REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, K.C.

CIVIL LAW REPORTER AND ASSISTANT REPORTER

L. W. COUTLÉE, K.C., (QUE.)

PUBLISHED PURSUANT TO THE STATUTE BY

E. R. CAMERON, K.C., REGISTRAR OF THE COURT

VOL. 49.

CANADA LAW BOOK COMPANY, LTD.,
84 BAY STREET
TORONTO, CANADA.

1914

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR CHARLES FITZPATRICK, C.J., G.C.M.G.

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

" JOHN IDINGTON J.

" LYMAN POORE DUFF J.

" FRANCIS ALEXANDER ANGLIN J.

" LOUIS PHILIPPE BRODEUR J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. CHARLES JOSEPH DOHERTY K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ARTHUR MEIGHEN K.C.

ADDENDA ET ERRATA.

Errors and omissions in cases cited have been corrected in the TABLE OF CASES CITED.

Page 33, line 14, for "R.S.C." read "R.S.B.C."

" 43, line 40, after "from" add "18 B.C. Rep. 450"

" 60, line 30, after "and" read "temporizing."

" 75, in foot-note (1) add "5 Alta. L.R. 391."

" 211, add foot-note reference to remarks of the Lord Chancellor, on application for special leave to appeal to the Privy Council, noted in 6 West. W.R., at p. 1060.

Pages 225-227, in side-notes for "Idington J." read "Duff J."

Page 471, at end of headnote, add "NOTE.—*Cf. Gentile* v. *British Columbia Electric Rway. Co.* (18 B.C. Rep. 307), affirmed by Privy Council ([1914] W.N. 278)."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 48 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Bell v. *Grand Trunk Rway. Co.* (48 Can. S.C.R. 561). Leave to appeal to the Privy Council was refused, 22nd May, 1914.

British Columbia Electric Rway. Co. v. *Turner* (49 Can. S.C.R. 470). Leave to appeal to the Privy Council was refused, 2nd July, 1914.

British Columbia Electric Rway. Co. v. *Vancouver, Victoria and Eastern Rway. Co.* (48 Can. S.C.R. 98). The appeal to the Privy Council was allowed with costs, 26th June, 1914.

Canada Niagara Power Co. v. *Township of Stamford* (not yet reported). Leave to appeal to Privy Council was refused, 4th August, 1914.

Canadian Pacific Rway. Co. v. *Canadian Oil Companies; Canadian Pacific Rway. Co.* v. *British American Oil Co.* (47 Can. S.C.R. 155). Appeals to the Privy Council dismissed with costs, 14 July, 1914.

Canadian Pacific Rway. Co. v. *McDonald* (49 Can. S.C.R. 163). Leave to appeal to the Privy Council was granted, 15th July, 1914.

Dumont v. *Fraser* (48 Can. S.C.R. 137). Appeal to the Privy Council dismissed with costs, 27th July, 1914.

Electrical Development Co. v. *Township of Stamford* (not yet reported). Leave to appeal to the Privy Council was refused, 4th August, 1914.

Hitchcock v. *Sykes* (49 Can. S.C.R. 463). Application for special leave to appeal to the Privy Council was refused with costs, 23rd July, 1914.

King, The, v. *Trudel* (49 Can. S.C.R. 501). Leave to appeal to the Privy Council was refused, 20th May, 1914.

Lamoureux v. *Craig* (49 Can. S.C.R. 305). Leave to appeal to the Privy Council was granted, 15th May, 1914.

Lapointe v. *Messier* (49 Can. S.C.R. 271). Leave to appeal to the Privy Council was granted, 7th July, 1914.

Long v. *Toronto Rway. Co.* (not reported). Leave to appeal to the Privy Council was refused, 4th Aug., 1914.

MacKenzie, Mann & Co. v. *Eastern Trust Co.* (not yet reported). Leave to appeal to the Privy Council was granted, 4th Aug., 1914.

McPherson v. *Grand Council, Provincial Workmen's Association* (not yet reported). Leave to appeal to the Privy Council was refused, 4th Aug., 1914.

Nova Scotia Car Works v. *City of Halifax* (47 Can. S.C.R. 406). The appeal to the Privy Council was dismissed, 4th Aug., 1914.

Peters v. *Sinclair* (48 Can. S.C.R. 57). The appeal to the Privy Council was dismissed, 4th Aug., 1914.

Quong-Wing v *The King* (49 Can. S.C.R. 440). Leave to appeal to the Privy Council was refused, 19th May, 1914.

Roots v. *Carey* (49 Can. S.C.R. 211). Leave to appeal to the Privy Council was refused, 7th May,

1914. See 6 West. W.R. 1060 for remarks by the Lord Chancellor.

Serling v. *Lavine* (47 Can. S.C.R. 103). The appeal to the Privy Council was allowed with costs, 21st May, 1914. (London Times, 22nd May, 1914).

