "containing the particulars of his claim." The day after the flooding of which he complains, the plaintiff caused a letter to be written by his attorney to the secretary-treasurer of the defendant corporation informing it of his claim for damages exceeding $2,000 suffered by him "*dans son moulin.*" With the view of the Court of King's Bench that the notice given by the plaintiff was a sufficient compliance with the statute as to the damages claimed for injury to the mill and such things as may reasonably be considered as incidental or appurtenant thereto, we are in accord. The legislature did not intend that there should be a detailed account of the items of the damage. The purpose of the notice was to give the municipal corporation such knowledge of the claim in respect of which it was given as would enable it to make the necessary inquiries to ascertain, within a reasonable time after the claim arose, the basis of it and the material facts and circumstances affecting the corporation's liability. The notice, therefore, was properly treated as sufficient to support a claim for liability for damages caused by the flooding to the mill property itself and to its appurtenances.

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JOBIN v. THE CITY OF THETFORD MINES.

Anglin C.J.C.

The plaintiff's damages as now formulated are particularized as follows:

A. Cost of restoring the mill, $225.
B. Damages to flume, $300.
C. Loss of time, $100.
D. Damages to electric motor, $64.65.
E. Cost of new motor, $400.
F. Temporary repairs to mill, $176.97.
G. Damages to revêtement wall and for levelling ground, $1,450.
H. Damages to cellar and garden, $100.

Total, $2,816.42.

Items A, B, C and D were allowed by the Court of King's Bench, with the exception of forty-five cents in item D, which may obviously be regarded as falling within the maxim "*de minimis.*" These four items, therefore, need not be further inquired into. It may be remarked, in respect of item B, that the Superior Court allowed only $200. The evidence, however, appears to warrant the increase made by the Court of King's Bench.

Item E: The ground on which this claim was disallowed was that the repairs covered by item D, when made, put the motor in good running order, and that the fact that it had really been destroyed and made useless by the flooding only developed after the action was brought. With great respect, that does not seem to be a proper ground for disallowing the item. If, in fact, the flooding so completely destroyed the motor that it could not be repaired and made fit for permanent use without an expenditure of $400, which would be the cost of a new motor, the cause of action for that damage arose at the time of the flooding, although its existence only became apparent subsequently. The decision of this court in *Finlay* v. *Howard* (1), establishes that such damages are recoverable. The evidence of the witness Lefebvre makes it clear that this expense will be necessary. On the other hand, however, although the motor which the plaintiff had was comparatively new—the evidence does not disclose how long it had been in actual use—it was in fact worth something less than a new motor would be. Moreover, as the motor proved to

(1) [1919] 58 Can. S.C.R. 516.

be of no value, the expenditure of $64.45 for repairs was money thrown away. Deducting this amount, therefore, and an allowance for depreciation in the value of the motor owing to its use up to the time of the flooding—which must at best be an approximation—we think that if the plaintiff recovers, in addition to the $64 already allowed, $275 towards the cost of a new motor, he will be compensated as fully as is reasonable.

Item F: The plaintiff has been allowed, in item A, the cost of restoring the mill; in this item he claims in addition $176.97 for temporary repairs to the mill. It is by no means clear on the evidence that the $225 estimated by the witnesses Couture and Breton as the cost of restoration did not include what was done by way of temporary repairs. Mr. Justice Bernier would allow on this account $161.47. On the whole, the proper conclusion seems to be that the plaintiff has not so clearly established that this expense was outside what is covered by the item of $225 already allowed that we would be justified in reversing the decisions of the Superior Court and of the Court of King's Bench, by both of whom it was rejected.

Item G: This is the most substantial claim made—$1,450 for damages to the revêtement wall and for levelling the ground. It is apparent from the plan that the revêtement wall is some distance from the mill. The evidence shews that it was built by the city for the protection of the highway. Moreover it is at least very doubtful whether it could in any case properly be regarded as so appurtenant to, or connected with the mill that the attention of the municipality would be drawn to a claim in respect of injury to it by a notice claiming damages for injury suffered by the plaintiff "*dans son moulin.*" In respect of this item the purpose of the requirement of the notice was probably not attained. The evidence in regard to the claim for levelling is most unsatisfactory. The trial judge allowed $300 in this connection "*pour dommages dans la cour du moulin et les accessoires.*" The judges of the Court of King's Bench unanimously disallowed this item *in toto*. The evidence does not enable us to say that in doing so they were clearly wrong.

The same observations apply to item H. The cellar and garden are appurtenant to the residence and in no way appurtenant to the mill.

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JOBIN v. THE CITY OF THETFORD MINES.

Anglin C.J.C.

In the net result, therefore, we would increase the award made by the Court of King's Bench in favour of the plaintiff by the sum of $275, making his total recovery $964. He should have his costs of the appeal to this court; but the disposition of costs made by the Court of King's Bench will not be disturbed.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Taschereau.*

Solicitor for the respondent: *A. Girouard.*

1925

*June 1.
*June 18.

A. W. McLAUGHLIN & CO. *v.* BIRKS

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

Principal and agent—Broker's commission—Negotiation of mortgage loan —Evidence.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court at Montreal and dismissing the appellant's action with costs.

The action is to recover $5,000 as broker's commission on the negotiation of a mortgage loan on real estate, or in the alternative for damages for breach of the commission agreement.

The only question at issue was whether, upon the evidence, the respondent was liable to pay to the appellant such a commission.

On appeal to the Supreme Court of Canada, the court dismissed the appeal with costs.

Appeal dismissed with costs.

Henderson K.C. for the appellant.

Montgomery K.C. and *Tyndale K.C.* for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE (PLAINTIFF)..... } APPELLANT;

AND

RURAL MUNICIPALITY OF CARTIER (DEFENDANT)..... } RESPONDENT

1925

*May 14, 15.
*June 4.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporation—Boundary river—Bridge—Costs—Agreement—By-law—The Municipal Act, R.S.M. 1913, c. 133, ss. 667 and 668

In order to give jurisdiction to the Municipal Commissioner, under sections 667 and 668 of the Municipal Act, to apportion the costs of building a bridge over a river or stream forming the boundary between two municipalities, the latter must previously have agreed to construct the bridge.

The power of a municipality to contract with another municipality to build by joint action such a bridge must be exercised by by-law.

Judgment of the Court of Appeal (34 Man. L.R. 405) affirmed.

APPEAL from the decision of the Court of Appeal for Manitoba (1), reversing the judgment of trial judge; Mathers C.J.K.B. (2), and dismissing the appellant's action.

This is an action by the rural municipality of Portage la Prairie against the rural municipality of Cartier upon an award made by the Municipal Commissioner under sections 667 and 668 of *The Municipal Act* for half the cost of construction of a permanent bridge across the Assiniboine River which forms the boundary between these two municipalities. The respondent's defence is that the bridge was constructed by the appellant alone and on its own behalf without any agreement or concurrence on the part of the respondent. The appellant answered this defence by stating that the respondent by its course of conduct estopped itself from setting up as a defence the absence of a by-law authorizing the building of this bridge jointly with the appellant.

F. G. Taylor K.C. for the appellant.

Ward Hollands K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] 34 Man. L.R. 405; [1924] 3 W.W.R. 244.
(2) [1924] 1 W.W.R. 225.

1925

R. M. OF PORTAGE LA PRAIRIE v. R. M. OF CARTIER.

Mignault J.

The judgment of the court was delivered by

MIGNAULT J.—The point to be decided in this case is whether the rural municipality of Cartier is bound to pay one-half of the cost of building a bridge over the Assiniboine River between the two municipalities. The appellant decided to build this bridge and gave the contracts for the work without any agreement by the respondent to share in the cost. It appears that Cartier at one time expressed its willingness to contribute to the construction in respect of the acreage benefited by the bridge, but nothing came of this tentative offer, and finally, but after the bridge had been completed, the matter was brought before the municipal commissioner, who, purporting to act under the authority of s. 668 of *The Municipal Act* (R.S.M., 1913, c. 133), as amended, decided that the respondent should pay one half of the sum expended by the appellant. The present action claims payment of certain accrued instalments under the award, and the respondent disputes its liability, alleging that the municipal commissioner acted without jurisdiction.

Section 667 of *The Municipal Act,* when a river or stream forms the boundary or part of the boundary between two or more municipalities, empowers the councils of these municipalities to construct a bridge or bridges across such river or stream. By s. 668, it is enacted that if the municipalities are unable mutually to agree as to their joint action in constructing, maintaining or keeping the bridge in repair, or as to the share of the expense of maintenance or repair to be borne by each, the Municipal Commissioner, on application to him by one or more of the municipalities, may determine all and singular the said matters and the amount which each municipality shall be required to expend. I think these two sections should be read together.

In order to give jurisdiction to the Municipal Commissioner to apportion the cost, the two municipalities must have agreed to construct the bridge. This essential condition is wanting here, for the council of the respondent never so agreed. Section 667 assumes that both the municipalities have exercised the power it confers to construct the bridge, but in this case the bridge was built by the appellant alone without the concurrence of the respondent.

It is also objected by the respondent that any consent by it to the construction of the bridge, in other words, any exercise of the power conferred by s. 667, could only be by by-law. This is in conformity with s. 327 of *The Municipal Act*, and the objection therefore seems well founded. There is an abundance of authority on this point.

It is, however, contended, and this the learned Chief Justice of the King's Bench considered the crucial point in the case, that the respondent adopted a course which was consistent only with the existence of liability for its proper proportion of the cost of the bridge. When threatened with litigation, it is said, it sent representatives to the Municipal Commissioner to request him to fix the amount the respondent should pay. It appears, as well by the statement of claim as by the recitals of the award, that it was the appellant that applied to the Municipal Commissioner to determine the amount that each municipality should expend in connection with the construction of the bridge. Certainly sending its representatives before the Municipal Commissioner under these circumstances could not amount to an assumption of liability by the respondent for a work undertaken entirely by the appellant, the more so as any agreement of the respondent to share in the cost of the bridge could only be expressed by a by-law. I am unable, therefore, to find in the circumstances of the case any foundation for the contention that the respondent is now estopped from disputing a liability it never assumed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor & Colwill.*
Solicitors for the respondent: *Bonnar, Hollands & Philp.*

1925
*June 12.
*June 18.

A. J. ASHBRIDGE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

N. C. SHAVER (PLAINTIFF) .....
AND
THOMAS HARRISON AND OTHERS (DEFENDANTS) ..... } RESPONDENTS

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Judgment—Co-defendants—Concurrent appeals to the Supreme Court of Canada and Privy Council—Stay of proceedings.

Where, A. and B. being co-defendants, A. had first inscribed an appeal for hearing in the Supreme Court of Canada and B. later on had inscribed an appeal to the Judicial Committee of the Privy Council, upon motion on behalf of B. the proceedings on the first appeal were stayed pending the decision of the Privy Council upon B's. appeal.

MOTION on behalf of the respondent Thomas Harrison that all proceedings upon appellants' appeal to this court should be stayed and suspended until his appeal pending before the Privy Council will have been disposed of.

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

Louch for motion.

Hellmuth K.C. contra.

Bullen for executors of estate.

The judgment of the court was delivered by

RINFRET J.—The respondent Thomas Harrison moves for an order that the appellants' appeal to this court be stayed until the adjudication on his appeal to His Majesty's Privy Council, or for such other order as may seem just and proper.

By the material filed in support of the motion, it appears that the appellants claim to be cousins and the heirs at law and first of kin of the late William Henry Hill, of Toronto, who died on the 30th January, 1923.

They had lodged a caveat; and, upon their motion, an order was made, removing the case from the Surrogate Court into the Supreme Court of Ontario and nominating the respondent Shaver, the sole executor named in the last will and testament of the late William Henry Hill, as plaintiff, and all others interested as defendants.

The action involved proof in solemn form of the said last will and testament bearing date the 16th day of January, 1923.

At the trial, the executor adduced as evidence three earlier wills of the deceased respectively dated 30th October, 1897, 16th July, 1901, and 25th February, 1911. Under this latter will, Thomas Harrison was named a residuary beneficiary and claimed approximately one-ninth of the estate of the deceased which is estimated to amount to about $350,000.

All of the appellants to this court are excluded and left without benefit from the terms of any known will of the deceased.

The trial judge found *inter alia* the purported will, dated 16th January, 1923, to be a forgery. He refused the petition for probate and dismissed the action.

Upon appeal by the executor Shaver and also certain beneficiaries under the said will, the Appellate Division of the Supreme Court of Ontario reversed the trial judgment, allowed the petition for probate and declared the said document of the 16th January, 1923, to be the last will and testament of the deceased. The appellants to this court took the first step towards an appeal from the appellate court's judgment by obtaining, on 28th May, 1925, an order approving of a bond as security for the appeal to this court.

However, on the 2nd June, 1925, the respondent Thomas Harrison paid two thousand dollars ($2,000) into court as security for an appeal from the said appellate court to His Majesty's Privy Council, and this security was, on the 5th June, approved and the appeal allowed

upon the undertaking of counsel for the applicant that a motion would be made forthwith to the Supreme Court of Canada for an order staying the pending appeal to that court in this action.

Such is the motion which is now being made to this court.

Harrison has always had his own solicitor and counsel, other than those employed or retained by the appellants here.

It is not disputed, in fact it was conceded at bar, that if the respondent Thomas Harrison be successful on his appeal to His Majesty's Privy Council, this result will be conclusive of the contentions of the appellants before this court; while the judgment of this court will not necessarily

1925

ASHBRIDGE v. SHAVER

Rinfret J.

be final, as leave to appeal from it may still be granted by the Judicial Committee.

The precise question involved in this motion does not appear to have yet come before this court in exactly the same form.

In the case of *McGreevy* v. *McDougall* (1) (3rd March, 1888), at the hearing, it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, which said appeal was then pending before the Judicial Committee. The court stopped the arguments of counsel and ordered that the hearing of the appeal to this court should stand over until after the adjudication of the said appeal to the Privy Council.

In the case of *Eddy* v. *Eddy* (2) (4th October, 1898), the situation was the same. The respondent before this court had taken an appeal from the same judgment to the Judicial Committee of the Privy Council. Again the hearing of the appeal to this court was stayed until the appeal to the Privy Council had been decided,

upon the respondent undertaking to proceed with diligence in the appeal so taken by him.

In neither of these decisions does the priority of the proceedings in appeal of one or the other party appear to have been the ratio decidendi.

In the case of *The Bank of Montreal* v. *Demers* (3), where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent, the proceedings on the Supreme Court appeal were stayed pending the decision of the Privy Council. The motion was granted with costs against the appellant, on the ground, not that he had inscribed his appeal subsequent to that of the respondent to the Privy Council, but that it was posterior to the decision in *Eddy* v. *Eddy,* which, in the judgment of the court as reported, was stated to have

settled the jurisprudence of the Supreme Court of Canada in such cases.

In each of the preceding cases, the parties were opponents in the courts below. The difference between them and the present case therefore is that Ashbridge and his

(1) Coutlée's Dig. 74. (2) Coutlée's Dig. 130.
(3) [1899] 29 Can. S.C.R. 435.

co-appellants here, as well as Thomas Harrison, the appellant to the Privy Council, were co-defendants in the action before the Supreme Court of Ontario. This difference, however, does not appear to us to be sufficient for distinguishing this case from the others above mentioned.

We know of no rule, and none has been pointed to us, which could prevent one of the co-defendants, under the circumstances appearing in this case, from severing and appealing to the Judicial Committee; and Thomas Harrison, having been properly allowed to appeal to the Privy Council, we think the principle laid down in the former decisions should also govern this appeal.

The motion to stay proceedings pending the decision of the appeal to the Privy Council shall therefore be granted; but upon the undertaking by the applicant Thomas Harrison to expedite his appeal so taken by him and to proceed with diligence. If he should not do so, leave should be reserved to the appellants herein to apply to this court for the removal of the stay under the present order.

Motion granted.

CANADIAN NATIONAL RAILWAYS *v.* DELAGE

This case is reported *ante,* p. 682.

The judgment of the Court of King's Bench was varied by the Supreme Court of Canada by reducing the amount of damages from $10,000 to $7,826, on the ground taken by Howard J., dissenting judge in the appellate court, that the trial judge had misdirected himself as to two items of the damages.

1925
*June 2.
*June 18.

IN RE SOCIETE DE LA CAISSE DE RETRAITE DE LA BANQUE NATIONALE ..... } IN LIQUIDATION

EUGENE TRUDEL (LIQUIDATOR) ..... APPELLANT;

AND

ST. GEORGES LEMOINE AND OTHERS (PENSIONERS) ..... } RESPONDENTS

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

Society—Pension fund—Members—Abolition of employment—Merger of banks

Under the provisions of the *Pension Fund Societies Act*, (R.S.C. 1906, c. 123), the employees of La Banque Nationale established a pension fund society including nearly all of them so long as they would remain in the employ of the bank. Article 16 of its by-laws enacted that an employee, obliged to discontinue his services to the bank by reason of abolition of his position (pour cause de suppression d'emploi) after 25 years of service to the bank and of participation in the society, should be entitled to claim the amount of the pension provided in the by-laws. But it was also provided by article 44 that, in the event of La Banque Nationale ceasing to exist, the society would be liquidated and the proceeds distributed to the members in accordance with the by-laws; and that those having no vested rights at that time would receive only their contributions with interest at four per cent. La Banque Nationale was merged with La Banque d'Hochelaga on the 30th April, 1924, in accordance with the provisions of the Bank Act.

Held that the merger of La Banque Nationale with the other bank, although it necessarily terminated the employment of the members of the society as employees of that bank, did not effect an abolition of positions (suppression d'emploi) within the meaning of article 16 of the by-laws of the pension fund society; but that the rights of the members were governed by the terms of article 44.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, at Quebec.

The present case arose out of the liquidation of a pension fund society known under the name of *La Société de la Caisse de Retraite de la Banque Nationale, Québec.* That society had for its object the creation and the administration of a pension fund, the revenues of which were intended to insure a life annuity for the employees of *La Banque Nationale* obliged to discontinue their services to the bank because of old age or disability. Its liquidation

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

became necessary as a result of the merging of *La Banque Nationale* with *La Banque d'Hochelaga.*

Mr. Eug. Trudel, the appellant herein, was appointed liquidator for the winding up of the assets of the society and their distribution amongst the associate members according to their respective rights under the by-laws of the society.

After realization of the assets the liquidator prepared a distribution sheet, which was contested in the present proceedings at the instance of ten members-annuitants or pensioners of the pension fund society, the respondents *St. Georges Lemoine and others.*

The latter claimed that the distribution sheet disregarded their rights, that they had been wronged to the benefit and profit of the other members, and they therefore demanded its annulment.