Stone v. *Canadian Pacific Rway. Co.* (47 Can. S.C.R. 634). Under Rule 32, of 1908, of the Judicial Committee of the Privy Council, the appeal to the Privy Council was withdrawn and stands dismissed, 26th June, 1914.

Temple v. *Municipality of North Vancouver* (not reported). Leave to appeal to the Privy Council was refused, 4th Aug., 1914. See 18 B.C. Rep. 546; 6 West. W.R. 70; 25 West. L.R. 245, 350.

Turgeon v. *St. Charles* (48 Can. S.C.R. 473). Leave to appeal to the Privy Council was granted, 7th May, 1914.

Wadsworth v. *Canadian Railway Accident Insurance Co.* (49 Can. S.C.R. 115). Leave to appeal to the Privy Council was refused, 1st July, 1914.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED.

C

K

L

M

Q

R

S

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

GENARO COMO (DEFENDANT) ..... APPELLANT; 1913

AND

WILLIAM STEWART HERRON (PLAINTIFF) ..... RESPONDENT.

*Oct. 14, 15.
*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Broker—Sale of land—Commission—General employment—Principal and agent—Introduction of purchaser—Interference by principal—Quantum meruit—Variation of written contract—Evidence—(Alta.) 6 Edw. VII., c. 27.

The Alberta statute of 1906, 6 Edw. VII., ch. 27, provides that no action shall lie to recover any commission for services in connection with the sale of land except upon a contract therefor in writing signed by the person sought to be charged or by his agent thereunto authorized in writing. C. by duly signed memorandum authorized H. to sell a section and a half of land, containing 960 acres, at the named price of $35 per acre, and to pay him a commission on the sale at the rate of 5%. In attempting to make a sale H. introduced T. to C. and, after they three had inspected the land together, T. made an offer to C. to purchase the section alone at $40 per acre provided certain

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1913

COMO
v.
HERRON.

other property should be taken in exchange as part payment. This proposition was accepted by C. and he sold the section alone to T. on those terms.

Held, that the sale effected was an entirely new contract which was in no manner referable to the written agreement respecting commission on a sale for a price in money and, as there had been no written contract respecting remuneration to the broker in respect of the transaction which took place he could not recover compensation for the services rendered by him either by way of commission or as *quantum meruit*.

The judgment appealed from (9 D.L.R. 381; 3 West. W.R. 923) was reversed, Duff and Brodeur JJ. dissenting.

Per Duff J.—The broker should be held strictly to the terms of the written agreement which was drafted by himself; it did not constitute a general authority to sell the lands therein described; he could not, therefore, recover remuneration for his services by way of commission as therein provided. Nevertheless, as such use was made of the introduction of the purchaser that the broker was prevented effecting a sale according to the terms of his agreement, the conduct of the principal in that respect entitled the agent to recover compensation by way of *quantum meruit*.

Per Brodeur J.—The broker had, under the agreement, a general authority for the sale of the lands for which he found and introduced the purchaser: therefore, he should not be denied compensation for his services on account of the conduct of the owner in carrying out the sale on terms different from those to which he had been restricted by the agreement.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Simmons J., at the trial, by which the plaintiff's action was maintained with costs.

The case is stated in the head-note and the questions at issue on the appeal are mentioned in the judgments now reported.

Bennett K.C. for the appellant.

Hellmuth K.C. and *G. H. Ross K.C.* for the respondent.

(1) 9 D.L.R. 381; 3 West. W.R. 923.

1913

COMO
v.
HERRON.

The Chief Justice.

THE CHIEF JUSTICE. — The plaintiff alleges an agreement in writing whereby the defendant undertook to pay him five per cent. commission on the selling price of a piece of land described as section 3, and the west half of section 11, township 20, range 28, west of the Fourth Meridian, in the Province of Alberta. The agreement produced gives the defendant general authority to sell the property and earn his commission; but, taken as a whole and construed with reference to the surrounding circumstances, it constitutes a limited mandate to sell a certain area of land of a defined acreage at a fixed price per acre and on terms of payment stipulated for in advance by the owner in view of his then financial necessities. Any departure from all or any of these special terms would amount to the creation of a new contract which would require to be in writing.

The plaintiff, fully aware of the difficulties of his position, attempted to amend the statement of claim by setting up an alternative right to compensation for introducing a buyer to the appellant "in pursuance of the said agreement." It is impossible for me to understand how it can be said that the exchange on which the respondent seeks to recover his commission can be construed to have been made "in pursuance of the agreement" or can in any way be referable thereto. After Twohey, the intending purchaser, visited the ranch with the plaintiff, Herron, and decided not to buy it, he made a direct offer to Como, the defendant, to acquire in exchange for another property a portion of the farm at a valuation per acre different from that stated in the listing contract. That offer for an object and consideration different from those covered by the contract declared upon was accepted by the defendant

1913

COMO v. HERRON.

The Chief Justice.

the next day in the absence of the plaintiff. Here is the way the respondent in his evidence describes what happened.