The Superior Court found against the respondents, the distribution sheet was maintained as prepared, but the costs of the contestation were adjudged against the estate.

On appeal to the Court of King's Bench, the judgment of the trial court was reversed, the distribution sheet was annulled and a new distribution sheet was ordered to be prepared.

The liquidator appealed to this court claiming that the trial court judgment should be restored together with the first distribution sheet.

On the other hand the respondents, St. Georges Lemoine and others, lodged a cross-appeal against that part of the judgment of the Court of King's Bench which found a third class of pensioners or annuitants composed of members who, after 25 years of service to the bank and of contribution to the fund, became obliged to discontinue their services to the bank by reason of abolition of their positions (suppression d'emploi) resulting from the merger of the bank.

On appeal to the Supreme Court of Canada, the appeal was dismissed, but the cross-appeal was allowed and the judgment of the Court of King's Bench was varied.

The judgment of the court, as delivered by Rinfret J., after dealing with other questions raised on the appeal, reads as follows as to the matter mentioned in the headnote.

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TRUDEL v. LEMOINE.

Rinfret J.

RINFRET J.—Nous sommes donc d'accord avec la Cour du Banc du Roi dans l'interprétation qu'elle a donnée aux mots " droits acquis " dans l'article 44 des règlements. Mais nous différons d'opinion dans l'application qu'elle a faite de cette interprétation: car nous croyons que la disparition de la banque ne peut être considérée comme la " suppression d'emploi " envisagée par l'article 16 des règlements.

Il s'agit là d'une suppression individuelle et non d'une suppression générale. L'article 16 donne ce que l'on peut considérer comme une définition de l'expression. Cette définition implique la continuation des affaires de la banque et de la société, alors que le sociétaire cesse d'être employé. Les mots qui se trouvent dans la définition, " toute autre cause du même genre " n'ont pas même besoin de l'application de la règle *ejusdem generis,* puisque le texte le dit lui-même; et la fermeture de toute la banque n'est certainement pas " du même genre " que la fermeture d'un bureau.

D'ailleurs, ce qui exclut définitivement l'interprétation que nous repoussons, c'est que les règlements contiennent un article spécial qui prévoit la suppression générale comme conséquence de la dissolution de la banque et de la liquidation de la société: c'est l'article 44. Il en résulte que l'article 16, en parlant de suppression d'emploi, a voulu pourvoir à un cas différent. En plus, les règlements supposent que cette suppression d'emploi existe au moment de la dissolution et non par suite de la dissolution.

Nous éliminerons donc de la classe des sociétaires ayant des " droits acquis " au sens de l'article 44 des règlements, ceux qui, bien qu'ayant vingt-cinq ans de service et de participation à la société, n'avaient pas encore atteint l'âge de soixante ans; car nous ne pouvons interpréter la disparition de la banque comme constituant la " suppression d'emploi " spéciale et particulière prévue à l'article 16. Il s'ensuit que nous sommes d'avis que les seuls sociétaires qui avaient alors (i.e. au moment de la dissolution) des droits acquis à faire liquider leur pension sont les employés ayant atteint soixante ans d'âge et ayant accompli vingt-cinq années de service à la banque et de participation dans la société, ainsi que les employés ayant dix ans au moins de participation à la société et qui avaient été obligés

de discontinuer leur service pour cause d'infirmité mentale ou corporelle.

Seuls ceux qui, au moment de la dissolution, étaient dans l'une ou l'autre de ces deux catégories doivent être appelés à recevoir, avec les pensionnaires qui jouissaient déjà de leur indemnité de retraite, un dividende représentant une pension.

Tous les autres sociétaires ne peuvent retirer que leurs versements avec un intérêt de 4 pour cent.

* * * *

Pour ces raisons, l'appel doit être rejeté et le contre-appel des intimés doit être accordé; de même que, comme conséquence, l'intervention doit être renvoyée. Le bordereau de dividende devra être fait suivant les conclusions du jugement de la Cour du Banc du Roi, sauf les modifications mentionnées ci-dessus. L'ordre sera:

1. Les frais de distribution et ceux faits dans l'intérêt commun;

2. Les créanciers de la société, comprenant les ex-sociétaires chacun pour la part des ses contributions, sans intérêt, dans le cas où ils n'ont pas encore été remboursés;

3. (*a*) Les pensionnaires ou leurs ayants droit, (*b*) les sociétaires ayant des droits acquis, c'est-à-dire ceux qui n'avaient pas encore exercé le droit à leur pension mais qui, au moment de la dissolution de la banque, avaient atteint soixante ans d'âge et accompli vingt-cinq ans de service à la banque et de participation à la société, ou qui, lors de la dissolution de la banque, avaient été obligés de discontinuer leurs services pour cause d'infirmité mentale ou corporelle et qui avaient au moins dix ans de participation à la société. Ces sociétaires ont droit à la liquidation de leur pension dont le montant annuel devra d'abord être calculé suivant l'article 17 des règlements. Le montant annuel des pensionnaires a déjà été liquidé. Le capital des pensions sera estimé conformément aux articles 1915 et 1917 du code civil. (*c*) Tous les autres sociétaires. Ils ont droit à un montant correspondant aux versements qu'ils ont faits à la caisse de retraite avec un intérêt de 4 p. 100.

Du moment que le montant appartenant à chacun de ces pensionnaires ou sociétaires aura été établi, ils devront être traités tous au même rang et ils seront colloqués au bordereau de dividende pour le total de leur dû, si les

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deniers à distribuer sont suffisants, ou au marc la livre, s'ils sont insuffisants.

Nous ne parlons pas d'un surplus à distribuer, puisque les parties nous ont déclaré qu'il était certain qu'il y aurait insuffisance de deniers.

Quant aux frais, le jugement de la Cour du Banc du Roi les a attribués contre le liquidateur ès-qualité. Nous croyons que la contestation devant les tribunaux a été poursuivie dans l'intérêt commun. La préparation du bordereau présentait des difficultés sérieuses qui n'ont pu être élucidées que grâce à la coopération de tous les intéressés; et nous sommes d'avis que les frais de toutes les parties devant cette cour doivent être supportés par la masse des fonds de la liquidation.

Appeal dismissed and cross-appeal allowed.

Lafleur K.C. and *St. Laurent K.C.* for the appellant.
Perron K.C. and *Galipault K.C.* for the respondents.
Geoffrion K.C. for the intervenants.

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IMPERIAL STEEL CORPORATION LTD. (DEFENDANT) AND J. A. CURRIE ..... APPELLANTS;

AND

H. A. BITTER AND IMPERIAL TRUST COMPANY OF CANADA ..... RESPONDENTS.

*Oct. 6.
*Oct. 7.
*Nov. 4.

IMPERIAL STEEL CORPORATION, LTD. (DEFENDANT), AND J. A. CURRIE ..... APPELLANTS;

AND

FREDERICK ARTHUR WATSON (PLAINTIFF) AND IMPERIAL TRUST COMPANY OF CANADA (DEFENDANT) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Practice—Status—Intervention—Discontinuance—Supreme Court Act, ss. 60, 69, 80

Where a judgment had been given against a corporation in favour of a holder of a debenture, the interest upon which was in default, and the company and its president personally (the latter not theretofore a party) gave security for an appeal to the Supreme Court of Canada without objection by the respondents.

Held, that the president had no status to take part in the appeal as he had not intervened in the manner provided by *The Supreme Court Act,* s. 80.

An informal statement in a letter from the solicitors of the appellants, (Imperial Steel Corporation Ltd.) indicating an intention to abandon an appeal does not suffice to effect a discontinuance, the explicit provisions of the Supreme Court Rule 60 not having been complied with.

APPEALS from the decisions of the Appellate Division of the Supreme Court of Ontario.

By originating summons under the *Trustee Act* the respondent Bitter sought the removal of the Imperial Trust Co. of Canada as trustee for bondholders under a bond mortgage made by appellant, The Imperial Steel Corporation, Ltd., and the substitution for it of the Trust & Guarantee Co. which he also asked should be appointed receiver of the appellant corporation. Mr. Justice Riddell made an

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order appointing the Trust & Guarantee Co. trustee and receiver as asked. From this order an appeal was taken to the Appellate Division, on the ground, *inter alia*, that the learned judge had exceeded his jurisdiction in appointing a receiver by way of equitable execution on a summary application under the *Trustee Act*.

To meet this difficulty, the respondent Watson then brought an action for realization of the mortgage security and for the appointment of a receiver of the assets of the Imperial Steel Corporation and made a motion returnable before Mr. Justice Riddell for the appointment of an interim receiver.

Watson was the holder of certain bonds of the Imperial Steel Corporation of which J. A. Currie was president. Default had been made in the payment of three half-yearly instalments of interest on these bonds.

Upon the return of Watson's motion it was turned by the court into a motion for judgment, and final judgment was pronounced for the realization of the mortgage security and appointing the Trust & Guarantee Co. receiver of the assets of the Imperial Steel Corporation, Ltd.

From this judgment an appeal was also taken to the Appellate Division.

Both appeals came on to be heard together. The Appellate Division, on the 13th of May, 1925, modified the first order made by Mr. Justice Riddell so as to restrict it to the appointment of the Trust & Guarantee Company as trustee. The judgment in the action it affirmed without variation.

From these judgments the appeals were taken to this court which the respondents move to quash.

On the motion to quash coming on for hearing on the 6th of October, judgment was reserved. The court subsequently quashed the appeal from the judgment affirming the order appointing the Trust & Guarantee Co. trustee in lieu of the Imperial Steel Corporation, for want of jurisdiction. It was, however, of the opinion that it had jurisdiction to entertain the appeal from the judgment in the Watson action for the realization of the mortgage security and appointing the Trust & Guarantee Company receiver by way of equitable execution, but directed that the appel-

lant should show cause why that appeal should not be dismissed as frivolous and vexatious and lacking substance.

Upon the return of the motion for this purpose on the 4th of November, the attention of the court was drawn to the fact that, although the appeal in the Watson action purports to be taken by the Imperial Steel Corporation, Limited, the defendant in the action, and also by J. A. Currie, the latter was not a party to the proceedings in the Ontario courts. His name, however, appeared as an appellant in the notice of appeal to this court and also in the bond taken as security for costs and approved by Smith J.A. in chambers. It also appeared that before the return of the motion to quash the solicitors of the Imperial Steel Corporation had written a letter to the solicitors for the respondent Watson intimating that they would not appear.

Rule 60 of the Supreme Court Rules reads as follows:

Any person interested in an appeal between other parties may, by leave of the court or a judge, intervene therein upon such terms and conditions and with such rights and privileges as the court or judge may determine.

Section 80 of the Supreme Court Act is in these terms:

An appellant may discontinue his proceedings by giving to the respondent a notice entitled in the Supreme Court and in the cause, and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings.

O'Meara for Currie.

Raney K.C. for respondent Watson.

Judgment was pronounced by the court on the same day holding that Currie had no status in the appeal although he had given security without objection by the respondent. He was not a party to the case and had not appeared in the court below. If he desired to intervene, he should have taken the steps required by Rule 60. To permit him now to intervene to prosecute the appeal which the sole appellant properly in the record has evinced its intention to abandon, would seem tantamount to allowing Mr. Currie to institute an appeal contrary to the prescription of s. 69 of the *Supreme Court Act*. On the other hand, the appeal of the Imperial Steel Co., Ltd., was still before the court, notice of discontinuance not having been given as prescribed by s. 80. The letter written to the solicitors was not sufficient for that purpose. The court being of the opinion, however, that it was reasonably clear

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that the appeal lacked substance and that the only appellant who had any status did not intend to prosecute it, dismissed the appeal; but, under all the circumstances, without costs.

Appeals dismissed.

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*June 8, 9.
*Nov. 2.

CORPORATION AGENCIES LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

HOME BANK OF CANADA (DEFENDANT) ..... } RESPONDENT.

APPEAL PER SALTUM FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC (*a*)

Bank and banking—Company—Power of attorney—Cheques—"Kiting"—Deposits—Possession—Right to recover—Fraud—Arts. 1031, 1047, 1048, 1049, 1050, 1051, 1143, 1704, 1706, 1727, 1803, 1904, 2268 C.C.—Arts. 77, 391, 410, 946, 1064 C.C.P.

The appellant corporation was engaged in business as registrar and transfer agent of the capital stock of joint stock companies and as trustee for the collection of mortgages, insurance and other company purposes. Its president was one C. H. Cahan, Sr., and amongst its directors were one C. H. Cahan, Jr., son of the former, and one B. F. Bowler, the latter acting also as secretary-treasurer. The appellant kept its bank account at the Merchants Bank of Canada in Montreal; C. H. Cahan, Sr., had bank accounts at the Bank of Montreal at Montreal, with the agency of that bank in New York, and with the Guarantee Trust Company in New York. C. H. Cahan, Jr., had a personal account with the respondent, the Home Bank, and another with the Empire Trust Company in New York; he was also, without the knowledge of his father, dealing in stock speculations and the promotion of companies, and had bank accounts at the Montreal branch of the Sterling Bank of Canada and with La Banque Provinciale at Montreal and several other banks. As C. H. Cahan, Sr., being extensively engaged in special work during the war, was frequently absent from Montreal for prolonged periods, he gave his son, from time to time temporary powers of attorney to transact his banking business and finally gave him a general power of attorney to draw and sign cheques upon any chartered bank with which he had an account. One of the by-laws of the appellant corporation provided that "* * * cheques * * * may be made, drawn * * * by the secretary-treasurer, acting

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(*a*) Appeal to the Privy Council.

jointly with the manager, or with any director of the company * * *." Bowler, placing himself in the hands of C. H. Cahan, Jr., signed whatever cheques the latter directed him to sign. During the absence of his father, C. H. Cahan, Jr., carried on an extensive exchange of cheques and, using all the above mentioned bank accounts, practised what is commonly known as "kiting." Amongst others, ninety-four cheques were thus drawn on the appellant's bank account in the Merchants Bank, which were presented for payment by or under the direction of Cahan, Jr., not at the office of the Merchants Bank, but at the office of the respondent bank, which credited the proceeds of the cheques to the private account of Cahan, Jr., or, in some cases, paid them to him in cash. These cheques were presented to the Merchants Bank by the respondent bank which received from the former the proceeds amounting in the aggregate to $205,960.37. The money which was requisite and available in the Merchants Bank of Canada for the payment of the cheques consisted, in addition to the appellant's small balance in its bank account, of money provided by deposits by Cahan, Jr., of cheques drawn on his father's bank accounts, and on the different other banks. When Cahan, Jr., disappeared from Montreal, and his father became aware of the condition of the appellant company's affairs, the present action was instituted for the recovery of the sum of $205,960.37. The appellant company alleged that the Home Bank received the proceeds of the ninety-four cheques wrongfully, fraudulently and in breach of trust; that these cheques on their face showed that Cahan, Jr., was using them for his own purposes; that the bank to which they were delivered took them with notice and knowledge of his defective title, or wilfully abstained from making any inquiry as to the nature and extent of the power and authority of Cahan, Jr., and Bowler, and in bad faith participated in their wrongful acts, thereby enabling C. H. Cahan, Jr., to appropriate to his personal use and benefit the funds out of which these cheques were met and paid by the Merchants Bank of Canada and which always were the property of the Corporation Agencies, Limited. The bank joined issue with the appellant and, in addition, filed a special defence to the effect that it received the cheques for value and in due course, that it became the owner and proprietor of the cheques; and further pleaded that during the whole of the period when these cheques were being issued irregularly, as alleged, Corporation Agencies, Ltd., had not assets to represent, in whole or in part, the sum which it pretends to have lost by reason of the facts set up in its declaration.

Held, Duff and Newcombe JJ. dissenting, that the appellant company was not entitled to recover from the respondent bank the amount claimed by its action; that as the funds with which the cheques were met were neither the property nor in the legal possession of the appellant company, the latter had failed to show such an interest as is requisite to entitle it to bring an action at law (Art. 77 C.C.P.); that although at the time the money so withdrawn apparently stood to the credit of the appellant company in the Merchants Bank of Canada, it cannot be considered to have been in its possession, since, according to the doctrine of the Civil Law, possession in the legal sense cannot be acquired without the volition (volonté) of the possessor; and as volition cannot exist without consent or knowledge, there never was possession by the appellant company of the funds in question. There was not the intention to possess, nor possession *animo domini.*

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Held further, Duff and Newcombe JJ. dissenting, that the appellant cannot maintain a claim for accounting for the fund which stood in its name at the Merchants Bank of Canada, as no contractual relation existed between appellant and respondent nor any obligation on the latter's part to maintain such fund; an essential condition of the action *condictio ob injustam causam,* ownership of the moneys with which the cheques were paid, is wanting; if considered as an action for damages, the only damages recoverable would be the amount of the loss of the appellant and there was no loss in fact; neither could appellant succeed, even were possession admitted, under the principle of *possession vaut titre,* since that doctrine does not apply in the case of *créances,* and moreover it affords essentially a plea which can be invoked only by the possessor while in possession and to repel an attack upon his possession; neither can the appellant's action be maintained as an *action en répétition de l'indu;* nor can it be based on a possible future claim against it by Cahan, Sr., or the other corporations whose accounts were used in the kiting operations; and, finally, the assertion by the appellant of a right to the moneys deposited by Cahan, Jr., involves its ratification of the entire fraudulent scheme of the latter.

Per Duff and Newcombe JJ., dissenting.—The respondent received the proceeds of the cheques in question from the appellant's bank account out of moneys which were in the appellant's possession and without the appellant's authority, having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Jr., the respondent's endorser, was not entitled to the cheques or to appropriate their proceeds, and in these circumstances the appellant was entitled to recover from the respondent bank the amount so received by it as money had and received by the appellant to the respondent's use, or as money of the appellant received by the respondent which was not due to the latter, (Art. 1047 C.C.); while it may be less likely that two directors would lend themselves to the fraudulent purpose of appropriating the company's money for the private uses of one of them than that the latter alone should do so, it is nevertheless, even where two directors join, *prima facie* evidence of fraud that one of them is making use of the company's funds for his own individual purposes; Cahan, Jr., and Bowler had, by the appellant company's by-laws, explicit authority to endorse cheques payable to the company's order and the proceeds of such cheques so endorsed and deposited by them in the appellant's bank account came into the appellant's possession as credits belonging to the appellant and under its control, because these proceeds were so deposited by the appellant's appointed agents in its account upon which it could have operated; if the appellant's officers, other than Cahan, Jr., and Bowler, did not know that the money had been deposited before the respondent drew it out, they had means of knowledge by the exercise of which, with ordinary diligence, they would have become aware of it, and the appellant therefore could not escape liability to the owners of the money deposited upon the ground that it was ignorant of the deposits; it was unnecessary to consider the effect of the kiting of the cheques, because independently of any cheques which represented kiting transactions there was actual money in the case to an amount in excess of that which the appellant claimed; the appellant was entitled by reason of its right and title of possessor to maintain this action as against the respondent, which was a wrongdoer, and had wrongfully deprived the appellant of its possession.

APPEAL *per saltum* from the judgment of the Superior Court, Duclos J., province of Quebec, dismissing the appellant's action.

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

E. Lafleur K.C., G. Barclay and *W. R. Henry* for the appellant.—The moment that it appeared to the respondent bank that these cheques had been drawn by C. H. Cahan, Jr., as agent, to be disposed of by such agent for his own purposes, either to pay the agent's personal indebtedness to the respondent bank, or to be credited in the agent's personal account with the respondent bank, such credits being drawn upon by the agent for his own private business and speculations, that moment the respondent bank ceased to act in good faith, and in so taking and applying the cheques participated knowingly in the wrongful acts of such agent.

There was no valid delivery of these cheques to the respondent, inasmuch as the respondent never became a holder in due course.

The authority of C. H. Cahan, Jr., to draw cheques was limited; it did not include any authority to draw cheques for his own benefit; nor did it include authority to dispose, for his own benefit, of the cheques when drawn.

The respondent was not in good faith; and even if acting in good faith, had notice of defect in the title of Cahan, Jr., to the ninety-four cheques.

Although the credits which the appellant had, from time to time, in its account with the Merchants Bank, upon which these cheques were drawn, represented, in a considerable part, funds of other persons and companies, which had been deposited to the credit of the appellant's account, nevertheless the appellant had title to the credits in its account and legal title to its cheques, or, in any event, appellant had an interest in its cheques and in the proceeds thereof, which entitled it to maintain the present action.

The respondent bank cannot, by virtue of the provisions of Art. 1031 of the Civil Code, exercise, in the present action, the rights and actions of Cahan, Jr., against the appellant, if any exist, as a defence to appellant's demand herein.

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Aimé Geoffrion K.C., and *W. K. McKeown K.C.* for the respondent.—The respondent bank was a holder in due course, and in particular had no notice of the alleged defects in the title of Cahan, Jr.

There was no defect in the title of Cahan, Jr., to the cheques sued on.

The appellant sustained no loss whatever as a consequence of the cheques sued on.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret J.J.) was delivered by

RINFRET J.—Corporation Agencies, Limited, brought suit and prayed that the Home Bank of Canada be condemned to pay to it the sum of $209,028.12.

The ground of the action was that, under the circumstances stated in the declaration, the Home Bank received the proceeds of ninety-six cheques wrongfully and fraudulently and in breach of their trust drawn in the name of the Corporation Agencies, Ltd., upon the Merchants Bank of Canada by C. H. Cahan, Jr., purporting to act as director of the Corporation Agencies, Ltd., and one B. F. Bowler, purporting to act as secretary-treasurer; that these cheques on their face showed that Cahan, Jr., was using them for his own purposes; that the bank to which they were delivered took them with notice and knowledge of the defective title, or wilfully abstained from making any inquiry as to the nature and extent of the power and authority of Cahan, Jr. and Bowler, and in bad faith wilfully participated in the wrongful acts of the latter, thereby enabling C. H. Cahan, Jr. to appropriate to his personal use and benefit the funds out of which these cheques were met and paid by the Merchants Bank of Canada and which always were and now are the property of the Corporation Agencies, Limited.

The Home Bank joined issue with the Corporation Agencies, Ltd.; and, in addition, filed a special defence to the effect that it received the cheques for value and in due course, that it became the owner and proprietor of the cheques; and further pleaded that during the whole of the period when these cheques were being issued irregularly, as alleged, the Corporation Agencies, Ltd., had not assets to represent, in whole or in part, the sum which it pretends to have lost by reason of the facts set up in its declaration.

Mr. Justice Maclennan, before whom the action was first tried, considered that the form of the cheques on their face was notice of the fact that C. H. Cahan, Jr., was appropriating to his own use the monies of the Corporation Agencies, Ltd. Thus the Home Bank was put upon inquiry as to his authority and right to issue and use the cheques; and, by refraining from making any inquiry, it participated in the wrongful act of C. H. Cahan, Jr.; it did not act in good faith and was not the holder in due course of the cheques. On the plea that the Corporation Agencies, Ltd., never had assets to represent, in whole or in part, the total aggregate sum of the cheques, he was of the opinion that the sources from which the Corporation Agencies, Ltd., received the monies out of which its bank paid them were irelevant in an issue between the Corporation Agencies, Ltd., and the Home Bank. He therefore condemned the Home Bank to pay to the Corporation Agencies, Ltd., the sum of $205,960.37. This sum is slightly under the amount of the original claim because evidence was lacking to show that two of the cheques were cleared by the Home Bank.

The Court of King's Bench (appeal side) however reversed the rulings of the trial judge which rejected evidence offered tending to show that the Corporation Agencies, Ltd., loss was less than the amount claimed, and it accordingly ordered that the record be remitted to the Superior Court and the *enquête* reopened, so that the parties might be afforded an opportunity of examining further witnesses and of adducing evidence in support of this issue.

The reasons of each of the judges sitting in appeal are worth referring to.

Chief Justice Lamothe said:—

Sans entrer dans le mérite de la cause, je suis d'avis que la motion de la banque appelante aurait dû être accordée. La dite banque a le droit de prouver que la compagnie demanderesse-intimée n'a rien perdu par suite des chèques tirés sur la Banque des Marchands, vu que l'argent provenant de ces chèques a été remis au crédit du compte de la dite compagnie demanderesse à la Banque des Marchands. Après preuve faite sur ce point, la cour sera en position de dire si, en droit, la prétention de la Home Bank sur ce point est fondée ou non. S'il est établi que les sommes ainsi remises au crédit de la compagnie intimée proviennent d'autres sources, que ces sommes sont, par exemple, le produit d'autres vols ou défalcations en tout ou en partie, la conséquence légale pourra être que la Home Bank ne peut en demander le bénéfice. Mais il faut d'abord que la preuve se fasse.

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Mr. Justice Martin said:—

While I express no opinion on the legal effect of any proof that may be made or whether or not appellant can successfully urge that the amount of its liability, if any, towards respondent should be reduced by amounts which Cahan, Jr., paid into the Merchants Bank to respondents' credit whether from moneys by him misappropriated from others or otherwise, I am of opinion that the appellant should have been allowed to amend its plea in so far as it amplifies the allegations of par. 46, and that it should have been granted an opportunity to examine the witness Bowler, respondents' secretary-treasurer, who signed the cheques with Cahan, Jr., and who must have had an intimate knowledge of all the transactions in question.

The rights and obligations of the parties must and can only be determined after full opportunity is afforded all parties in interest to allege and urge their respective pretentions and support same if they can by legal proof.

* * * * *

The learned trial judge held that the sources from which the respondent received the moneys out of which its bankers paid these cheques is irrelevant. In a restricted sense this is true, but as a practical business proposition, I should say it is wrong in principle. If Cahan, Jr., one day fraudulently obtained from respondent $10,000 of its moneys and the next day brought back and deposited to its credit $5,000, manifestly Cahan, Jr., could urge that and anyone else legally bound with him by reason of knowledge of or complicity in the fraud could also do so.

Mr. Justice Greenshields said:—

I am of opinion that the appellant, the Home Bank, should not be denied the right to endeavour to prove that the whole, or some part, of the money withdrawn upon the cheques signed by Cahan, Jr., subsequently reached the credit and control of the company respondent by being deposited to its credit, with its banker, the Merchants Bank of Canada. I freely admit that the respondent should not lose by reason of the illegal acts of Cahan, Jr., if they were illegally participated in by the appellant (if participation took place); but I am yet to be convinced that the respondent should be enabled to make a profit by these illegal acts. Without expressing an opinion on the merits, but solely for the purpose of my judgment on these rulings at enquête by the trial judge I do not believe the respondent could maintain an action for a greater amount against the Home Bank of Canada (appellant) than it could against Cahan, Jr., by reason of the dealings with these cheques.

Mr. Justice Allard said:—

L'appelante, la Home Bank, a le droit de prouver que l'intimée n'a rien perdu par suite des opérations de banque du fils de M. Cahan, et que l'argent, tiré du compte de l'intimée à la banque des Marchands, a été remis au crédit de son compte, à la dite banque. Quand cette preuve sera faite, la cour aura à décider si, en droit, la prétention de l'appelante est bien fondée.

The case was accordingly retried by Mr. Justice Duclos, who heard all the new evidence. He considered that the Home Bank obtained the cheques in question for value, in good faith and without knowledge or notice, express or constructive, of the alleged defect in the title of Cahan,

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Jr., that the circumstances existing at the time these cheques were paid by the bank were of a nature to allay and lull to sleep any suspicion that might have arisen in the bank manager's mind, that the Corporation Agencies, Ltd., suffered no loss by reason of the withdrawal of funds by means of these cheques, and that the money with which they were paid was not the money of the Corporation Agencies, Ltd., but was stolen money to which it could acquire no title; and he therefore dismissed the action with costs.

An appeal is now brought directly to this court from the judgment of Mr. Justice Duclos by consent of the parties.

It is evident that the Court of King's Bench thought it material to ascertain whether the Corporation Agencies, Ltd., loss was less than the amount claimed by it, or whether it had met any loss at all. It would be unreasonable to assume that otherwise it would have remitted the record to the Superior Court for the purpose of this inquiry.

Being of opinion that the Corporation Agencies, Ltd., cannot succeed against the Home Bank, at all events unless it has shown itself to have been either the owner or the legal possessor of the monies withdrawn, and that Corporation Agencies, Ltd., never was the owner or never had possession of the kind or in the quality which might entitle it to revendicate, it is apparent that it will not be necessary to decide whether the defendant bank was a holder in due course, which would involve a difficult choice between the holdings of fact of the two trial judges on that point. To put it perhaps more precisely: if the funds with which the cheques were met were neither the property nor in the legal possession of Corporation Agencies, Ltd., it has failed to show such an interest as is requisite to entitle it to bring an action at law (C.C.P. Art. 77).

The first cheque upon which the Corporation Agencies, Ltd., now seeks to recover is dated the 29th March, 1919, and the last the 20th December, 1919. At the date of the issue of the first cheque, the balance standing to the credit of the Corporation Agencies, Ltd., in the Merchants Bank of Canada was only $61.74. For the whole period with which we are concerned, the Corporation Agencies,

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Ltd., was practically dormant. It had no business of any consequence during the years 1918 and 1919 and merely acted as registrar or transfer agent for certain other companies and as trustee for one company.

The statement of the Merchants Bank of Canada, as well as a number of other statements emanating from Corporation Agencies, Ltd., and prepared by its president himself, or at his request, were filed at the second trial. A firm of chartered accountants made an examination of them; in adition, the exhibits were placed before them. In connection with their investigation, they prepared certain schedules and made a report based entirely on the Corporation Agencies, Ltd., own figures and statements. These showed that, as a result of the transactions of C. H. Cahan, Jr., during the period of time for which the cheques in question were drawn, i.e., between 29th March and 31st December, 1919, the minimum gain in Corporation Agencies, Ltd., account was $2,887.42, and the maximum gain was $8,350.89, according as certain items are or are not charged to C. H. Cahan, Jr., or the sundry corporations which he used for the purposes of his operations.

This report takes into account the regular and legitimate business of the Corporation Agencies, Ltd., as distinguished from the irregular transactions, as they were qualified by the president of the Corporation Agencies, Ltd., Mr. Cahan, Sr., himself.

The accountants showed that, for the period covered by the ninety-six cheques, the deposits made in Corporation Agencies' account in the Merchants Bank by Cahan, Jr., were in excess of the withdrawals. During this same period, all that Corporation Agencies, Ltd., received from its clients and paid into its bank account was a sum of $5,890.34, while the amount which it paid out in the course of its legitimate business was $8,402.35, or a surplus of $2,512.01, which came out of the funds irregularly deposited by Cahan, Jr.

It was the conclusion of the chartered accountants—and this was fully borne out by the statements filed—that no money of the Corporation Agencies, Ltd., was used to meet the ninety-six cheques irregularly issued by Cahan, Jr., and Bowler. These cheques were only items in a kiting system, or an exchange of cheques carried on by

Cahan, Jr., and each of them was fully met by money provided from sources other than Corporation Agencies, Ltd.

Kiting has been described by the witnesses as a scheme "for obtaining credit for a short period by running three or four accounts" or "getting credit for the time it takes to clear cheques from one bank to another."

The evidence is overwhelming, and in fact it is not disputed, that the operations of Cahan, Jr., in connection with the cheques sued upon were nothing but kiting. To give some idea of their extent, Cahan, Jr., for that purpose, used as many as twelve bank accounts, there being, in addition to the account of Corporation Agencies, Ltd., in the Merchants Bank of Canada, the accounts of his father in the Bank of Montreal at Montreal, the Bank of Montreal at New York, the Guarantee Trust Company in New York; his own personal accounts in the Home Bank of Canada and in the Empire Trust Company, in New York; and also the accounts of several companies, such as Canadian Records Press, Ltd., Dominion Operating Company, Hotel Company of St. John, Ltd., International Exploration Company, Ltd.; and also private accounts under the name of George V. Greene and Olive Trevor. Outside of the Merchants Bank of Canada, the Home Bank of Canada and the Bank of Montreal and the New York institutions already mentioned, several other banks were used: the Standard Bank of Canada, La Banque d'Hochelaga, La Banque Provinciale, the Sterling Bank, the Montreal City and District Savings Bank and the Bank of Toronto.

Two items will suffice to show at once the volume and the nature of the transactions. A recapitulation of the deposits from March 29th, 1919, to the end of the year, shows that they amounted to $2,108,452.01, of which only $5,890.34 had to do with the regular business of Corporation Agencies, Ltd. A study of the Corporation Agencies, Ltd., account in the Merchants Bank discloses that it had no assets to represent, in whole or in part, the amount of the ninety-six cheques, and that they were fully met by money from other sources. The cheques that came in and went out always offset each other. It was not, as in *Canadian Pacific Railway Co.* v. *La Banque d'Hochelaga* (1), a case of repayment of the money withdrawn

(1) Q.R. 18 K.B. 237.

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by means of cheques; but a deposit was made in the account before each cheque was presented for the purpose of meeting it. As a matter of fact, although the Corporation Agencies, Ltd., had practically no funds and notwithstanding the large amounts irregularly withdrawn, at no time was its bank account overdrawn.

It may be true that an examination of the total operations since 1915 would show a loss by Corporation Agencies, Ltd., although that could never exceed a sum slightly over $30,000, half of which was represented by the unauthorized sale of Victory Bonds payable to bearer and has nothing to do with the case here.

As observed by Duclos J. in the course of the *enquête,*

all the assets Corporation Agencies Ltd. had to lose was $30,900. They could not lose what they had not got.

But this money had already been lost for some time when the first of the cheques here sued on was presented by Cahan, Jr. It should not be forgotten that the present action is not brought for the recovery of the amount which Corporation Agencies, Ltd., has lost at the hands of Cahan, Jr. That would entail an accounting between the Corporation Agencies, Ltd., and the latter since 1915, and with that accounting the Home Bank of Canada is not concerned. This action is limited to ninety-six specified cheques. The charge is that by means of these cheques the funds of the Corporation Agencies, Ltd., have been irregularly withdrawn. The onus is upon the Corporation Agencies, Ltd., to show that these cheques were met by its funds; and from that inquiry must be excluded funds antecedently withdrawn.

The trial judge to whom the case was remitted for the purpose of making such inquiry, found as a fact that none of these cheques were paid out of the funds of the Corporation Agencies, Ltd. They were paid out of funds provided by Cahan, Jr.

Upon the evidence, these findings are correct.

It follows that Corporation Agencies, Ltd., failed to establish what it alleged as the basis of its declaration, to wit: that the proceeds of the ninety-six cheques

always were and now are the property of the plaintiff.

The appellant had to establish the foundation of its action. It is erroneous to say that the bank cannot raise such a question because it would be tantamount to put-

ting forward a defence which belongs only to Cahan, Jr. Before the bank is required to enter upon its defence, the Corporation Agencies, Ltd., must prove its interest in the case and establish its right of action. It is significant that, at the outset, the Corporation Agencies, Ltd., relied on the ground that the monies with which the cheques were paid were its property and that this contention, after two trials, appeared so devoid of foundation that before this court it felt obliged to put its case on an entirely different footing.

It is now claimed that, even if the Corporation Agencies, Ltd., was not the owner of the funds, it is nevertheless entitled to recover them because, at the time they were withdrawn, they stood to its credit in the Merchants Bank of Canada, and should be considered to have been in its possession. It was contended that the possession of the monies which it thus had, without ownership thereof, suffices to enable it to maintain this action against the defendant bank because of their wrongful withdrawal by means of the fraudulent cheques made by C. H. Cahan, Jr., and of which the bank obtained payment as holder.

The monies were put into the Corporation Agencies, Ltd., account at the Merchants Bank mostly in the form of cheques, but, for the present purposes, cheques are not different from money, and the statement of Lord Halsbury in *The Great Western Ry. Co.* v. *The London and County Banking Co. Ltd.* (1), can be made with equal force

> the supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me absolutely illusory

in a Quebec case.

Now the deposit by Cahan, Jr., of monies or cheques which did not belong to the Corporation Agencies, Ltd., was wholly unauthorized. He was no more authorized to make the irregular deposits, than he was to make the irregular withdrawals. Even if the by-laws of the Corporation Agencies, Ltd., empowered its directors or its officers to make deposits on its behalf, clearly this must be understood of regular and legitimate deposits only. For it cannot be conceived that these by-laws anticipated the possibility of there being paid into the Corporation Agencies, Ltd., bank account monies which were illegally procured or stolen. The Corporation Agencies, Ltd., could

(1) [1901] A.C. 414, at p. 418.