Q. Now, after going over the ranch that day, what did you do?

A. Mr. Twohey asked Mr. Como if he would sell the section without the half section and Mr. Como said, "Yes." Mr. Twohey said: "What price would you put on the section itself?" and Mr. Como replied: "$40 an acre."

Q. After you had this discussion you returned to Calgary?

A. Yes, and Mr. Como said he would come to Calgary on the following Monday morning.

Q. And did he come to Calgary on the following Monday morning?

A. Yes, he did.

Q. Did you see him?

A. He came to my house and I hitched up my rig and shewed him Mr. Wright's property and Mr. Twohey's property.

Q. What property?

A. Mr. Wright's property that I had been talking to him about before, and Mr. Twohey's property in Mount Royal.

Q. Well, then, what did you do next?

A. He looked through the house and seemed quite pleased with it. Mrs. Twohey took him through every room up stairs and downstairs and down to the basement and everywhere. Then he came back and Mr. Twohey and myself and him talked about the deal and the deal was finally closed up on the 28th of May.

Q. How do you know that?

A. It was about two or three o'clock in the afternoon I was called out to my ranch here on the telephone and had a sick mare and I got a veterinary surgeon and went out. Then, as soon as I came back, I suppose about four o'clock in the afternoon, I met Mr. Twohey and he told me.

Q. Did you see Mr. Como at all?

A. Yes, that evening.

Q. Did you have any conversation with him?

A. They both told me they had closed the deal.

This is entirely a new contract, as I have said before, which is not in any way referable to the one declared upon and cannot be enforced unless evidenced by a document in writing, and there is no such evidence forthcoming. See section 1, chapter 27, Statutes of Alberta, 1906.

In my opinion the appeal should be allowed with costs.

IDINGTON J.—The Legislature of Alberta in 1906, enacted as follows:—

1. No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

The appellant signed a contract with respondent pursuant thereto of which the material part is as follows:—

In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.

The land described consisted of a section and a half.

The appellant exchanged one section thereof with a third person (who was, I assume, introduced by respondent) for some equity in land in Calgary. Half a section remained undisposed of.

I cannot conceive how, in face of the statute, the respondent can found, on such facts, an action on this contract for commission only accruing to him, as the express terms of the contract specify, on a sale of the whole land.

The statute substantially adopts the language used in the Statute of Frauds, which it has been held time and again as the authorities collected in Leake on Contracts (4 ed.), pages 565 to 567 shew, do not permit any verbal variation or waiver of terms the Act requires to be in writing, as foundation for an action at law thereupon.

The appeal should be allowed with costs.

1913

COMO v. HERRON.

Duff J.

DUFF J. (dissenting).—I think this appeal should be dismissed with costs. My view of the case will be best understood after a statement of the material facts. The appellant was the owner of two parcels of land (a section and an adjoining half-section) near Calgary which he desired to sell; and in May, 1912, he employed the respondent as agent to dispose of this property and signed what is called a listing agreement in the following terms:—

> In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.
>
> Signature of owner: CAPT. G. COMO.
> Address: High River.

On the back of this document there appeared a description of both the section and half-section in question and certain terms of sale. Shortly after this document was signed the respondent introduced to the appellant, a Mr. Twohey, who was the owner of some property in Calgary which he desired to exchange for farm property. Twohey in company with the respondent visited the appellant's property, where the appellant resided, and inspected it. Finding that the quality of the soil of the half-section was not to his liking he asked the appellant if he was ready to sell the section alone, and the appellant immediately informed him that he would sell it at the price of $40 an acre.

After some further negotiations an agreement was entered into between the appellant and Twohey by which Twohey's property was to be exchanged for the appellant's, the former being valued at the price of $15,000 and appellant being allowed for his property $40 an acre. The effect of this transaction was that

1913

COMO v. HERRON.

Duff J.

it became practically impossible to sell the half-section. That was admitted by the appellant at the trial; was, indeed, put forward by him as one of the grounds on which he justified his refusal to pay the respondent his commission. In his statement of claim the respondent demanded commission under the listing agreement at the rate of 5% upon a purchase price for the section exchanged calculated at $40 an acre. At the trial an application was made upon notice for leave to amend the statement of claim by adding a statement of the facts already referred to, an allegation that the appellant had accepted the plaintiff's services and a claim to be remunerated for services as upon a *quantum meruit*. The application to amend was opposed on the ground that chapter 27 of the Alberta statutes of 1906 was a bar to any claim based upon the allegation in the amendment and the appellant offered, in the alternative, an amendment of his defence, in the event of the respondent's amendment being allowed, by which, among other things, he denied that he had accepted the respondent's services. The learned trial judge reserved his decision upon the application until, as he said, he should "see what the evidence disclosed." There was a good deal of discussion during the course of the trial touching the admissibility of evidence under the claim of *quantum meruit*, but the learned judge appears to have admitted the evidence as if the amendment had been made. We were informed on the hearing of the appeal that eventually the learned trial judge refused to allow the amendment, presumably on the ground taken by the appellant that the Alberta statute above referred to would be a bar to a recovery on the basis of the allegations the respondent proposed to add

1913

COMO v. HERRON.