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not be bound by the consequences of the irregular deposits until they had come to its knowledge and it had ratified them expressly or tacitly (Art. 1727 C.C.). Here both trial judges have found that the Corporation Agencies, Ltd., was absolutely without notice of the fraudulent transactions of Cahan, Jr., and that the monies were deposited without its consent or knowledge. Nor can the knowledge of Cahan, Jr., of the deposits which he made in fraud of Corporation Agencies, Ltd., be attributed to it for the purpose of supplying the element of volition necessary to convert its mere temporary detention of the monies so deposited into legal possession. There are no special circumstances in this case which would take it out of the general rule that notice of a fraud committed by an agent upon or against his principal and of the facts and circumstances connected with it is not imputed to the latter. Such is the well-established doctrine in English Law (Bowstead, Agency, 7th Ed., p. 336; *The Commercial Bank of Windsor* v. *Morrison* (1), and I know of no reason why it should not prevail in Quebec. See 8 Revue Légale, n.s. 297. Moreover, by paragraph 6 of its answer to the amended plea, the Corporation Agencies, Ltd., sets up as a ground why knowledge of the acts of Cahan, Jr., and Bowler should not be imputed to it, that these acts were done in fraud and were kept hidden from any officer or employee of the company. The doctrine of imputation of knowledge to the principal because of knowledge by the agent is for the benefit of third parties; to find the principal invoking it on his own behalf savours of novelty. Finally, the volition (*volonté*) requisite to legal possession implies something more than merely constructive notice or knowledge by imputation.

Quite independently of the particular character of bank deposits, which will have to be examined later, it is strictly according to the doctrine of the civil law that possession in the legal sense cannot be acquired without the volition (*volonté*) of the possessor; and as volition cannot exist without consent or knowledge, there never was here possession by the Corporation Agencies, Ltd., of the funds so deposited. There must be the intention to possess and the possession must be *animo domini*. This accords with

(1) [1902] 32 Can. S.C.R. 98.

the jurisprudence in Quebec (*Lafortune* v. *Vézina* (1); Langelier, Cours de Droit Civil, vol. VI, p. 445), and with the doctrine of the French authors which is conveniently collected in Fuzier-Herman, Répertoire du Droit Français, *verbo* Possession; nos. 3, 4, 26, 28 and 38:

3. * * * Il importe donc, pour mieux préciser la notion de possession, de la distinguer soigneusement de deux autres institutions avec lesquelles un examen superficiel pourrait amener à la confondre: la propriété et la détention. D'une part, en effet, la possession ne doit pas être confondue avec le droit (de propriété) lui-même dont elle n'est que la manifestation extérieure; comme le disent les textes romains, *nihil commune habet proprietas cum possessione* (fgt. 12, par. 1, D. *de acq. vel amitt. poss.* XLI, 2): c'est précisément dans cette distinction entre le droit de propriété et la possession que réside tout l'intérêt pratique de la théorie juridique de la possession. D'autre part, il peut se faire qu'une personne tienne de fait une chose sous sa puissance, sans avoir l'intention de la soumettre à l'exercice d'un droit réel; ce fait prend alors plus particulièrement le nom de détention.

4. La détention constitue donc une situation juridique parfaitement définie et qui est tout à fait distincte de la possession véritable; elle en diffère par l'absence de *l'animus*. * * *

26. Selon une doctrine traditionnelle qui vient du droit romain, la possession se compose de deux éléments: l'un matériel, appelé le *corpus*, l'autre intentionnel, appelé *l'animus*. Sur ce point, et notamment en ce qui concerne *l'animus domini*, les rédacteurs du code civil s'en sont tenus aux idées traditionnelles de Pothier, de Domat et de Dunod, et par conséquent il n'y a point lieu, dans une étude des textes du code civil, de se préoccuper de la question, aujourd'hui très-controversée, de savoir si, au point de vue des textes du droit romain, la possession supposait nécessairement *l'animus domini*. On ne peut en effet, interpréter notre code à l'aide de théories nouvelles qui constituent non un développement doctrinal ou jurisprudentiel, mais une critique de notre législation.

28. *L'animus* constitue l'élément immatériel de la possession. Suivant la doctrine traditionnelle, enseignée par Savigny, *l'animus* est l'intention chez celui qui possède de se comporter vis-à-vis de la chose comme un véritable propriétaire, c'est *l'animus domini*. Suivant une doctrine plus récente, exposée par Ihering, *l'animus* serait seulement l'intention de posséder, *animus rem sibi habere*. On peut définir *l'animus* sous une forme plus large, en disant que c'est l'intention chez celui qui possède d'agir pour son propre compte.

39. *L'animus* étant l'intention de se comporter à titre de propriétaire d'une chose ou de titulaire d'un droit, il ne peut y avoir d'acquisition de possession sans la volonté de posséder à un titre quelconque. Il suit de là que celui qui achète une chose et auquel on en livre une autre qu'il prend par erreur, n'acquiert la possession ni de l'une ni de l'autre; car il ne possède pas celle qu'il a achetée, puisqu'elle ne lui a pas été livrée, ni celle qui lui a été livrée, puisqu'il n'a pas eu l'intention de la posséder. De même, la volonté de posséder étant de l'essence de la possession, il s'ensuit que ceux qui sont incapables de volonté, tels que les impubères et les fous, ne peuvent acquérir la possession; mais ils le peuvent par le tuteur qui les représente. Une femme peut acquérir la possession sans l'autorisation de son mari, car la possession est une chose de fait; mais

(1) [1916] Q.R. 25 K.B. 544.

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elle ne pourrait, sans en être autorisée, exercer les droits qui résultent de cette possession.

Pothier, De la possession:

40. Il est évident qu'on ne peut acquérir la possession d'une chose, sans avoir la volonté de la posséder.

Par exemple, on me fait entrer dans le cabinet d'une personne à qui je vais rendre une visite: en l'attendant je prends un livre que je trouve sur son bureau, pour voir ce que c'est; il est évident que, quoique je l'aie entre mes mains, je n'en acquiers pas la possession; car je n'ai pas la volonté de le posséder.

Pareillement à l'égard des héritages: si, dans un voyage, je vais coucher au château de mon ami en son absence; quoique je sois seul dans ce château, je n'en acquiers pas la possession; car je n'ai pas la volonté de l'acquérir: *Qui jure familiaritatis amici fundum ingressus est, non videtur possidere, quia non eo animo ingressus est ut possideat, licèt corpore in fundo sit;* L. 41, ff. *de Acq. poss.*

De ce principe, "que pour acquérir la possession d'une chose, il faut avoir la volonté de la posséder," il s'ensuit que, si j'ai acheté de vous une chose, et que vous m'en livriez une autre, que je prends par erreur pour celle que j'ai achetée et dont j'ai intention d'acquérir la possession, je n'acquiers la possession ni de celle que j'ai acquise par erreur, parce que ce n'est pas celle dont j'ai la volonté d'acquérir la possession, ni de celle que j'ai la volonté d'acquérir, parce que je ne l'ai pas reçue: *Si me in vacuam possessionem fundi Corneliani miseris, ego putarem me in fundum Sempronianum missum, et in Cornelianum iero, non acquiram possessionem, nisi fortè in nomine tantùm erraverimus, in corpore consentiamus;* L. 34 *ff. eod. tit.*

The above doctrine is also expounded in Aubry & Rau. tome 2, paragraphs 177 and 179; Baudry-Lacantinerie & Tissier, nos. 195, 197, 203, 216; Planiol, 6th ed. tome 1, no. 2269; Laurent, 5 ed. vol. 32, pp. 273 and 276; Colin & Capitant, vol. 1, pp. 873 and seq.

The same doctrine will also be found in Dalloz, Répertoire Pratique, *verbo* Possession, nos. 7, 8, 21, 23, 25, 26, 51, etc.

Both Laurent (vol. 32, p. 270) and Fuzier-Herman (Répertoire, *verbo* Possession, no. 5) allude to Troplong's opinion that

dans la doctrine du code, les détenteurs précaires sont aussi des possesseurs, de sorte que toute détention serait une possession (and state that he has) vainement essayé de soutenir que l'article 2228 C.C. s'applique aux simples détenteurs; que ceux-ci sont des possesseurs dans le sens général du mot et que leur possession produit certains effets de droit.

They both show that he alone, of all the French authors, entertains such an opinion.

Such being the doctrine and the French law of possession, Corporation Agencies, Ltd., never had the possession because it lacked the *animus possidendi* or intention to possess, or what Saleilles calls "la volonté possessoire." Planiol, vol. 1, p. 701, points out: "Sans volonté, point de

rapport possessoire; par exemple, il n'y a pas de possession *si quis dormienti aliquid in manu ponat* (Paul, au Digeste XLI, 2 fr. 1, par. 3)."

Not only Corporation Agencies, Ltd., had not the will to possess, but it had absolutely no knowledge or notice of what was going on; and, indeed, this has been its attitude throughout this case.

It had no more possession of the monies put by Cahan, Jr., into its account in the Merchants Bank than it would have had if Cahan, Jr., had simply placed them, without its knowledge, in the vault in its office and, subsequently, had taken them out and remitted them direct to the Home Bank. In neither case could it be said that, in the course of these operations, Corporation Agencies, Ltd., had, at any moment, acquired possession of the monies.

There is this difference however between the supposed deposit in a vault and the deposit in a bank, that in the case of banking, there is no "dépôt régulier." A banker is not a depositary "bound to restore the identical thing which he has received in deposit" (Art. 1904 C.C.). The customer parts with the title to his money and loans it to the banker, the result being to make the bank the debtor of the customer with the sole obligation of honouring the customer's drafts or cheques.

This conception of banking is generally accepted, as well in the other provinces of Canada and in England as it is in France and in the province of Quebec. Falconbridge, Banking and Bills of Exchange, 3rd ed. p. 311; *Foley* v. *Hill* (1); *Robarts* v. *Tucker* (2); *In re Derbyshire. Webb* v. *Derbyshire* (3); *Marine Bank* v. *Fulton Bank* (4); Baudry-Lacantinerie, 3rd ed. *Du dépôt et du séquestre,* no. 1097; Dalloz, Répertoire, verbo Banque, nos. 3 and 4; Fuzier-Herman, Répertoire du Droit Français, verbo Banque, nos. 70-71-72 and 73; *Vanier* v. *Kent* (5).

In contradistinction to the depositary under the civil code (art. 1803), the banker is authorized to use the money deposited, and his only obligation is to remit an equal sum of money. Notwithstanding this difference, however, the customer may in the normal case be regarded as

(1) [1848] 2 H.L.C. 28.
(2) [1851] 16 Q.B. 560.
(3) [1906] 1 Ch. 135.
(4) [1864] 2 Wall (U.S.) 252, at p. 256.
(5) [1902] Q.R. 11 K.B. 373.

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in possession of the credit which results from his deposit with his banker. But there the volition essential to legal possession is present, whereas what we have in the case at bar is at the utmost a mere detention.

We may now consider the nature of the remedy which the Corporation Agencies, Ltd., is seeking.

In its factum, the appellant states that, under English law, it might sustain its right to recover under various forms of action, such as an action in trover to recover the cheques, or an action for conversion, or an action for money had and received, or an action for the restoration of property. It however encounters a difficulty in finding under the law of Quebec a principle upon which to base a right of action. That difficulty really is that, in the circumstances of this case, it has no right of action whatever.

Perhaps it is appropriate to point out here that none of the cases decided in England to which our attention has been drawn has any real application.

In the case of *North & South Wales Bank* v. *Irvine* (1), which most nearly resembles it, the cheque was signed by Irvine and "paid out of Irvine's money at his own bankers," which had been deposited by himself. Under such circumstances, the inquiry as to "where he got that money was irrelevant" and the defendants were held not

> entitled to stand in the shoes of White's trustees and claim against the plaintiff what, in effect, is a set-off, arising out of an indebtedness of the plaintiff, not to themselves but to White.

But here the cheques were not paid out of monies belonging to the Corporation Agencies, Ltd.; and that renders the *Irvine Case* inapplicable.

This action cannot be maintained, as suggested by Mr. Lafleur, as one for the restoration of the fund which stood in the name of the appellant at the Merchants Bank of Canada. The obligation to account for that fund was not upon the Home Bank, but only upon the Merchants Bank, which alone had accepted the position of a borrower. There was not and there never existed any contractual relation between the Corporation Agencies, Ltd., and the Home Bank of Canada. Assuming that the appellant's action could be considered as a *condictio ob injustam causam,* the essential condition of that action, the ownership of the monies with which the cheques were paid, is

(1) [1908] A.C. 137.

wanting here (Aubry & Rau, 5th ed. vol. 6, p. 325, par. 442 bis). If the action can be regarded as an action for damages resulting from the abstraction of the funds by means of the fraudulent operations in which the Home Bank is alleged to have participated, then the measure of such damages must be the amount of the loss of Corporation Agencies, Ltd. There was in fact no such loss; the trial judge held that there has been none; and, in our view, that finding is fully justified.

Even were possession admitted, it would not avail to enable the appellant to institute proceedings. In France, the law is (Art. 2279 C.N.): "En fait de meubles, la possession vaut titre." Nevertheless, all the commentators agree that this article applies only to corporeal moveables and not to "créances," that it merely creates a presumption of title which may be rebutted, and that the maxim it embodies only affords a defence to a person in actual possession for the purpose of repelling a revendication. See Fuzier-Herman, *verbo* Possession, nos. 290, 300, 338 and 339; Dalloz, Répertoire pratique, *verbo* Possession, nos. 45, 90, 91; Baudry-Lacantinerie, 3rd ed. De la prescription, no. 480; Laurent, 5th ed. vol. 32, nos. 562 and seq. Guillouard, tome 2, no. 847.

Dalloz, Répertoire Pratique, *verbo* Possession, no. 95, says:—

> L'effet de la règle posée par l'article 2279 est d'empêcher la revendication des meubles. Le possesseur d'une chose mobilière peut repousser la revendication intentée contre lui en alléguant seulement sa possession. (Aubry & Rau, tome 2, paragraph 183, page 158; Laurent, tome 32, n° 540; Guillouard, tome 2, n° 879; Baudry-Lacantinerie & Tissier, n° 879).

It is looked upon as being essentially a plea which can be invoked only by the possessor while in possession and to repel an attack upon his possession.

If that be true in France, with the law as it is expressed in Art. 2279 of the Code Napoléon, with how much greater force must this doctrine be held to apply here, in view of the corresponding article of the Quebec code, of which the first paragraph is:—

> 2268. Actual possession of a corporeal movable, by a person as proprietor, creates a presumption of lawful title. *Any party claiming such movable must prove, besides his own right,* the defects in the possession or in the title of the possessor who claims prescription, or who, under the provision of the present article, is exempt from doing so.

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It may be added moreover that, under the law of Quebec, mere possession can seldom be made the basis of an action.

The possessor of any immovable or of a real right, other than a farmer on shares, or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and to be maintained in his possession. (The) person who has had possession of an immovable or real right for a year and a day (can bring) the action for repossession * * * against any person who has forcibly dispossessed him. Art. 1064 C.C.P.

This article is limited to the possessor of an immoveable property or a real right.

In respect of moveable property, the corresponding procedure is the attachment in revendication. But article 946 of the Code of Civil Procedure gives this remedy to the owner, to the pledgee, the depositary, the usufructuary, the institute in substitution and the substitute. As will be perceived, this enumeration does not include a mere possessor as such. The fact that the article enumerates certain classes of possessors is indicative of the intention to exclude the others. Moreover, the procedure for attachment in revendication applies to moveable property only so far as it can be identified. The appellant here does not meet the conditions required.

In the view which we take of the case, neither can this action be maintained as "l'action en répétition de l'indû" (Art. 1047 C.C.), for if Corporation Agencies, Ltd., is in a position to disregard and repudiate the cheques entirely and if the money paid out by the Merchants Bank of Canada to meet them did not belong to Corporation Agencies, Ltd., and was so paid without its knowledge and participation, it follows that the appellant has never paid anything and is therefore not entitled to be reimbursed.

It has been suggested however that the present action might be entertained as being in anticipation of a possible future claim on behalf of Cahan, Sr., or the other corporations whose accounts have been used in the kiting operations. It is urged that this would constitute the required interest in the appellant to enable it to assert its right of action. It will be sufficient to consider the suggestion with regard to C. H. Cahan, Sr., there being no difference in that respect between his case and those of the other corporations.

We are not now called upon to decide whether the appellant company is liable to C. H. Cahan, Sr.. or whether the fraudulent withdrawals by C. H. Cahan, Jr., from its bank account without its knowledge or assent would afford the appellant an answer to a claim by C. H. Cahan, Sr. That is not the ground upon which the action was taken and fought out in the court below. The appellant distinctly put its claim on the ground that it was and always had been the owner of the monies with which the cheques were paid by the Merchants Bank of Canada. In fact, the Corporation Agencies, Ltd., appears to have been careful to avoid any admission of liability towards C. H. Cahan, Sr. In view of articles 1048, 1049, 1050, 1051 and 1143 of the Civil Code, the Corporation Agencies, Ltd., being in good faith, it would seem likely that its absolute lack of knowledge of the operations of C. H. Cahan, Jr., of the irregular deposits made by him and of the subsequent withdrawals of the same amounts would protect it against any liability towards C. H. Cahan, Sr. (See Laurent, 5th ed., vol. 32, page 602, no. 585, at the end; Pothier, vol. II, pp. 497 and 498.)

There are besides other circumstances which make it highly improbable that a claim of that kind will ever be lodged against the Corporation Agencies, Ltd., by its own president.

As for the other sundry corporations or subsidiary companies, where accounts were opened and used for kiting purely and simply, the withdrawals and deposits therein tally to a cent; they never lost anything and they had really nothing to lose.

But suffice it to say that in our view this ground is not open here; for Corporation Agencies, Ltd., has not placed itself in a position where it could base its right of action on such an hypothetical interest. Its very allegation that it was the owner of the funds precludes the idea that it was accountable therefor to somebody else.

And, moreover, if its intention was to claim the monies on the ground that it may have to return them to their respective owners, since it is admittedly impossible to reach any final decision on that point without the proper parties being in the case, as the action stands, we are not in a position to decide whether these other parties can

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claim from the Corporation Agencies, Ltd. If the appellant intended that to be a ground of action, it should have alleged it and should have brought all the required parties into the case so that such an issue might properly be passed upon. Whether, if the appellant be liable to C. H. Cahan, Sr., that liability would give it a right of action against the Home Bank before C. H. Cahan, Sr., asserts and establishes his right of recovery against it is, at first sight, a question admitting of the gravest doubt and which personally we would be inclined to answer in the negative (Pothier, vol. II, no. 498); but it is unnecessary to decide it until it comes up in a proper case.

Finally it would appear that the appellant cannot assert its right to the monies deposited by Cahan, Jr., without committing itself to a ratification of the fraudulent scheme of the latter, in partial execution whereof such deposits were made, and is thus precluded from repudiating the completion of the scheme by the withdrawal of such monies from its bank account. The whole course of dealing by Cahan, Jr., with the Corporation Agencies, Ltd., bank account, whether in drawing on it or in depositing funds to meet the withdrawals, was unauthorized and the principal cannot repudiate the withdrawals and take the benefit of the deposits. The logical position must be that the whole course of dealing should either be entirely repudiated or wholly accepted. The monies which went into Corporation Agencies, Ltd., account, in the course of the kiting operations, went in for the sole purpose of meeting the incoming cheques as they were issued. They were put in with no other object in view than to cover these cheques, which would not, and could not otherwise have been paid; and all this in a kiting game, where, in most instances, no real deposit was made. There was nothing more than a mere playing with paper. It would appear entirely fallacious to add up the successive deposits and permit the appellant to retain them as against the respondent, while charging to the latter the withdrawals by means of the ninety-six cheques which it was the sole purpose of the deposits to meet when they should be presented to the Merchants Bank. It seems unquestionable, notwithstanding the large aggregate amount of deposits and withdrawals, that, in the course of the kiting opera-

tions, a very much smaller amount was actually in turn deposited and withdrawn, with the net result that in the end the real balance of the appellant was in no wise impaired. The following passage from the well-known case of *Atlantic Cotton Mills* v. *Indian Orchard Mills* (1), seems to be absolutely in point and may be adopted, at least as *ratio scripta*, as correctly expressing the situation:

> The rule is general that, if one assumes to do an act which will be for the benefit of another, commits a fraud in so doing and the person to whose benefit the fraud will enure seeks, after knowledge of the fraud, to avail himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured.

See also Demolombe, t. 31, no. 202; Dalloz, Rép. Prat., vo. Quasi-contrat, no. 53. In other words, the appellant cannot be allowed to approbate and reprobate at the same time and in the same action. The purpose of C. H. Cahan, Jr., in making the deposits was exclusively to meet the cheques which he had drawn against them. Ratification of that purpose by the appellant involves approval of the monies being used in pursuance of the object for which they were deposited.

In the result, if the appellant's contention were sound, it would receive an amount of $205,960.37 on the assumption that it may have to account for it to corporations practically brought into being for mere kiting purposes and whose bank accounts balance to the cent, or to Cahan, Sr., on the ground that part of those monies were stolen from him by Cahan, Jr., and were afterwards by the latter deposited in the Merchants Bank of Canada in the name of the Corporation Agencies, Ltd., although they were immediately withdrawn in the same manner, and although the Corporation Agencies, Ltd., had not the slightest suspicion that anything of the kind was going on.

Either the Corporation Agencies, Ltd., might never be called upon or it would be held liable to account. In the former case it would have got and would keep money to which it never was entitled; in the latter, through the instrumentality of the Corporation Agencies, Ltd., Cahan, Sr., would, to the prejudice of the creditors of the Home Bank, recover the money stolen from him by Cahan, Jr., although most of that money had already been lost before

(1) [1888] 147 Mass. 268, at p. 275.

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the first of the cheques here in question was cashed by the Home Bank. It is satisfactory that we are not constrained to a conclusion fraught with such consequences.

For these reasons, the action fails and was properly dismissed.

The formal judgment should, however, be modified by striking from it the direction that costs to be allowed defendant shall include

costs of the schedules and statements specially prepared for this case.

These expenses do not form part of the costs of litigation such as are allowed to a successful party on taxation. They are not covered by defendant's conclusion praying costs. While they might be recoverable as damages, as such they are not claimed. The award of these expenses would, therefore, seem to be *ultra petita*. Moreover, the very special circumstances requisite to justify such a recovery are not presented on the record before us.

As a rule, this court will refuse to interfere with the discretion of the provincial courts in disposing of costs. But this is a case where we think an exception ought to be made. The appeal is *per saltum* and the extraordinary disposition as to costs made by the Superior Court has not therefore received the approval of the Court of King's Bench. These seem to us to be reasons which justify our dealing with the costs as we believe the Court of King's Bench would probably have done, had it been afforded the opportunity. A well-established rule is that, though the appeal involve costs only, the Court of King's Bench will rectify the decision of the court below when the latter appears to have proceeded upon an erroneous principle. *Prowse* v. *Nicholson* (1); *Atlantic Ry. Co.* v. *Trudeau* (2); *Déchène* v. *Dussault* (3). This view was affirmed by this court in *Archibald* v. *Delisle* (4).

Now, in Quebec, costs are fixed by a tariff having the force of law, after it has received the approval of the Lieutenant-Governor in Council. The reports and statements of the accountants in this case were not the result of an investigation ordered or of a reference made by the presiding judge (Arts. 391, 410 C.C.P.), but were prepared at the ex-parte request and in the interest of the defend-

(1) [1889] M.L.R. 5 Q.B. 151.
(2) [1892] Q.R. 2 K.B. 514.
(3) [1896] Q.R. 6 K.B. 1.
(4) [1895] 25 Can. S.C.R. 1.

ant. As such, they cannot form part of the costs prayed for by the conclusions of the defence (*Laurent* v. *City of Montreal* (1); *Hickey* v. *City of Montreal* (2); *Robert* v. *Denault* (3); *Layton* v. *City of Montreal* (4). At best, they must be made the subject of a special demand (*Patenaude* v. *Edwards* (5), and authorities therein referred to).

The judgment of the dissenting judges (Duff and Newcombe JJ.) was delivered by

NEWCOMBE J.—The plaintiff company (appellant) seeks to recover from the defendant bank (respondent) the amount of 94 cheques, in the aggregate $205,960.37, which were drawn upon and paid by the Merchants Bank of Canada at Montreal, together with interest from the respective dates of payment. There is no material difference between the parties as to the facts of the case; these may be stated briefly. The plaintiff is a body corporate under the laws of Canada, having its chief place of business at Montreal, and it was engaged in business as registrar and transfer-agent of the capital stock of joint stock companies and as trustee for the collection of mortgages, insurance, and other company purposes. Prior to the war the plaintiff's business appears to have been active and prosperous, but after the war broke out it became impossible to finance further undertakings; several members of the staff undertook war service, and the business of the company was reduced to the concluding of that which it had in hand, and to the execution of its agency for some companies whose affairs were being wound up. It was in this connection, and owing to losses sustained, that the capital of the company, which was previously authorized to the extent of $500,000, was, on 25th February, 1918, reduced to $50,000. Some changes were at the same time made in the directorate, and, while C. H. Cahan, Sr., who had been serving as president of the company since 1910, continued to hold that office, his son, C. H. Cahan, Jr., and B. F. Bowler became directors, the latter also being charged with the duties of secretary-treasurer. C. H. Cahan, Sr., was a successful lawyer of considerable means. He kept a bank account at the

(1) [1915] 17 Q.P.R. 139.
(2) [1896] Q.R. 12 S.C. 195.
(3) [1902] 9 R. de J. 60.
(4) [1916] 23 R.L. n.s. 132.
(5) [1915] 17 Q.P.R. 203.

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Bank of Montreal at Montreal, another with the agency of that bank in the city of New York, and still another with the Guaranty Trust Company, also in New York, and in each of these accounts there was a large credit balance. While the permanent residence of Mr. Cahan was at Montreal, he was, during the war, very extensively engaged in special work, or professional or other duties connected with the war, and, for this and other reasons which are stated in the evidence, he was frequently absent from home for prolonged periods. Mr. Cahan therefore from time to time, on such occasions, gave his son temporary powers of attorney to transact his banking business; three such powers had been given and had expired when, on 21st September, 1916, Mr. Cahan gave to Cahan, Jr., his power of attorney authorizing the latter

> to sign, endorse, deposit, draw and deliver all such cheques and other orders for the payment of money as he may deem proper in connection with any account of funds on deposit which I may now or hereafter have with the Guaranty Trust Company of New York.

On 30th October, 1916, Mr. Cahan gave to his son a similar power of attorney to make, sign and draw cheques on his account with the agents of the Bank of Montreal in the city of New York. On 25th August, 1917, he also gave to his son his power of attorney, until 25th August, 1918,

> to draw and sign cheques upon the Bank of Montreal, including cheques creating an overdraft, and to make, draw, accept and endorse for deposit only in my account and for my credit all bills of exchange, promissory notes, cheques or orders for the payment of money or other negotiable paper.

Finally, on 11th May, 1918, Mr. Cahan gave to his son his power of attorney to draw and sign cheques upon any chartered bank in Canada with which he (Cahan, Sr.) might have an account, including cheques creating an overdraft, but without limiting the time for execution of these powers. Cahan, Jr., was thus equipped with authority from his father to withdraw, on account of the latter, the funds which were standing to his credit in the various accounts mentioned.

It appears that the young man, unknown to his father, had, since early in 1915, been engaged in stock speculations, and that he had been carrying on a personal account with the defendant bank at Montreal, and another with the Empire Trust Company in New York. It appears moreover that Cahan, Jr., also without the knowledge of

his father, was engaged, with one Geo. V. Green, B. F. Bowler, Morton and Trevor, otherwise known as Carter, and others, in the promotion of a number of companies, among others, Canadian Records Press, Ltd., Dominion Operating Company, Ltd., and Hotel Company of St. John, Ltd., the two first mentioned companies having bank accounts at the Montreal branch of the Sterling Bank of Canada, and the latter having an account with La Banque Provinciale at Montreal.

Cahan, Jr., was an advocate of the province of Quebec and was engaged in his father's office at Montreal, which was situated in the Transportation Building, where the offices of the plaintiff company and of the defendant bank also were; and, in addition to such practice or professional business as he may have had on his own behalf, he attended to minor duties for his father, receiving therefor, from the latter, salary at the rate of $225 per month.

There is in evidence by-law no. 54 of the plaintiff company, which provides that:

> 54. Contracts and engagements on behalf of the company may be made, and cheques, bills of exchange, promissory notes and other negotiable paper may be made, drawn, accepted or endorsed, by the secretary-treasurer, acting jointly with the manager, or with any director of the company, or by any two directors acting together; provided, however, that cheques, drafts, bills of exchange, promissory note or other negotiable paper may be endorsed for deposit only in the company's bank account by either the manager or the secretary-treasurer acting alone.

Previously to 29th March, 1919, the date of the first cheque upon which the plaintiff declares, Cahan, Jr., under his father's power of attorney, had, during the years 1916, 1917 and 1918, already fraudulently withdrawn, for his own purposes, from the agency of the Bank of Montreal in New York and from the Guaranty Trust Company there, substantially the whole of the deposits standing to his father's credit in these accounts; he had also, after becoming a director of the plaintiff company in 1918, turned his attention to the account of the latter as a base of operations against his father's bank account at Montreal, and involved in this fraudulent project were the accounts of the several corporations which Cahan, Jr., appears to have had under his control. At the time of the election of Cahan, Jr., as director of the plaintiff company, and subsequently, its account in the Merchants Bank was, as has already been explained, not very active. The first fraudulent draft upon

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that account seems to have been made on 1st March, 1918. At that time the balance to the credit of the account was $4,591.71; the transactions in the account which are described as regular, during the period from March, 1918, to December, 1919, inclusive, amount in deposits to $81,947.60, and in withdrawals to $79,635.20. In the interval there was also a series of fraudulent withdrawals and deposits by Cahan, Jr., which were not in fact known to the plaintiff company, nor to any of its officers, except Cahan, Jr., and Bowler, and which were not discovered until after 26th December, 1919. The first draft upon which the plaintiff seeks to recover is dated 29th March, 1919. There were 94 of these cheques drawn from time to time during the period from the last mentioned date up to and inclusive of 26th December, 1919. The earlier fraudulent transactions did not come to light until after the commencement of the action. It would appear that Bowler, who was nominally secretary-treasurer of the plaintiff company, placed himself entirely under the direction of Cahan, Jr., who was acting as the company's manager, and signed such cheques as the latter directed him to sign. The cheques upon which the plaintiff claims were drawn on its bank account in the Merchants Bank, signed by Cahan, Jr., as director of the plaintiff company, and by Bowler as its secretary-treasurer; they were presented for payment by or under the direction of Cahan, Jr., not at the office of the Merchants Bank, but at the office of the defendant bank, which credited the proceeds of the cheques to the private account of Cahan, Jr., or, in some cases, paid them to Cahan, Jr., in cash. A number of these cheques, not less than 27, including the cheque of 29th March, 1919, first drawn, served to liquidate the personal indebtedness of Cahan, Jr., to the defendant bank by covering the debit balances against him in his private account. Of the 94 cheques, 67, amounting to $146,429.87, were drawn payable to the order of C. H. Cahan, Jr., six others, amounting to $16,530.50, were drawn payable to the order of the defendant bank, the first of the cheques so drawn bearing date 14th May, 1919. The remaining cheques, 21 in number, amounting to $43,000, were drawn payable to the order of C. H. Cahan, Jr., or, in several cases, to the order

of an agent, his office boy, or Geo. V. Green, or Trevor, each of whom was acting under the direction of Cahan, Jr., or to bearer. The cheques were endorsed by Cahan, Jr., and were presented to the Merchants Bank by the defendant bank, which received from the former the proceeds amounting in the aggregate to $205,960.37, the principal amount sought to be recovered by the plaintiff in the action.

The money which was requisite and available in the Merchants Bank of Canada for the payment of these and other cheques consisted, in addition to the plaintiff's legitimate balance in its bank account, of money diverted by Cahan, Jr., through the fraudulent use of his father's powers of attorney, from the latter's bank accounts; deposits of some trust funds which were in the plaintiff's custody, and to which Cahan, Jr., had access; deposits made by Cahan, Jr., out of his private account, or, under Cahan, Jr's., direction, from the accounts in other banks of Geo. V. Green, who was an accomplice of Cahan, Jr., by means of cheques in plaintiff's favour drawn against Green's accounts in the Standard Bank of Canada, and in the Banque d'Hochelaga; cheques of the Hotel Company of St. John, drawn on La Banque Provinciale in plaintiff's favour; cheques of the Dominion Operating Company, drawn on the Sterling Bank; cheques to a comparatively small amount on the Montreal City and Savings Bank; a cheque of the International Exploration Company, Limited, drawn on the Bank of Toronto, and some small miscellaneous deposits of cheques and cash, the sources of which have not been definitely ascertained. These deposits amount in total to a sum much in excess of the amount of the drafts now in suit, and the total ascertained defalcations of Cahan, Jr., likewise greatly exceed the latter amount; but the net total amount admittedly drawn by Cahan, Jr., from his father's bank accounts by means of the fraudulent cheques, which he drew in his father's name in favour of the plaintiff, and which were paid into the plaintiff's account in the Merchants Bank is ascertained at the sum of $132,828.45. These facts appear not to be in dispute. The deposits made by Cahan, Jr., in the plaintiff's bank account may also include, so far as disclosed by the evidence, amounts in the sum of $97,184.21, not traced to any source other than

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Cahan, Jr., and which may have belonged to him. The withdrawals which Cahan, Jr., made under his powers of attorney against his father's bank accounts extended over a considerable period previous to 1919, and continued during the whole of that year down to 26th December, when Cahan, Jr., disappeared; also, during that period, large deposits were made by Cahan, Jr., to the account of his father in the Bank of Montreal. These deposits were of course made to assist or to promote and maintain the fraudulent project in which Cahan, Jr., was engaged of converting to his own use the funds belonging to his father and to the plaintiff, the immediate source of the diversion being the plaintiff's bank account in the Merchants Bank.

There seems to be no doubt that in the course of this fraudulent business there was considerable kiting of cheques, a process which is thus described by the expert accountant who testified for the defendant:

> Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque, that is kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more.

Bowler, who was a party to the transactions which he describes, and who was examined as a witness for the defendant, upon commission, says that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank; that cheques are passed from one bank account to another and

> credit is obtained at the bank into which they are paid for which they are debited at the bank on which they are drawn.

It is in this sense apparently that the word is used in the case; but, whatever may have been the nature and effect of the kiting operations, it is apparent, as I shall show, that there was, outside of these, real money involved in the deposits which went to the credit of the plaintiff's account, in addition to the credits which were the result of its ordinary legitimate transactions, to an amount greater than that of the fraudulent cheques upon which this action is brought.

On the night of 26th December, 1919, C. H. Cahan, Jr., who had up to that time been living at Montreal, disappeared. He has not since been seen by anybody concerned in the case, and none of these knows where he is to

be found. On the following morning his father learned that he had been meddling with the accounts and misappropriating money; enquiries were made, and the case was put into the hands of accountants for investigation. Soon afterwards the action was brought, the plaintiff's declaration being delivered on 7th April, 1920; the plaintiff declared upon 96 cheques, but the claim as to two of them was subsequently abandoned because it was found that these two cheques had not been cleared at the defendant bank. The ground of the action was that Cahan, Jr., fraudulently, in breach of his trust and duty as a director of the plaintiff company, drew these cheques against the plaintiff's account at the Merchants Bank; that the defendant bank to which the cheques were presented for payment cashed them upon the endorsement and at the request of Cahan, Jr., placing the proceeds to the credit of the latter's private account, often in discharge of Cahan, Jr's., overdrafts, or paying the proceeds of them to him directly in cash at the wicket, and that, inasmuch as these cheques were, with few exceptions, made payable to Cahan, Jr., personally, who, in all cases, to the knowledge of the defendant bank, also personally had the benefit of the proceeds, the latter acquired and became the holder of the cheques and received the proceeds from the Merchants Bank with knowledge or notice that Cahan, Jr., was, fraudulently and in breach of trust, acting in excess of his authority in so procuring and disposing of the proceeds of the plaintiff's cheques for his own individual use and benefit.

The defendant bank pleaded a general denial, and subsequently, by amendment, raised the defences that the cheques were authorized by the plaintiff; that the defendant took the cheques in the ordinary course of its banking business in good faith, and without notice or knowledge of any defects in the title of Cahan, Jr.; that the cheques were not taken by the defendant for collection or as an agent, but in due course and for value, and that the defendant bank, upon receiving the cheques, became the holder and owner of them in due course. Moreover the defendant pleaded that, for the whole of the period during which the cheques were drawn and paid, the plaintiff had not assets to represent the amount of the cheques, and that

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the plaintiff did not lose the whole or any part of the sum claimed in the action by reason of the cheques, the full amount thereof having been directly or indirectly accounted for, returned or paid to the plaintiff by Cahan, Jr., and that, by reason of such accounting, return and repayment, the plaintiff's claim was not maintainable, even as against the latter.