Duff J.

to his claim. The learned trial judge held the respondent entitled to recovery on the ground that the employment under the listing agreement above mentioned was a "general employment" in the sense in which Lord Watson used that phrase in *Toulmin* v. *Millar*(1); in other words, that the agreement on its true construction provides for the payment of commission to the respondent upon any sale or other disposition of any part of the lands referred to, to a person introduced by the respondent. On the whole I am inclined to think that this construction of the agreement cannot be maintained. It is not the most natural reading of it; and one must not leave out of consideration the fact that the agreement was drawn up by an agent whose business was that of land-selling, and who was accustomed to framing and entering into such contracts. I think that in the circumstances, the agent must be held to the *strictissimum jus* so far as concerns the construction of the words employed by him.

But there is another ground upon which I think the respondent was entitled to recover. There can be no question that when an owner has entered into a contract of this description (in which the agent has contracted expressly to use his best efforts for the sale of the property in consideration of receiving a commission upon introducing the purchaser) the owner undertakes an obligation not to interfere with and frustrate the agent's efforts. If the agent introduces a purchaser who is prepared to enter into negotiations for the purchase of the property, the owner would be acting in contravention of the obligations of his contract if he were to take advantage of the agent's ser-

(1) 58 L.T. 96.

vices to enter into some arrangement with the person introduced, whereby it should become impossible for the agent to earn his commission under the terms of his contract of employment. In this case the owner did take advantage of the agent's services by entering into a contract with the person introduced, the result of which was that the term of the contract requiring the sale of the whole property as a condition of the respondent's right to commission became impossible of performance — impossible, that is to say, in a business sense because impracticable. *Dahl* v. *Nelson, Donkin & Co.*(1): The principle applies which was laid down by Willes J., in *Inchbald* v. *Western Neilgherry Coffee, etc., Co.*(2), and quoted with approval by the Judicial Committee of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(3), at page 626:—

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

In such a case the agent is clearly entitled to recover compensation for his services. The only point to be considered in this connection is whether there is anything in the Alberta statute already referred to barring such recovery. It seems to me to be clear that there is not. The foundation of the agent's right to recover in such a case is the contract of employment. The principal's conduct preventing a performance of the condition prescribed by the contract has the effect in law of precluding him from insisting upon the performance of that condition, and entitles the agent

(1) 6 App. Cas. 38. (2) (1864) 17 C.B. (N.S.) 733.
(3) [1910] A.C. 614.

1913

COMO v. HERRON.

Duff J.

to recover compensation for his services as services rendered at the request of the principal; the request being evidenced by the written contract of employment. See precedent, Bullen & Leake, "Precedents of Pleadings" (6 ed.), page 328. The only objection to this view that I can think of is that the arrangement with Twohey was assented to by the respondent and consequently the appellant's conduct in entering into it cannot be said to have been wrongful as against him. The answer to that is this: *Primâ facie* the principal's conduct gives the agent a right to recover against him remuneration for his services. If the principal relies upon the conduct of the agent as an assent justifying his own conduct, then since this assent is to be implied from the conduct of the parties, he must accept all the implications to which this conduct gives rise. It would be ridiculous to suggest that the agent by his conduct must be taken to have assented to the appellant entering into the arrangement with Twohey except upon the terms that he should be paid for his services in introducing Twohey. Then the appellant cannot blow hot and cold, and he cannot be permitted to take advantage of the respondent's implied assent as an answer to the respondent's action without observing the conditions also implied. The appellant cannot, therefore, set up the respondent's conduct in answer to the respondent's claim to recover for his services on a *quantum meruit*.

As to the amount the respondent is entitled to recover, I think if the appellant desires it, there should be a reference to ascertain the amount, the cost of the appeal to be paid by the appellant, the costs of the reference and further directions to be reserved.

ANGLIN J.—This action is brought upon a written

contract by which the defendant agreed to pay a commission of 5% for a sale for a money price, of which a substantial part should be payable in cash, of a defined property. The transaction in respect of which commission is claimed was a disposal of part only of the property mentioned in the written contract not for a money price, but in exchange for another property. It was not a performance of the terms on which, under the written contract, the commission was to be payable. In order to succeed the plaintiff must prove a substantial variation in the terms of the written contract on which he sues. He must shew the substitution of another consideration for that upon which the defendant undertook in writing to pay the commission. That is in effect setting up a new contract. But if it should be regarded as a case of variation, that variation is in a most material element and, if made, was in parol. Under the Alberta statute, 6 Edw. VII., ch. 27, an agent, in my opinion, cannot recover upon a contract so varied.