The action was tried before Maclennan J., of the Superior Court, who found that the defendant did not act in good faith, and did not not become the holder of the cheques in due course; that the defendant had notice of the defective title under which Cahan, Jr., held the cheques; that the sources from which the plaintiff received the money which was standing to its credit in its bank account in the Merchants Bank, and out of which the cheques were paid, were irrelevant to the issues between the parties; that the plaintiff had established its allegations; that the defendant had failed to establish a defence, and therefore that the plaintiff was entitled to recover the amount claimed with interest.

Upon appeal to the Court of King's Bench, this judgment was set aside; the rulings at enquête which rejected evidence offered tending to show that the plaintiff's loss was less than the amount claimed were reversed, and it was ordered that the record should be remitted to the Superior Court; that the defendant should have leave to amend; that the enquête should be re-opened, and that the parties should be accorded an opportunity to examine such further witnesses, including Bowler, as they might call in support of the issues as amended.

During the first trial the defendant had endeavoured to introduce evidence to show that, upon an accounting as between the plaintiff, Cahan, Sr., Cahan, Jr., and the other individuals and corporations concerned, the plaintiff had not, in the period covered by the cheques which are the subject of the action, funds of its own available in its bank account for the payment of those cheques; that the proceeds received by the defendant were not moneys of the plaintiff, and that the plaintiff had therefore suffered no loss. This evidence was rejected as inadmissible, the court holding that the accounts could not be taken in the absence of the parties to them, who were not joined in the action,

but intimating that it would receive any evidence of the repayment to the plaintiff of the sum claimed. After the conclusion of the evidence and while the case was under consideration, the defendant presented a petition for leave to amend the defence and to re-open the enquête. The antepenultimate paragraph of the defence, as pleaded, was in these words:

46. That defendant further pleads and puts in issue that during the whole of the period mentioned in the plaintiff's declaration it had not assets to represent in whole or in part the sum of $209,028.12, which it pretends to have lost by reason of the facts set up in its declaration, and that as a matter of fact, the plaintiff did not lose the whole or any part of the sum sued for in this cause by reason of the cheques upon which the said action is based, the full amount of the same having been directly or indirectly accounted for, returned or repaid to the plaintiff by and for the account of the said C. H. Cahan, Jr., and by reason of said accounting, return and repayment plaintiff's pretended claim upon the said cheques would not be and is not maintainable even as against the said C. H. Cahan, Jr.

The amendment desired was by way of supplement to this paragraph, with the object of setting out with more particularity that the moneys deposited in the Merchants Bank, out of which the cheques in question were paid, had been so deposited, or entered to plaintiff's credit, as a result of the cheques fraudulently drawn upon the account of Cahan, Sr., or deposited in the Merchants Bank by Cahan, Jr., for kiting purposes, and that the amounts paid out of the account by the Merchants Bank in discharge of the cheques upon which the plaintiff claims had been compensated or made good by the deposit of other cheques by Cahan, Jr. The defendant also desired leave to examine Bowler who had left the country, and whose place of abode was unknown at the time of taking the former evidence; also permission to examine further witnesses, and to re-examine C. H. Cahan, Sr. This application was refused by the learned trial judge; but upon appeal it was granted by the Court of King's Bench. It is clear I think that the judgment of the latter court, when interpreted in the light of the reasons given, was intended only to vacate the judgment of Maclennan J. in order that the defendant might plead the paragraphs supplementary to paragraph 46 of the defence, which set forth with further particulars the defence generally indicated by that paragraph, and to re-open the enquiry for the admission of Bowler's testimony, and such other material evidence as might be tendered. Nothing

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whatever was determined as to the merits of the case, or the effect of the additional evidence which the defendant desired to produce. The court seems to have been of the opinion that this evidence was of a character of which the relevancy could not be determined without hearing the testimony, and perhaps this was due to some misapprehension of the learned trial judge's reason for rejecting the evidence which is expressed in his statement

> that any evidence of accounting between the plaintiff and outsiders, who were not parties to this action, or the evidence of any moneys put into the Merchants Bank apparently tending to diminish the total losses, would not be evidence in this case. If this action is to be maintained I should think it is to be maintained for the total amount, the Home Bank having obtained $209,000 belonging to Corporation Agencies Limited. I don't think it is material to the defendant where the company got that money, or whether part of that money has been paid back through the activities of C. H. Cahan, Jr., operating on accounts which he had no right to deal with;

the learned judge did however subsequently intimate that if the defence had any evidence of repayment of the amount claimed he would receive it. It would appear moreover that the Court of King's Bench considered that the case was not ready for final determination upon the record submitted, and that the defendant should be allowed generally to enlarge its evidence, in addition to the introduction of the testimony which had been excluded at the trial.

At the second trial the case was heard before Duclos J. The plaintiff renewed its objection to an accounting with those who were not parties to the action, and to evidence of deposits which were not appropriated to reduce or satisfy the plaintiff's claim. The objection was over-ruled by the learned judge, as governed by the judgment of the Court of King's Bench, and a large volume of additional evidence was taken, including the testimony of Bowler, who had been examined in England upon commission, and the evidence of expert accountants, who had been engaged in the case on defendant's behalf, and who produced a number of statements or exhibits which they had compiled to illustrate or establish their conclusions, covering 84 pages of the third volume of evidence. In the result Duclos J. found that the defendant had received the cheques in question for value in good faith, and without knowledge or notice of the defect in title of Cahan, Jr., which the plaintiff alleged; that the circumstances existing at the

times when the cheques were received by the defendant were of a nature to quiet or lull to sleep any suspicion which the defendant bank might otherwise have entertained; that the plaintiff had suffered no loss by reason of the withdrawal of the funds represented by the cheques, and that the money with which these cheques were met was not the money of the plaintiff, but was stolen money, to which the plaintiff could acquire no title.

Finally (he says), to whom belong the moneys with which the series of cheques were paid? These moneys were stolen by Cahan, Jr., from his father C. H. Cahan, from his funds in the Bank of Montreal here, and the New York branch of the Bank of Montreal, and in the Guaranty Trust Company of New York, by means of a power of attorney which he held from his father. Being stolen money, Cahan, Jr., could not transfer the title to it to the plaintiff or to anybody else, and when he deposited these moneys in the Merchants Bank of Canada it was not intended for the plaintiff, but for himself, and he withdrew it from the bank by the legal means which the plaintiff corporation had itself placed at his disposal.

The plaintiff appealed from the judgment of Duclos J., directly to this court.

Upon the merits of the case I find myself in substantial agreement with the judgment pronounced by Maclennan J. upon the first trial, and I do not think that the evidence given later changes the aspect of the case. I have come to the conclusion that the defendant received the proceeds of the cheques in question from the plaintiff's bank account out of moneys which were in the plaintiff's possession, and without the plaintiff's authority, having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Jr., the defendant's endorser, was not entitled to the cheques, or to appropriate their proceeds, and that in these circumstances the plaintiff is entitled to recover from the defendant the amount so received by it as money had and received by the defendant to the plaintiff's use, or as money of the plaintiff received by the defendant which was not due to the latter. Art. 1047 C.C., *Sinclair* v. *Brougham* (1); *John* v. *Dodwell* (2).

There can be no doubt that Cahan, Jr., as a director of the plaintiff company, and Bowler as director and secretary-treasurer, could not lawfully exercise the authority which they had to draw cheques upon the company's bank account for the business of the company in a manner to appropriate the amounts standing to the plaintiff's credit

(1) [1914] A.C. 398, at p. 436. (2) [1918] A.C. 563, at p. 569.

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to their own purposes, or to the purposes of either of them individually. The rule is universally recognized and founded upon abundant authority that an agent, whether of a company or person, cannot be permitted so to execute his mandate as to bring his own interest into conflict or competition with that of his principal. In *Parker* v. *McKenna* (1), the Lord Chancellor (Cairns) says:—

> Now the rule of this court, as I understand it, as to agents, is not a technical or arbitrary rule, it is a rule founded upon the highest and truest principles of morality. No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.

In *North West Transportation Company* v. *Beatty* (2), Sir Richard Baggallay, pronouncing the judgment of the Judicial Committee of the Privy Council in a Canadian case, says:—

> A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of the several directors as to the managing or sole director.

In the application of this rule the principle has been enunciated, and it is established by conclusive authority, that when an agent gives to his individual creditor, or for his personal benefit, the paper of his principal, and thus uses the latter's credit for his private purposes, without authority of his principal, not only is he guilty of fraud, but the person who accepts the paper has, from the very nature of the transaction, *prima facie* notice that the agent is mis-applying the security or credit of his principal, and therefore acting without due authority.

In re Riches Ex Parte Darlington District Joint Stock-Bank Company (3), Lord Westbury said:—

> I may also adopt a passage which I find in a book of considerable merit, the late Mr. Smith's Compendium of Mercantile Law,—a passage which was cited with great approbation by judges of the Court of Common Pleas in the recent case of *Leverson* v. *Lane* (4), and which is as follows:—
>
> "It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the

(1) [1874] L.R. 10 Ch. App. 96, at p. 118.
(2) [1887] 12 A.C. 589, at p. 593.
(3) [1865] 4 De G. J. & S. 581, at p. 586.
(4) [1862] 13 C.B. N.S. 278, at pp. 282, 285.

security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so."

It is immaterial whether the partnership security is applied in discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own bankers to be applied for his own personal purposes.

In *John* v. *Dodwell & Company, Ltd.* (1), Lord Haldane spoke as follows:—

However, it is none the less clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *prima facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction.

There is a very apt statement in *Stainer* v. *Tysen* (2), where the defendant executed a broad power of attorney authorizing the attorney to draw and endorse notes for and in the name of the defendant, and in the exercise of this power the attorney made and delivered a promissory note to satisfy an indebtedness to the plaintiff of a firm of which the attorney was a member, but in which the defendant had no concern. The note was made in the defendant's name, payable to the firm, and by the firm endorsed to the plaintiff. The court, dismissing the plaintiff's action upon this note, said:—

There is no doubt that a power drawn up nakedly to do acts for and in the name of the principal negatives all idea of interest in the agent, or authority to act for the benefit of any one beside the principal. This limitation therefore, the plaintiff was bound to notice. * * * When a person sees the note of a stranger made and endorsed by one of the payees to discharge their own debt, and takes such an endorsement, he has seen enough, in connection with the power, to raise a strong suspicion, not to say conviction, that the whole is a fraud upon that stranger. It is too much to allow that he may shut his eyes and say, he supposed there were some special circumstances on which the attorney had a right thus to act. The transaction is, on its face, out of the ordinary course of business.

There is also a lucid exposition of the law to be found in the judgment of the Circuit Court of the United States for the southern division of New York in *Anderson* v. *Kissam et al* (3), a passage which was not questioned, although the

(1) [1918] A.C. 563, at pp. 568-569.

(2) [1842] 3 Hill (N.Y.), 279.

(3) [1888] 35 Fed. Rep. 699, at p. 703.

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judgment was reviewed by the Supreme Court upon another point. The senior circuit judge said:

> Therefore, if there is any significance in the fact that a bank president or cashier offers negotiable paper of his corporation, made by him in his official character, in payment of his personal debt, or to raise money for his personal use, it matters not that bankers generally do not appreciate it. If they regard the transaction as equivalent to one in which the individual comes with money in hand, they ignore its real character, because in that case he comes with what purports to be his own, having the possession which implies title and ownership, and the right to use it as he sees fit. When he comes with money obligation of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without authority, the transaction is a very different one. Every person who takes such an obligation must ascertain at his peril that the agent who has made it was authorized to do so; and the moment that it appears that the contract has been made for the agent's own use and benefit, that moment his authority is impugned and impeached. No principle of the law of agency is better settled than that no person can act as the agent for another in making a contract for himself. Therefore it is that a bank president or cashier has no implied authority to bind his corporation to negotiable paper made for his own use; and if it appears upon the face of the paper that it is payable to the individual who has made it in an official capacity, the obligation is nugatory, and no purchaser can enforce it.

These American decisions serve to illustrate a rule which is in conformity with the judgments of final authority in England, and, as said by Cockburn C.J., in *Scaramanga* v. *Stamp* (1):

> The sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

The principle under consideration underlies the provisions of the Civil Code respecting mandate. By article 1704 it is provided that

> the mandatory can do nothing beyond the authority given or implied by the mandate.

By article 1706,

> an agent employed to buy or sell a thing cannot be buyer or seller of it on his own account.

The commentaries of the French authors are practically in accord. Delange, Des Sociétés Commerciales, 1843-1-255; Dalloz, Jur. Gén., Rép. 40; Société, no. 927, p. 561; Rép. 30, Mandat—no. 386, p. 741; J. Bédarride, Droit Commercial, Des Sociétes, 1857, Liv. 1, Tit. III, pp. 159 and 185.

It would be easy to multiply the references. The principle was affirmed in this court in *Creighton* v. *The Halifax*

(1) [1880] 5 C.P.D. 295, at p. 303.

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Banking Company (1), where two firms were carrying on different businesses, Esson & Company, which was largely indebted to the respondent bank, and of which William Esson was a member, and Creighton & Company, of which the appellant Samuel Creighton and William Esson were also members, Creighton having no interest in the firm of Esson & Company. William Esson drew a promissory note in the name of Creighton & Company, payable to Esson & Company, without the authority of Creighton, and endorsed it in the name of Esson & Company to the respondent bank on account of the indebtedness of Esson & Company to the bank. Sir William Ritchie C.J., gave the following reasons for judgment in agreement with the other members of the court:

We do not think it necessary to hear further argument in this case. I think the evidence and findings of the jury afford sufficient material to establish that Esson signed the note in question in the name of the firm of Creighton & Co. without the authority of his co-partners, that he endorsed it in the name of Esson & Co.—whether with or without authority is not material—and that he took it to the bank and had it discounted, and I am of opinion that the bank had a fair intimation that Esson was using the name of the firm of which Creighton was a partner, for his own private purposes, which was an illegal transaction; therefore, I think it should have put the bank on enquiry as to Esson's authority, and the facts shown threw on the plaintiffs the burthen of showing that the transaction was a right and proper one. Had they made the enquiries they should have made they would have seen that Essen was using the name of Creighton & Co. without authority, and that they should not have discounted the note. Not having made such inquiries, the loss should not fall upon Creighton, the partner whose name was unlawfully used, but upon the bank.

There seems to be no material difference between *Creighton's Case* and this one, although in the former the fraud was committed by means of a promissory note, while in the latter the money was withdrawn directly from the plaintiff's bank account by means of cheques made payable to the fraudulent director or agent.

The incapacity of an agent in such circumstances to use the credit of his principal for his own benefit seems thus to have been so well established that upon first impression it seems wonderful that a bank would pay these cheques without any inquiry or explanation to ascertain or to show that they were issued by the plaintiff's authority. A bank cashier of ordinary experience and care should have been

(1) [1890] 18 Can. S.C.R. 140.

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put on enquiry when these cheques were presented to him by a private customer, since, by the terms of the cheques themselves, it was open to doubt whether the customer had a good title to them. *Ross* v. *London County Westminster and Parr's Bank Ltd.* (1). Mr. Scott, the manager of the respondent bank, tells us, however, why it was that he took the cheques. It was because he relied upon the integrity of Cahan, Jr., and upon his ability to discharge the obligations involved in his endorsements of them and the receipt of their proceeds. Mr. Scott explains that Cahan, Jr., had kept his account in the respondent bank from the latter part of 1913 or the beginning of 1914; that the account had been absolutely satisfactory, and that prior to the disappearance of Cahan, Jr., in 1919, he had never heard anything against his character or integrity. Mr. Scott gave the following testimony:

Q. P.C.-85 is a cheque dated November 1, 1919, for $4,000; that cheque was brought to your personal notice and initialed by you?

A. It must have been, yes, initialed by me.

Q. Did you know what the capital of the Corporation Agencies Limited was at that time?

A. No, sir.

Q. That cheque was not accepted by the Merchants Bank of Canada at the time you initialed it for payment?

A. No, sir.

Q. You did not know what the financial standing of the plaintiff, the Corporation Agencies Limited, was at that time?

A. No.

Q. Then on what were you relying for protection of your bank at the time you initialed that cheque and authorized the payment of $4,000 in cash to C. H. Cahan, Jr.?

A. On C. H. Cahan, Jr's., endorsation.

Q. Did you at the time you initialed this cheque regard it as peculiar that C. H. Cahan, Jr., was drawing a cheque to his own order for so large a sum as $4,000?

A. No, sir, I did not.

And again, generally:

Q. Did it not sound a note of warning to you, Mr. Scott, when Mr. C. H. Cahan, Jr., was depositing cheques of a company of which he was director to his own personal credit?

A. Having the confidence in Mr. C. H. Cahan, Jr., that we had, it never entered our heads.

Q. And really you say you were relying upon the financial credit and stability of C. H. Cahan, Jr.?

A. Yes.

In these circumstances I see no reason for the contention of the respondent bank, founded upon the judgments in

(1) [1919] 1 K.B. 678, at p. 686.

Morison v. *London County and Westminster Bank* (1), a case which is also distinguishable upon other grounds, that its officers paid these proceeds to Cahan, Jr., because they were lulled to sleep by the fact that the payment of previous similar cheques by the bank in like manner had not at the time elicited any protest or objection from the plaintiff company. I should think that Mr. Scott, if he gave the matter the least consideration, must have realized that these cheques were *prima facie* irregular and imported absence of authority; but he appears to have had great confidence in Cahan, Jr.; he was always ready to initial the cheques and to pass them on for payment by the bank when, as sometimes happened, his attention was especially directed to them by his clerks, and evidently it was because he relied upon Cahan, Jr., and the latter's bank account, that he abstained from enquiry.

The defendant put in evidence by-law no. 22 of the plaintiff company which provides as follows:—

22. No director shall be disqualified by his office from contracting with the company either as a vendor, purchaser or otherwise nor shall any such contract, nor any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested, be avoided; nor shall any director so contracting or being interested, be liable to account to the company for any profit realized in any such contract or arrangement, by reason of such director holding that office or of the fiduciary relation thereby established, but the nature of the director's interest must be disclosed by him at the meeting of the board of directors at which the contract or arrangement is determined on, if his interest then exists, or, in any other case, at the first meeting of the directors after the acquisition of his interest.

And it is contended that inasmuch as the plaintiff company had thus allowed its directors to contract with it, and inasmuch as by-law 54, which has already been quoted, provides that contracts and engagements on behalf of the company may be made and cheques drawn or endorsed by the secretary-treasurer, acting jointly with any director, the defendant bank was entitled to assume without enquiry, upon presentation of the cheques for payment, that the director, Cahan, Jr., had received them from the company in discharge of contractual obligations to him which the company had undertaken; and moreover, that because the cheques were signed not only by the director, Cahan, Jr., who was the payee, but also by the secretary-treasurer of the plaintiff company, the au-

(1) [1914] 3 K.B., 356.