The action is not framed and was not tried either as an action for damages for breach of the provision in the written contract for an exclusive listing, or as an action to recover upon a *quantum meruit* on the basis of an implied contract to remunerate the plaintiff for his services in consideration of his relinquishing his rights, if any, under the written contract, and in my opinion if any such cause of action exists it should not now be dealt with here.

The appeal should be allowed with costs in this court and in the full court of Alberta and the action should be dismissed with costs.

1913

COMO v. HEBRON.

Brodeur J.

BRODEUR J. (dissenting).—I have come to the conclusion that this appeal should be dismissed. The law in Alberta states that:—

> No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

That is a new provision in the law and a very wise one if we may judge by the great number of cases that come before us concerning commissions claimed by real estate agents. The contract of sale of lands could not give rise to any right of action, except when it is in writing. Now the provisions of the statute are extended to cover the relations between principal and agent.

In this case the memorandum proves conclusively that the respondent had authority to act as agent of the appellant. The respondent began to perform his duties as such agent and found an intending purchaser. He could not by himself conclude the contract of sale, because in the instructions which he had received from his employer, some conditions of the purchase price had to be determined and agreed upon by him. But the real estate agent in this case found a purchaser whom he put in relation with his principal. The vendor and the intending purchaser carried out negotiations, and as a result a sale was made of the lot in question. Now, if the vendor has found it advisable to make a sale on conditions different from those he had mentioned to the agent, he is, all the same, responsible for the services rendered to him by his agent. The services rendered by the agent give rise to a right of

1913

COMO
v.
HERRON.

Brodeur J.

action on his part. His contract of agency is established and proved and it certainly entitles him to claim for the services rendered. Lord Watson in the case of *Toulmin v. Millar*(1), at page 97, discusses in the following terms the effect of a contract similar to the one in this case:—

> When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

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

Appeal allowed with costs.

Solicitors for the appellant: *Lougheed, Bennett, McLaws & Co.*

Solicitors for the respondent: *Short, Ross, Selwood & Shaw.*

(1) (1887) 58 L.T. 96.

1913

*Oct. 24.
*Nov. 10.

BARK-FONG, CHUCK-SING AND LOW NOI WING-ON (PLAINTIFFS) ..... } APPELLANTS;

AND

THOMAS COOPER (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of land—Contract—Defeasance—"Time to be of the essence of the agreement" — Deferred payments — Notice after default — Laches—Abandonment—Specific performance.

In an agreement for the sale of lands, for a price of which half was paid and the balance to be paid by deferred instalments at specified dates, there was a clause for forfeiture, both of the agreement and the payments made, upon default in punctual payments; time was of the essence of the contract and, on default, the vendor had the right to give the purchasers thirty days' notice in writing demanding payment; in case of continuing default, at the expiration of that time, forfeiture would become effective and the vendor might retake possession and re-sell the lands. On default in payment as provided, a notice was given in the terms mentioned, but only to one of the purchasers, an extension of time was applied for and refused and, after thirty days from the time of the notice the vendor re-entered. Five days later the purchasers tendered the balance unpaid, which was refused by the vendor on the grounds that no conveyance was tendered for execution and that the purchasers had abandoned the agreement. Two weeks later the purchasers sued for specific performance.

Held, reversing the judgment appealed from (18 B.C. Rep. 271), that the clause making time of the essence of the contract had reference not to the gale dates, but to the time mentioned in the notice; that the notice as given did not comply with the condition of the agreement requiring notice to all of the purchasers, and that, in the circumstances of the case, there were not such laches chargeable against the purchasers as would amount to abandonment of their rights under the agreement or deprive them of their remedy of specific performance.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

BARK-FONG v. COOPER.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), dismissing an appeal from the judgment of Gregory J., at the trial, by which the plaintiffs' action was dismissed with costs.

By agreement for sale and purchase, dated the 6th day of December, 1910, the defendant (respondent) agreed to sell and the plaintiffs (appellants) agreed to purchase certain lands in the City of Victoria for $1,600 of which $800 was paid in cash, and the balance was payable in two equal instalments of $400 each on the 6th day of June, 1911, and the 6th day of December, 1911. Neither of these payments was made on the due date, and on the 27th of March, 1912, the defendant sent a notice demanding payment and purporting to cancel the agreement of sale, and to forfeit the moneys paid should the default continue after the expiration of thirty days from the date of the notice. This notice was alleged to be given in accordance with the clause in the agreement providing for such cancellation and forfeiture, and setting out that the notice might be well and sufficiently given if "mailed at Victoria, B.C., Post Office, under registered cover addressed as follows," * * * but the blank space in the printed form was not filled in. A few days later, the plaintiff asked defendant for an extension of time, but this was refused, and on 10th May, 1912 the defendant entered into possession of the lands. On the 15th May, 1912, the plaintiffs offered the defendant the sum of $900, but no conveyance was tendered therewith for execution. The defendant refused to receive this sum on the grounds stated in the head-note.

The learned trial judge held that the notice of cancellation was sufficiently given, and that the plain-

(1) 18 B.C. Rep. 271.