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thority for the issue of these cheques was sufficiently certified by the latter and that this fact in itself made further enquiry unnecessary. It will be remembered, however, that the defendant paid these cheques without any enquiry whatsoever, or any information, either from the plaintiff or from Cahan, Jr., as to the reason why, or the circumstances in which, he was entitled, or claimed to be entitled, to receive from the plaintiff any of the payments for which the cheques were drawn. If there were proof that Cahan, Jr., had represented to the manager of the defendant bank that he was a contractor with the plaintiff company, and that the cheques were issued to him in payment or on account of moneys payable to him under his contract, and if the company had been informed of by-law no. 22, or if Cahan, Jr., had directed attention to it, as showing that he was not disqualified to contract with the company, it may possibly be, I do not decide it, that such an explanation would be held reasonably sufficient to justify the bank in the payment of the cheques; but neither did Cahan, Jr., nor anybody on his behalf, or on behalf of the plaintiff company, inform the bank or pretend that any contract had been made in pursuance of the by-law, or that the payments were being made on that account. Moreover, in the absence of any by-law upon the subject a director's disqualification to contract with his company is not absolute; he may, disclosing his interest, contract with the company's consent, and there is thus always a possibility that payments may be due by a company to one of its directors as a contractor. That possibility I suppose existed in every one of the decided cases, but it was never suggested that it afforded any justification or excuse. A general by-law authorizing the making of such contracts may lead to the conjecture of this explanation, but it does not by any means exclude the suspicion of fraud nor rebut the *prima facie* evidence of fraud which the paper itself discloses; it does not in my opinion justify the banker to abstain from enquiry, especially when, as in the present case, it is not shown that the bank considered or was even aware of the by-law, and it is not pretended that the bank was in fact influenced thereby. On the contrary, as I have already shown, the bank took the cheques because of the endorsation of Cahan, Jr.

Then, as to the excuse that the cheques payable to Cahan, Jr., the defaulting director, were signed not only by him but also by Bowler, the secretary-treasurer of the plaintiff company, the answer is that two directors, no more than one, can authorize the misappropriation of the company's money, and that *prima facie* the payee of a cheque receives the proceeds for his own purposes, and when therefore a director, either solely or jointly with another, signs a cheque upon the company's bank account in his own favour the cheque on its face is evidence of absence of authority, or the exercise of his powers for a purpose which is incompetent to him. In *Creighton* v. *The Halifax Banking Company* (1), to which I have already referred, Strong J. quotes the following passage from the judgment of Lord Westbury in *Re Riches* (2):—

(1) 18 Can. S.C.R. 140, at p. 145. (2) 4 De G.J. & S. 581.

> If an individual partner gives directly to his private creditor the paper of his firm for his own individual benefit and thus uses the credit of the firm for his own private purposes in that case such partner is guilty of fraud.

And he adds, upon the authority of Lord Justice Lindley, that such a transaction

> is fraudulent against the firm whose name is affixed to the paper, even if the partner using it does not himself sign the name of the firm; *a fortiori* when he does sign it.

Moreover it is stated in Lindley on Partnership, 5th ed., p. 171:—

> Again, although a partner may be a *bonâ fide* holder, for his own separate use, of the paper of his firm, yet if he gives such paper in payment of a separate debt of his own, this is *primâ facie* an irregular proceeding and a fraud on his co-partners. Consequently, the creditor taking the paper must rebut this *primâ facie* inference before he can compel the firm to pay.

Therefore I conclude that, while it may be less likely that two directors would lend themselves to the fraudulent purpose of appropriating the company's money for the private use of one of them than that the latter alone should do so, it is nevertheless, even where two directors join, *primâ facie* evidence of fraud that one of them is making use of the company's funds for his own individual purposes.

The irregular or fraudulent deposits to the credit of the plaintiff's account in the Merchants Bank were made by means of cheques payable to the plaintiff's order, and thus required the plaintiff's endorsement to authorize their deposit; these cheques could therefore have come to credit

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only by the endorsement of Cahan, Jr., or Bowler, who had the plaintiff's authority to endorse cheques payable to its order.

The officers who endorsed the cheques had, by the company's by-laws, explicit authority to endorse. Thus the money found its way into the plaintiff's possession as a credit belonging to the plaintiff and under its control, because it went into the plaintiff's bank account on which the plaintiff could have operated. If the plaintiff's officers, other than Cahan, Jr., and Bowler, did not in fact know that the money was credited before the defendant drew it out, it was because they blindly trusted Cahan, Jr., and Bowler. Certainly they had means of knowledge by the exercise of which, with ordinary diligence, they would have become aware of what was taking place in the company's bank account; the plaintiff cannot, I should think, permit its bank account, for a year or more, to be made the repository of other people's money by its appointed and entrusted officers, to whom was in fact committed the management of its business, and escape liability upon the ground that it was ignorant of the deposits. *Marsh* v. *Keating* (1); *Jacobs* v. *Morris* (2), and upon appeal (3); *In re Carew's Estate* (4); *Le Neve* v. *Le Neve* (5); *In re European Bank* (6); *Rolland* v. *Hart* (7); *Boursot* v. *Savage* (8).

There can be no doubt as to the validity and binding effect of the deposits as between the plaintiff and the Merchants Bank; they were made in strict accordance with authority conferred. No question of ratification, express or implied, arises involving an assumption of responsibility by the plaintiff company for the fraudulent outgoings from its account. The plaintiff having received the money became liable for its proper application. It promptly repudiated all authority for the persons concerned with the cheques by which the money was withdrawn. I have shown that the defendant bank had no title to them. It is a part of the defendant's case that it bought these cheques from Cahan, Jr., and collected their proceeds, not as his agent or man-

(1) [1834] 1 Bing N.C., 198.
(2) [1901] 1 Ch., 261.
(3) [1902] 1 Ch., 816.
(4) [1862] 31 Beav. 39, at p. 46.
(5) [1747] 1 Ves. Sr. 64, at p. 68.
(6) [1872] L.R. 8 Ch. App. 41.
(7) [1871] L.R., 6 Ch., 679, at p. 681.
(8) [1866] L.R. 2 Eq., 134.

datory, but as the owner of the cheques and for its own benefit. Thus the defendant wrongfully converted the cheques to its own use and received their proceeds.

The defendant bank, having acquired the cheques in suit upon the faith of the endorsement of Cahan, Jr., the payee, cannot justify its claim to them except by establishing the title of Cahan, Jr.; and if, as Lord Herschell said in *The London Joint Stock Bank* v. *Simmons* (1),

> When it is said that a person is put on enquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made enquiry; he cannot better his position by abstaining from so doing,

then it must be taken that the defendant bank had knowledge, when paying the cheques, that they were unauthorized by the company, and therefore is not entitled to urge that the payment of these cheques served lawfully to entitle it to the money by which the plaintiff's balance was reduced.

The deposits in the plaintiff's bank account, out of which these cheques were paid, were not the less in the plaintiff's possession because its accountability for them, or for some portions of the blended fund, may depend upon the tracing of the money to its sources, or upon other considerations affecting its ultimate ownership. The accounting for the various amounts paid in, or the application of these sums, may be a matter of some difficulty. Questions of set off or compensation and of the imputation of the payments may arise, but these do not affect the defendant's present liability to restore the amount which it withdrew without authority. The plaintiff, accepting its responsibility to make proper application of the funds which came into its possession, is entitled to have these funds in hand. It is useless to contend that there were no assets or money of the plaintiff involved. The deposits were treated as money by the Merchants Bank which gave credit for them to the plaintiff in its bank account, and subsequently paid them out to the defendant in response to the fraudulent drafts which it presented. It seems not to be questionable that the deposits in the Merchants Bank were money in the plaintiff's hands, or that when withdrawn they actually were money in the hands of the defendant. In *Spratt et al* v. *Hobhouse et al* (2), Best C.J. said:

(1) [1892] A.C., 201, at p. 220. (2) [1827] 4 Bing. 173.

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It has been established even since the case of *Longchamp* v. *Kenny* (1) that if a party gives another what may be readily turned into money, it may be treated as such in an action for money had and received. * * * The principle in all cases is, that if a thing be received as money, it may be treated and recovered as such.

And Park J., said:

According to all the cases, that which has been treated as money by the parties must be considered as such by the court.

The defendant bank has presented a number of accounts prepared by the accountants whom it retained for the purposes of the action, covering the period from the end of March, 1919, to 26th December following, during which the cheques in suit were made and issued, with the object, so far as I can perceive, of showing that, if the plaintiff's interest in this action is, as I understand the defendant to contend, limited to the amount by which the balance in its bank account at the beginning of the period exceeded the amount which stood to its credit at the end of the period, that excess is negligible. It is said that the plaintiff's balance in its account in the Merchants Bank on 27th December, 1919, after the last of the fraudulent cheques had been paid, was not less than it was nine months previously when Cahan, Jr., made the first of the cheques which are the subject of the action. But, even if this were so, it ought not to affect the plaintiff's right of recovery, because, nevertheless, in the interval, the defendant withdrew from the plaintiff's account, with which it had no authority to meddle, the total amount claimed in the action; and it cannot of course justify this trespass, and the conversion of the deposits, either upon the ground that the money which it appropriated came into the plaintiff's account and possession in the period during which Cahan, Jr., and the defendant were illegally operating upon the account, or because the balance to the credit of the account consisted for the greater part of deposits made by Cahan, Jr. Indeed this contention is but a restatement of the argument that possession of property does not give title as against a wrongdoer who converts it, and that argument, in whatever form it is stated, must, as I shall presently show, upon principle and authority be rejected.

The results of the accounts which the defendant submits are founded very usually upon facts which are not

(1) [1779] 1 Doug. 137.

disputed; but in other respects they depend upon inferences which might or might not be found to coincide with the facts which would appear if the individuals or corporations concerned, and whose moneys are said to be represented in the deposits, were parties or represented in an accounting; and it is, I should think, obvious that the plaintiff's right to recover the possession of the money of which it was deprived by the defendant cannot be affected by a partial or *ex parte* accounting or by evidence of the character submitted. There can only be a conclusive accounting by agreement of the parties or by enquiry and judgment of the court in proceedings in which they are represented.

It is unnecessary to consider the effect of the kiting of the cheques, because it appears to be certain that, independently of any cheques which represent kiting transactions, there is actual money in the case to an amount in excess of that which the plaintiff claims. One of the defendant's exhibit shows that there were net defalcations of Cahan, Jr., in respect of securities and money which actually belonged to the plaintiff amounting to $38,961.92. McDonald, the defendant's expert accountant, testifies in effect that during the time from 29th March to 31st December, 1919, there were deposited in the plaintiff's account in the Merchants Bank $142,345.60 from Cahan, Sr's., account, and that during the same period there were deposited $97,184.21 from Cahan, Jr's., account in the defendant bank; it has been found impossible to ascertain the source of the latter amount; it is thought to represent profits derived by Cahan, Jr., from his stock speculations; that perhaps is mere conjecture; but although, in the absence of strict accounting, the origin of the deposits cannot definitely be ascertained, it seems to be a perfectly legitimate and indeed necessary inference from the evidence that an amount considerably more than that which is claimed in the action came from sources which had nothing to do with the kiting of cheques. I have already shown that according to the findings of the trial judge, the money which paid the fraudulent cheques was stolen from Cahan, Sr.

The defendant bank contends that it is entitled in this action to any relief to which Cahan, Jr., would have been

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entitled, if the plaintiff company had proceeded directly against him, and the defendant relies upon art. 1031 of the Civil Code, which provides that:—

> Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so, with the exception of those rights which are exclusively attached to the person.

But, to mention only one of the answers to this contention, the defendant bank is not a creditor of Cahan, Jr., and its principal defence in the action depends upon the denial of facts out of which, in the transactions involved in the case, it could become a creditor. I am satisfied that the defendant derives no advantage for purposes of the present action from art. 1031 C.C.

In the view of the trial judge the case of *"Mr. A."*, *Robinson* v. *Midland Bank, Ltd.* (1), is decisive of this action, and he would reject the plaintiff's claim because the moneys to the credit of the plaintiff, in the Merchants Bank, with which the cheques in question were paid, were, as he says, stolen by Cahan, Jr., from his father's funds in the Bank of Montreal (Montreal and New York branches) and the Guaranty Trust Company of New York, and he applies an observation of Lord Darling's judgment, who is reported to have said:—

> This money was stolen from an Indian gentleman. If it were stolen from him, it remained his still, and nobody could give anybody else title to it, no matter what transactions were gone through.

Upon the assumption that it was stolen money, deposited by the thief in the plaintiff's account in the Merchants Bank, that the defendant bank received in payment of the cheques, it may be observed that to this extent there is a similitude between this case and that of *"Mr. A."* in that the plaintiff here seeks, as did the plaintiff in the case of *"Mr. A."* to recover from a bank stolen money which had found its way into the bank. But in the case of *"Mr. A."* the plaintiff failed because the money had not been received by the bank for his account and he had no title and no right of possession, not because the money had been stolen, while in the present case the Merchants Bank held the money for the plaintiff, and the latter has at least the right and title of possessor which is sufficient to enable it to maintain this action as against the defendant which had wrongfully deprived the plaintiff of its possession.

(1) [1924] 41 T.L.R., 170.

In *Gordon* v. *Chief Commissioner of Metropolitan Police* (1), Buckley, L.J., said:—

There is no ground of public policy upon which the defendant should keep that which under no circumstances is his. It may be that the plaintiff never ought to have acquired that property, but, having acquired it, his cause of action to recover it from the person who deprives him of it arises only from the fact of deprivation.

North & South Wales Bank v. *Irvine* (2); *Kleinwort* v. *Comptoir National d'Escompte de Paris* (3); *The Winkfield* (4); *British America Elevator Co., Ltd.* v. *Bank of British North America* (5).

In *Eastern Construction Company, Ltd.*, v. *National Trust Company, Ltd., and Schmidt* (6), Lord Atkinson, delivering the judgment of the Judicial Committee of the Privy Council in an appeal from the Province of Ontario, and referring to the statement of Lord Campbell in *Jeffries* v. *Great Western Railway Company* (7), that as "against a wrongdoer possession is title," said:—

That is no new doctrine. It was decided in 1721 in *Armory* v. *Delamirie* (8), "that the finder of a jewell, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the case of *The Winkfield* (9). But this case and the case of *Jefferies* v. *Great Western Ry. Co.* (10), were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Glenwood Lumber Co.* v. *Phillips* (11), and it must be now taken as conclusively established.

In *Moffatt* v. *Burland* (12), Dorion C.J. said:

In 1848, the Court of Queen's Bench decided, in the case of *Mills* v. *Philbin et al* (13), that although the plaintiff had admitted on *faits et articles*, that he had no interest in the note sued upon, that he only held it for the purpose of collection, and that the money when collected would go to one Malo, still he was entitled to recover judgment.

Similar decisions had already been given by the Court of Appeals, the first on the 20th of July, 1821, in the case of *Armour* v. *Main*, and the second on the 20th of January, 1838, in the case of *Ferrie* v. *Thompson* (14).

These rulings were in accordance with the well known rule of law that he who has an apparent title can enforce such title in the courts of justice as against every one except the real owner of the thing claimed, or as Troplong puts it in his *Traité du Mandat*, n° 43: Ce dernier, le prê-

(1) [1910] 2 K.B. 1080, at p. 1098.
(2) [1907] 24 T.L.R. 5, at p. 8; [1908] A.C. 137, at p. 141.
(3) [1894] 2 Q.B.D., 157.
(4) [1902] P.D. 42.
(5) [1919] A.C. 658.
(6) [1914] A.C. 197, at p. 210.
(7) [1856] 5 E. & B., 802, at p. 805.
(8) [1795] 1 Str. 505; 1 Sm. L.C. 166 and others.
(9) [1902] P.D. 42.
(10) 5 E. & B. 802, at p. 805.
(11) [1904] A.C. 405, at p. 410.
(12) [1884] 4 Dor. 57, at p. 73.
(13) [1847] 3 Rev. de Lég. 255.
(14) [1838] 2 Rev. de Lég. 303.

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CORPORATION AGENCIES LTD. v. HOME BANK OF CANADA.

Newcombe J

te-nom, est revêtu d'un titre apparent, qui lui donne, dans ses rapports avec les tiers, tous les droits du propriétaire. Il est à leur égard, non pas un agent intermédiaire qui se meut sous l'influence de la volonté d'autrui, mais un maître qui dispose de sa chose. Sans doute entre les parties, celui dont le rôle a été réduit par une contre-lettre à la simple qualité de prête-nom n'est pas autre chose qu'un mandataire.

In *Porteous* v. *Reynar* (1), the Judicial Committee of the the Privy Council had no hesitation in adopting the reasoning and decision of Dorion C.J., in *Moffatt* v. *Burland* (2) "as consistent with reason and law."

In *Sinclair* v. *Brougham* (3), Lord Dunedin, said:

> Both an action founded on a *jus in re*, such as an action to get back a specified chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

If I am right in the view that the defendant bank had actual notice of Cahan, Jr's., lack of title to the cheques, or to apply their proceeds for his individual benefit, or knowledge of facts which should have raised suspicion as to the validity of this title or right, and which should therefore have put it upon enquiry to ascertain or to satisfy itself that Cahan, Jr., was acting with the plaintiff's authority; and if the defendant, with this notice or knowledge, and without any inquiry or explanation, paid the cheques to Cahan, Jr., upon his endorsement, then it follows that the defendant acquired no right or title to the cheques, or to their proceeds, which the defendant received from the Merchants Bank out of the funds standing to the plaintiff's credit. Moreover it follows that, whatever may have been the legal position as between the plaintiff and Cahan, Sr., or others to whom it may have been accountable, its possession of the money as between itself and the defendant conferred a right or title, not in the nature of a limited interest, but absolute and complete. As against a wrongdoer possession is title which cannot be disturbed. The defendant bank was a wrongdoer; it had no vindicable title.

I would therefore allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Lafleur, MacDougall, Macfarlane and Barclay.*

Solicitor for the respondent: *W. K. McKeown.*

(1) [1887] 13 A.C. 120, at p. 131. (2) 4 Dor. 57.
(3) [1914] A.C., 398, at p. 436.