1913

BARK-FONG v. COOPER.

tiffs had practically abandoned their purchase and were not in any case entitled to specific performance. The Court of Appeal for British Columbia, in upholding this decision, held further that no sufficient tender was made inasmuch as no conveyance was tendered for execution.

Travers Lewis K.C. for the appellants.
R. A. Pringle K.C. for the respondent.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff. I would venture merely to add that the clause in the agreement belongs to that class of resolutive conditions known in the civil law as *une clause commissoire*. The difficulty in this case has arisen out of the fact that the agreement has been construed below as containing a resolutive condition pure and simple. The difference between the two with respect to the rights of the parties under the agreement is neatly expressed by Aubry & Rau, vol. 4, page 83 (4 ed.) :—

> En général, et sauf ce qui va être dit sur le pacte commissoire, la condition résolutoire opère de plein droit, dès l'instant où elle se trouve accomplie, sans qu'il soit nécessaire de faire prononcer la *résolution en justice*. Le pacte commissoire est la clause par laquelle les parties conviennent que le contrat sera résolu si l'une ou l'autre d'entre elles ne satisfait point aux obligations qu'il lui impose. Cette clause est toujours sousentendue dans les contrats parfaitement synallagmatiques. A la différence des autres conditions résolutoires, qui opèrent de plein *droit, le pacte commissoire ne produit, en général, son effet qu'en vertu du jugement qui declare la convention résolue. Le juge, saisi de la demande en résolution, n'est pas obligé de la prononcer; il peut accorder au défendeur un delai pour l'exécution de ses engagements.*

DAVIES J.—I think this appeal should be allowed and the decree for specific performance as prayed for granted.

I do not think the notice in case of default in making the payments stipulated for, expressly provided for in the agreement of purchase, was given and there was not, consequently, the continuing default in making the purchase payments which the agreement expressly provided would nullify it and operate as a forfeiture of previous payments.

The only remaining reason advanced for refusing the relief asked for was that the circumstances were not such as justified the court in granting this special relief. I differ from the courts below on this point also and cannot see anything on the facts as proved which should preclude the plaintiffs from obtaining the relief they ask.

One-half of the purchase money was paid at the time of the purchase. The notice called for by the agreement to be served upon the purchasers in the event of their failing punctually to make payment of the balance of the purchase money, and thus evidencing the vendors' determination to avoid the agreement and the rights of the purchasers under it, was not given. The evidence does not shew an intention on the purchasers' part to abandon their rights under the agreement and no evidence was given of any facts which, in my judgment, ought to deprive the complainants of the special relief prayed for.

IDINGTON J.—The term of this contract making time of the essence thereof is so coupled with a specific mode of enforcing it, as to form a necessary part thereof. This specification though somewhat imperfect may be so construed as to give it some effect, but any such possible construction has not been so fol-

1913

BARK-FONG v. COOPER.

Idington J.

lowed by the steps taken as to be in conformity therewith. The contract must, therefore, be looked at as an ordinary contract of sale and purchase, destitute of any provision relative to time being of the essence of the contract.

So treated the mere default for a few months (where not a mere deposit but half the purchase money had been already paid), in payment of the two instalments to be made later does not constitute sufficient ground for refusing specific performance.

No case has been cited to us, and I venture to think none can be found, resting merely upon the like default, as in law depriving a vendee, under such circumstances, of his right to specific performance in face of his tender of the balance due.

The appeal should be allowed with costs throughout.

DUFF J.—This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Mr. Justice Gregory, who dismissed the appellants' action for specific performance of an agreement for the sale of land made between the respondent and the appellants on the 10th of December, 1910. The purchase price was $1,600 of which $800 was paid at the time of the execution of the agreement, and the residue was to be paid in two equal instalments, one on the 11th of June, 1911, and the other on the 11th of December, in the same year. In February of 1911, the vendees, the appellants, assigned the benefit of this agreement to one Lim Bang, at the price of $2,500, receiving in cash $1,700 at the time of the assignment and an undertaking to pay on the days respectively appointed for the making

of the deferred payments, under the appellants' agreement for purchase. This last agreement contained the clause in the following terms:—

> And it is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are punctually made at the time and in the manner above mentioned, and as often as any default shall happen in making such payment, the vendor, his heirs or assigns, may give to the purchasers, their heirs, executors, administrators and assigns, thirty days' notice in writing demanding payment thereof, and in case any such default shall continue, these presents shall at the expiration of any such notice be null and void and of no effect, and the vendor shall be at liberty to re-possess, or re-sell and convey the said lands to any purchaser as if these presents had not been made, and all the moneys paid hereunder shall be absolutely forfeited to the vendor, his heirs, executors, administrators or assigns. The said notice shall be well and sufficiently given if delivered to the purchasers, their heirs, executors, administrators, or assigns, or mailed at Victoria, B.C., Post Office, under registered cover addressed as follows:—

The appellants having made default in meeting the deferred payments provided for in their agreement, on the 26th of March, 1912, the respondent caused a notice to be sent by registered letter addressed to the appellants demanding payment of the overdue instalment and stating that in default of payment within thirty days from the date of the notice the agreement would be null and void and all moneys already paid thereunder forfeited. The appellant, Bark-Fong, was then in China. On the 15th of May following, the appellants tendered the amount overdue which the respondent refused to accept. On the 27th of the same month, the appellants sued for specific performance. In the statement of defence the respondent set up the appellants' default, the forfeiture clause in the agreement as quoted above, the notice of the 26th March, 1912, and, further, alleged that the respondent, on the 10th of May, 1912, "took re-possession of

1913

BARK-FONG v. COOPER.

Duff J.

the lands in question" and had been in possession ever since. At the trial the respondent was given leave to add a further defence to the effect that the appellants by their neglect to make the deferred payments had "abandoned and repudiated the said agreement."

The learned trial judge dismissed the action. He held first that notice had been sufficiently given under the forfeiture clause above set out and, by implication, that the appellants' rights had thereby terminated. He also held that the default in respect of the deferred payments disentitled them to specific performance. In the Court of Appeal, Irving and Martin JJ. agreed with the learned trial judge on this latter ground. Mr. Justice Galliher appears to have taken the view that the appellants were not entitled to succeed owing to the absence of a proper tender of the purchase money or of a conveyance.

I am unable to agree with the view of this case which has been taken in the courts below. I think the steps taken by the respondent with a view to terminate the agreement under the forfeiture clause were not effectual for that purpose; and that if they had been effectual the appellants would be entitled to relief against forfeiture. I think there is no ground for the suggestion that the respondent did exercise or intend to exercise any right that he may have had to terminate the agreement (on the ground that the appellants' conduct constituted a repudiation of their obligations under it) except the right given him by the forfeiture clause. I have also come to the conclusion that the appellants' conduct was not such as to disentitle them to specific performance.

That the contract was not terminated by the con-

duct of the parties amounting to mutual abandonment of the contract, as Cotton L.J. called it, in *Mills* v. *Haywood*(1), at page 202, is very clear. Assuming that the appellants' default was such conduct as would have entitled the respondent to say to them "you, by your conduct have declared your intention of not carrying out the contract and I shall treat the contract, therefore, as rescinded," it is quite plain that that is not the course the respondent took. On the contrary he says that on several occasions prior to the giving of the notice in March, 1912, he requested the appellants to fulfil their agreement. The notice itself recognizes the agreement as a subsisting contract and demands performance of it. The appellant, no doubt, by that notice does declare his intention to terminate the contract, but to terminate it, not as in exercise of any rights he might have had under the general law, but only in exercise of his rights under the forfeiture clause. He declares his intention to forfeit the moneys already paid. If he had terminated the contract under the general law it is questionable whether he could have retained those moneys. The law upon this point is perhaps not quite settled, but the respondent's notice makes it quite clear that he intended to run no risk of being obliged to refund the moneys he had received. That the vendor's rights under the forfeiture clause were not effectually exercised seems to me equally clear. The notice of the 26th of March was received by two of the appellants. One method of giving the notice is, according to the terms of the contract delivery to the purchasers; and that, I think, is the only method authorized by the contract. The subsequent clause ("mailed at Vic-

(1) 6 Ch. D. 196.

1913

BARK-FONG v. COOPER.

Duff J.

toria, B.C.") is obviously incomplete and ought to be disregarded. It was argued that the appellants were engaged as partners in a common adventure and that service of notice on one would consequently be service on all. I do not think it is necessary to consider whether in the circumstances the appellants ought to be held to be partners in the purchase and sale of the property in question. I think it is immaterial. The agreement does not treat them as partners. It is an agreement between Thos. Cooper on the one hand, and three individuals as purchasers on the other, and I entertain no doubt, that the agreement contemplated delivery of the notice to each one of these individuals. But, quite apart from that, assuming notice had been properly given, I am quite clear that the appellants are entitled to relief from the forfeiture. The clause is clearly a penalty clause, that is to say, it is a provision intended to secure punctual payment, and that being so, on general principles of equity the appellants are entitled to relief upon coming into court and offering to perform the obligations of which the clause was intended to secure performance, unless they are precluded from obtaining such relief by some conduct which makes it inequitable that such relief should be granted. If the vendee, relying upon the effect of this clause, had made a sale of the lands or had rented them to a *bonâ fide* purchaser or lessee or in some other way dealt with that property so that it would be impossible to restore the parties to their former positions, then any relief which the court could give might be of only a very limited character. But nothing of the kind has occurred in this case.

The question remains whether the appellants have lost their right by reason of laches. The general prin-

1913

BARK-FONG v. COOPER.