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BANK AND BANKING—*Continued*

were one C. H. Cahan, Jr., son of the former, and one B. F. Bowler, the latter acting also as secretary-treasurer. The appellant kept its bank account at the Merchants Bank of Canada in Montreal; C. H. Cahan, Sr., had bank accounts at the Bank of Montreal at Montreal, with the agency of that bank in New York, and with the Guarantee Trust Company in New York. C. H. Cahan, Jr., had a personal account with the respondent, the Home Bank, and another with the Empire Trust Company in New York; he was also, without the knowledge of his father, dealing in stock speculations and the promotion of companies, and had bank accounts at the Montreal branch of the Sterling Bank of Canada and with La Banque Provinciale at Montreal and several other banks. As C. H. Cahan, Sr., being extensively engaged in special work during the war, was frequently absent from Montreal for prolonged periods, he gave his son, from time to time temporary powers of attorney to transact his banking business and finally gave him a general power of attorney to draw and sign cheques upon any chartered bank with which he had an account. One of the by-laws of the appellant corporation provided that "* * * cheques * * * may be made, drawn * * * by the secretary-treasurer, acting jointly with the manager. or with any director of the company * * *." Bowler, placing himself in the hands of C. H. Cahan, Jr., signed whatever cheques the latter directed him to sign. During the absence of his father, C. H. Cahan, Jr., carried on an extensive exchange of cheques and, using all the above mentioned bank accounts, practised what is commonly known as "kiting." Amongst others, ninety-four cheques were thus drawn on the appellant's bank account in the Merchants Bank, which were presented for payment by or under the direction of Cahan, Jr., not at the office of the Merchants Bank, but at the office of the respondent bank, which credited the proceeds of the cheques to the private account of Cahan, Jr., or, in some cases, paid them to him in cash. These cheques were presented to the Merchants Bank by the respondent bank which received from the former the proceeds amounting in the aggregate to $205,960.37. The money which was requisite and available in the Merchants Bank of Canada for the payment of the cheques consisted, in addition to the appellant's small balance in its bank account, of money provided by deposits by Cahan, Jr., of cheques drawn on his father's bank accounts, and on the different other banks. When Cahan, Jr., disappeared from Montreal, and his father became aware of the condition of

BANK AND BANKING—*Continued*

the appellant company's affairs, the present action was instituted for the recovery of the sum of $205,960.37. The appellant company alleged that the Home Bank received the proceeds of the ninety-four cheques wrongfully, fraudulently and in breach of trust; that these cheques on their face showed that Cahan, Jr., was using them for his own purposes; that the bank to which they were delivered took them with notice and knowledge of his defective title, or wilfully abstained from making any inquiry as to the nature and extent of the power and authority of Cahan, Jr., and Bowler, and in bad faith participated in their wrongful acts, thereby enabling C. H. Cahan, Jr., to appropriate to his personal use and benefit the funds out of which these cheques were met and paid by the Merchants Bank of Canada and which always were the property of the Corporation Agencies, Limited. The bank joined issue with the appellant and, in addition filed a special defence to the effect that it received the cheques for value and in due course, that it became the owner and proprietor of the cheques; and further pleaded that during the whole of the period when these cheques were being issued irregularly, as alleged, Corporation Agencies, Ltd., had not assets to represent, in whole or in part, the sum which it pretends to have lost by reason of the facts set up in its declaration.—*Held*, Duff and Newcombe JJ. dissenting, that the appellant company was not entitled to recover from the respondent bank the amount claimed by its action; that as the funds with which the cheques were met were neither the property nor in the legal possession of the appellant company, the latter had failed to show such an interest as is requisite to entitle it to bring an action at law (Art. 77 C.C.P.); that although at the time the money so withdrawn apparently stood to the credit of the appellant company in the Merchants Bank of Canada, it cannot be considered to have been in its possession, since, according to the doctrine of the Civil Law, possession in the legal sense cannot be acquired without the volition (volonté) of the possessor; and as volition cannot exist without consent or knowledge, there never was possession by the appellant company of the funds in question. There was not the intention to possess, nor possession *animo domini*.—*Held* further, Duff and Newcombe JJ dissenting, that the appellant cannot maintain a claim for accounting for the fund which stood in its name at the Merchants Bank of Canada, as no contractual relation existed between appellant and respondent nor any obligation on the latter's part to maintain such fund; an essential condition of the action *con-*

CHATTEL MORTGAGE—*Failure to renew—Goods sold by mortgagor—Existence of mortgage known by purchaser—Good faith—Bills of Sale Act, R.S.A.* (1922) *c.* 151, *s.* 19.] The appellant was a mortgagee of goods but failed to file a renewal statement within the time required. The respondent purchased the goods from the mortgagor, paying full value. He knew that the mortgage was unpaid but considered he was entitled as a matter of law to rely upon the mortgagee's failure to file renewal, which fact he had ascertained by having caused a search to be made at the registry office. No collusion on respondent's part to protect the mortgagor was found.—*Held*, reversing the judgment of the Appellate Division ([1925] 1 W.W.R. 1), Idington and Mignault JJ. dissenting, that the respondent was not a "purchaser * * * in good faith" within the meaning of s. 19 of the Bills of Sale Act.—*Per* Anglin C.J.C. and Duff, Newcombe and Rinfret JJ. A purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third person, cannot be said, either legally or morally, to be a purchaser "in good faith" and therefore cannot maintain his claim to the goods as against such third person. CANADIAN BANK OF COMMERCE *v.* MUNRO..... **302**

2——*Company—Powers of directors—Managing director—Power to give chattel mortgage for past indebtedness—The Companies Act, R.S.A.* (1922) *c.* 156, *art.* 55 *of table A.*] Even independently of the express provision of art. 55 of table A. of *The Companies Ordinance*, the directors of a company constitute its governing and managing body, and, except to the extent that their powers are expressly restricted by statute or the articles of association or the by-laws and regulations they possess authority to exercise all the powers of the company.—When a board of directors of a company appoint one of them "managing director," they may be taken to have *ipso facto*

PRACTICE AND PROCEDURE—*Stay of proceedings—Jurisdiction—Security for costs only—Execution for debt and costs below.*] The appellant company, having been held liable in the courts below for a sum approximately $7,000, appealed to this court giving security only for the sum of $500 for the costs of the appeal. The appeal to this court was dismissed with costs. The appellant then applied for a stay of proceedings in the action pending a projected appeal to the Judicial Committee of the Privy Council.—*Held* that the application as made could not be granted as, security for the debt and costs in the courts below not having been given, the control of the issue of execution for them rests wholly with the provincial courts; a judge of this court can only direct that further proceedings be stayed in this court until the appellant should have an opportunity of presenting a petition for leave to appeal to the Judicial Committee of the Privy Council. FIDELITY-PHENIX FIRE INS. CO. OF N.Y. *v.* MCPHERSON..... 104

2 —— *Appeal — Final judgment — Substantive matter — Pleading — Action on separation agreement—Defence—Breach of conditions—Reply—Excuse for breach—Scandalous charges—Custody of infant.*] The Supreme Court of Canada entertained an appeal from a judgment confirming an order by a judge in chambers to strike out as scandalous and irrelevant a paragraph of the plaintiff's reply to the defence pleaded.—By a separation agreement the husband undertook to pay his wife an annual sum by monthly instalments and it was provided that the wife should be given the custody of their son but that his father should be allowed to see him with reasonable frequency and should be consulted as to, and satisfied with, his up-bringing. To an action by the wife for overdue instalments of her annuity breach of the condition as to the son was pleaded. In a paragraph of her reply the plaintiff set up facts which were scandalous and vexatious if not material and sought to justify such breach by alleging that she had become aware since the agreement was made that the character and conduct of the defendant was such that she would not be justified in taking his advice as to, or permitting him to associate with, their son on account of the bad influence that would likely result therefrom. On application of the defendant a judge in chambers struck out this paragraph from the reply as scandalous and irrelevant and the court *en banc* confirmed his order affirming the judgment of the Supreme Court of Nova Scotia ([1925] D.L.R. 277).—*Held*, Idington J. dissenting, that such order was properly made; that the reply alleging the husband's bad character is no excuse for a breach of the conditions in the agreement; and that the only way in which she can avail herself of such a matter would be by producing a judgment or order of the court under the Custody of Infants Act giving her the custody of the son free from the father's right of access.—*Held* also, that she cannot in this action claim such judgment or order from the court. Order XIX, rule 16, of the court rules. MCLENNAN *v.* MCLENNAN..... 279

3——*Replevin—Recovery of goods—Subsequent dismissal of action—Return of goods not ordered. Action on bond—Right to order for return or damages.* P. brought a replevin action to regain possession of goods seized under process of law. He succeeded at the trial and the goods were delivered to him. The judgment in his favour was reversed by the full court but return of the goods or damages for their detention was neither demanded nor adjudged. In an action on the replevin bond.—*Held*, that as the obligees could, in the replevin action, have claimed and obtained an order for return of the goods or for damages they cannot claim it in this action. PETRIE *v.* RIDEOUT.... 347

4 —— *Constitutional law — Canadian National Railways—Garnishment—Proceeding—Fiat—Special leave of appeal—Provincial appellate courts—Jurisdiction—Discretion—Canadian National Railways Act* (1919) 9-10 *Geo. V, c.* 13, *s.* 15—*Supreme Court Act*, 10-11 *Geo. V, c.* 32, *s.* 41.] The discretion conferred on the provincial courts of appeal by section 41 of the Supreme Court Act under which special leave to appeal to this court may be granted is untrammelled and free from restriction save such as is implied in the term "special leave."—A writ of garnishment attaching moneys owed by the Canadian National Railway Corporation to a judgment debtor in its employment is a "proceeding" within the provisions of s. 15 of the *Canadian National Railways Act* and may therefore issue "without a fiat" from the Crown. (Idington J. dissenting). CANADIAN NATIONAL RAILWAYS *v.* CROTEAU..... 384

5——*Appeal—Final judgment—Demurrers to pleadings—Issues of fact—Verdict for plaintiffs—Nonsuit or new trial refused—Demurrers undisposed of.*] In an action on an insurance policy the defendant demurred to counts in the declaration and the plaintiff to some of the pleas. Pursuant to an order in chambers the issues of fact were first tried. A general verdict for the plaintiff was rendered after nonsuit had been refused. On appeal to the court *en banc* a motion for nonsuit, for which leave was reserved at the trial, or for a new trial was refused and the defendant obtained special leave to appeal

RAILWAY—*Statute—Construction—Railway Board—Jurisdiction—Agreement of railway company with province—1 Edw. VII, c. 53 (D).*] By an agreement made in 1901 between the Canadian Northern Ry. Co. and the Government of Manitoba the Lieutenant Governor in Council was authorized to fix the rates to be demanded by the company for the carriage of freight on its lines in the province. This agreement was confirmed by Acts of Parliament and the legislature respectively, the Dominion Act containing the following provisions: Sec. 3. "Nothing in this Act or in the indenture contained in the schedule shall * * * (*a*) divert or limit, temporarily or otherwise, the rights or powers * * * of any commission * * * respecting any matter or thing, obligation or duty; (*c*) authorize the Canadian Northern Ry. Co. * * * to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, etc., or any higher rates for the carriage of freight or passengers, than those heretofore or hereafter fixed * * * by any commission or other authority."—*Held*, that sec. 3 (*a*) clearly reserves the rights and powers of the Board of Railway Commissioners which is a commission or authority within its terms; and that 3 (*c*) which deals with special matter of tolls does not except that subject from the generality of 3 (*a*) on the principle *generalia specialibus non derogant*, inasmuch as the two subsections are concerned with different matters and do not overlap nor conflict. THE GOVERNMENT OF THE PROVINCE OF MANITOBA AND ANOTHER *v.* THE CANADIAN NORTHERN RY. CO. AND OTHERS..... 18

2 —— *Statute — Construction — Subsidy—Railway tolls—Agreement by railway company—Board of Railway Commissioners—Powers—Revision of tolls—Effect on agreement*—60-61 *V., c.* 5—*Railway Act*, 1903, 3 *Edw., VII., c.* 58.] By an Act passed in 1897 Parliament, *inter alia*, granted a subsidy to the C.P.R. Co. for building the Crow's Nest Line provided the company entered into an agreement for substantial reductions in the rates for carrying certain classes of freight over the railway between designated points and feeders and that no higher rates should thereafter be charged. The items of such reductions were set out in the Act and the company executed an agreement embodying these conditions. The reduced rates have since remained in force except as suspended by temporary measures during the war and after the war by power temporarily given to the Board of Railway Commissioners to revise railway tariffs notwithstanding any such statutes

RAILWAY—*Continued*

or agreements. When this temporary power ceased to exist the question of the reduced rates came before the board which made an order disallowing tariffs filed under the Act and agreement of 1897 claiming the right to do so under the general authority over railway tariffs given it by the Railway Act.—*Held*, that the said statute and agreement made in 1897 are binding on the board which has, therefore, no power to change the rates thereby fixed.—*Held* also, Idington J. dissenting, that the rates so fixed apply only to carriage of freight between said points and feeders as they existed in 1897. Against such restricted application the anti-discrimination provisions of the Railway Act cannot be invoked.—The Act of 1897 is a "Special Act" as that expression is defined in the Railway Act.—If said Act authorizes the agreement and prescribes its terms the obligations under said agreement are statutory and not merely contractual, just as if the agreement were confirmed by, and made part of, the Act. GOVERNMENTS OF ALBERTA, SASKATCHEWAN AND MANITOBA *v.* CANADIAN PACIFIC RY. CO..... 155

3 —— *Constitutional law — Agreement — Provincial line—Constructed by a coal company—Operated by a federal railway company—Applicability of the federal Railway Act—Power of federal parliament to pass s.s. c. of s.* 6 *of the Railway Act, (D)* 1919—*B.N.A. Act*, 1867, *s.* 92, *s.s.* 10, *par. c.*] The appellant is a colliery company and had been authorized by a statute (c. 78 of 1921) of the province of Alberta to construct a railway known as the Luscar Branch to connect with the railway of the Mountain Park Coal Company, Limited, at or near Leyland station. In April, 1923, the appellant entered into an agreement with the Mountain Park Coal Company, the Grand Trunk Pacific Branch Lines Company and the Grand Trunk Pacific Company, the two latter companies now represented by the Canadian National Railways, for the construction and operation of this railway. It also submitted its railway to the operation of certain agreements between the three other companies concerning the construction and operation of the railway of the Mountain Park Coal Company. The effect of all these agreements is that these railways were built by the Grand Trunk Pacific Branch Lines Company at the expense of the two colliery companies, the cost of construction to be reimbursed to the latter by certain rebates allowed them on the shipment of all coal over these railways, it being agreed that when the companies are fully reimbursed the railways will become the property of the Grand Trunk Pacific Branch Lines Company. The Grand Trunk Pacific Company undertook

SALE OF LAND—*Continued*

writing, agreed to sell certain land, within a stated time, for $30,000 to W. who, within such period, was to have the exclusive right to buy it. W. had an interest in the land which, if he failed to purchase, he agreed to sell for $1,000. But, while the contract was in force, he sold this interest to R. for $4,000 of which he got paid $1,125 on account. W. did not purchase within the time stated and was tendered a deed with a cheque for $1,000 to convey his interest as agreed to D. and others. This being refused, the latter brought action for specific performance of the contract and to have the deed to R. set aside as being given without consideration and with a collusive and fraudulent intent. The trial judge dismissed the action holding the conveyance to R. to be *bona fide* and that performance could not be decreed. The court *en banc* accepted his finding of *bona fides* but held the plaintiffs entitled to other relief than damages against W. for breach of contract, which the trial judge held was the only remedy they had. The relief granted by the court *en banc* was to award to the plaintiffs the balance of the purchase money due from R. to W. and give them the benefit of a lien or charge of W. on his interest in the land for payment of his purchase money therefor.—*Held* that, under the *Registry Act* of Nova Scotia then in force (R.S.N.S. 1900, c. 137, s. 15) R. has acquired a title clear of all legal and equitable claims; but the option agreement was still in existence as against W. and also bound R., after he had actual notice of it, to the extent to which it was then available; and it should be given effect to on equitable principles as to the unpaid purchase money.—The question whether the right to the vendor's lien ever existed was not raised by the plaintiffs, nor evidence upon the subject taken at the trial.—*Held* that the judgment appealed from (57 N.S. Rep. 262) should be varied by striking out the direction that the plaintiffs should have the benefit of any lien in favour of W. as unpaid vendor.—Evidence was given at the trial showing that W had obtained an advance from a bank, which was not a party to the action, the security of the money payable to him by R.—*Held*, that R. is entitled to protection against the bank's claim and the case should be remitted to the court below to have the bank added as a party and its rights to R's purchase money ascertained. That court has inherent power to correct the error in its judgment resulting from its failure to dispose of the bank's claim. R's failure to bring this matter to the attention of the court on the settlement of the judgment would, according to the general rule of procedure, be a reason for depriving him of his costs but the court

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feels justified in making an exception in this case.—Idington J. dissenting, would allow the appeal and restore the judgment of the trial judge. WEBB *v.* DIPENTA **565**

6 —— *Joint purchase — Speculation purposes—Title in the name of one—Failure to transfer title to other—Right to repudiate —Return of moneys.*] The appellant acquired an interest in land purchased by H. for purposes of speculation. H. agreed to transfer to the appellant, free from encumbrances, an undivided quarter interest, and he professed to make this transfer by an instrument subsequently executed, in which, moreover, H. agreed, upon demand, to execute such further transfers, assignments and other documents as should protect the interest of the appellant.—*Held* that the latter instrument left nothing outstanding between the parties except the undertaking for further assurance, which is an independent covenant, and that delay in the performance of it was not a cause for rescission of the executed conveyance and recovery of the purchase money. BOWLEN *v.* CANADA PERMANENT TRUST CO. **672**

7——*Right of buyer*..... **120**
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8——*Company—Aqueduct—Contract*.. **192**
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9—— *Sale — Immovable — Mandate — Commission—Profit—Arts.* **1233, 1722** *C. C.* HAMEL *v.* PATENAUDE..... **493**

10——*Representation by vendor—"Good arable land"—Weight of evidence.* ARMSTRONG *v.* MUTUAL LIFE ASSUR. CO. OF CANADA..... **671**

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SHERIFF'S SALE — *Lease — Effect — Transfer of the lease to the buyer—Right of the lessee to abandon premises. Art.* 781 *C.C.P. Arts.* 1663, 2128 *C.C.*] Where, subsequently to the sheriff's sale of an immovable, the person on whom the property was sold transfers his rights in a lease to the buyer (adjudicataire) and the latter notifies the lessee that he can remain in possession of the immovable, the lessee has no right to abandon the premises and is not discharged from the obligations resulting from the lease.—Judgment of the Court of King's Bench (Q.R. 38 K.B. 17) affirmed. COLUMBIA GRAMOPHONE CO. *v.* RACINE..... **593**