Duff J.

ciple is stated in Fry on Specific Performance, at page 539:—

> The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

The delay in commencing the action, that is to say, the lapse of the seventeen days between the 10th of May, when the respondent announced his refusal to carry out the contract, and the 27th May, when the action started, is not important, nor was there any delay in the prosecution of the action. The point which has to be considered is whether the delay of the appellants in the payment of the purchase price disentitled them to specific performance. The doctrine of laches, it has been frequently said, is not a technical doctrine, and in order to constitute a defence there must be such a change of position as would make it inequitable to require the defendant to carry out the contract or the delay must be of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the contract or otherwise to make it unjust to grant specific performance. It cannot be said that anything has occurred which makes it inequitable that the respondent should be called upon to perform his contract; the only change suggested is that the property has risen in value. In the special circumstances of this case I do not see why that should be regarded as a ground for thinking it is unfair that

1913

BARK-FONG v. COOPER.

Duff J.

the defendant should be held to his contract. Nor do I think that the circumstances in evidence justify the conclusion that the appellants intended to abandon their rights under the contract. The appellants had paid $800 on the purchase price. They had assigned the benefit of their agreement and had made a profit of $900. It may be that two of them were people of no substance but Bark-Fong, at all events, appears to have been a man of means, and the abandonment of their contract without the consent of Lim Bang might have exposed them to a liability to refund the moneys they had received. The delay is not really difficult to explain when one considers the circumstances. They did undoubtedly expect that Lim Bang, the assignee of the agreement, would, in performance of his contract, provide them with funds for making the payments under their own purchase. The appellants were in posesssion of the property which was perfectly good security for the amount due to the vendor; and it was not until March, 1912, when the value of the property was rising, that he began seriously to press for payment. He then gave a notice demanding payment within thirty days. That notice constituted an admission that there was a subsisting contract and an admission, indeed, that until the end of the period mentioned the contract would not be at an end, and I think in the words of Malins V.-C., in *McMurray* v. *Spicer*(1), that this notice excludes all the anterior time in the computation of delay. I do not think that their conduct from that time forward can be imputed to them for laches. They communicated with Bark-Fong, who was in China, who appears to have acted with all reasonable diligence; and I

(1) L.R. 5 Eq. 527, at p. 538.

1913

BARK-FONG v. COOPER.

Duff J.

think, in view of the previous acquiescence of the respondent and of all the circumstances, it would be applying to these appellants an unduly rigorous standard if we should interpret their conduct during this period as demonstrating an intention on their part of not performing the obligations of the agreement or as shewing such a want of diligence as to make it just to withhold the remedy of specific performance.

ANGLIN J.—Under a written agreement the plaintiffs, on the 6th of December, 1910, became purchasers from the defendant of a property in the City of Victoria, for the sum of $1,600, of which one-half was paid in cash, and the balance was made payable with interest at 7%; $400 on the 6th June, 1911, and $400 on the 6th December, 1911. By a special provision in the agreement the vendor reserved the right on any default in payment to rescind the contract and forfeit whatever part of the purchase money had been already paid by giving to the purchasers and their assigns thirty days' notice in writing demanding payment, at the expiration of which, the default continuing, the contract should be null and void and the moneys paid thereunder forfeited. At the outset of the paragraph containing this power time is declared to be "of the essence of this agreement." On the 24th February, 1911, the plaintiffs re-sold the land, receiving from their sub-vendee all his purchase money except $800. This sum he undertook to pay, with interest at 7%, at the dates and in the manner stipulated for in the plaintiffs' agreement with the defendant.

Default was made in payment of the instalment of $400 and interest due in June, 1911. The defendant

1913

BARK-FONG v. COOPER.

Anglin J.

made some oral demands for payment from one of the three purchasers, but it is not clear upon the record whether these demands were made before or after the second instalment fell due. The default continuing and the second instalment also being overdue, the defendant on the 26th of March, 1912, caused to be mailed a notice addressed to the three purchasers demanding payment and purporting to be given under the special provision of the contract above mentioned. This notice was received by one of the purchasers who informed his co-purchaser, who was in Victoria, of its receipt. The third purchaser, who was in China, was then written to by one of his co-purchasers to come back at once. It does not appear that he was informed of the notice. No attempt was made to give notice to the assign or sub-purchaser, although the defendant had been informed of the sub-sale. The purchaser who had received the notice called on the defendant on the 27th of March, and explained the absence of one of the purchasers in China and says he asked for more time to make the payment demanded, which was refused. In his plea the defendant says he re-took possession of the property on the 10th of May, 1912. On the 15th of May one of the purchasers tendered to the defendant in his solicitor's office the sum of $900, which was rejected. The sufficiency of this tender is not objected to except on the ground that it was not accompanied by tender of a conveyance for execution.

This action for specific performance followed. The defendant pleaded default and laches, rescission by notice, and failure to tender a conveyance. By amendment at the trial he added a plea of abandonment of the contract by the plaintiffs. The learned

1913

BARK-FONG v. COOPER.

Anglin J.

trial judge found that the notice had been sufficiently given under the special clause providing for rescission and forfeiture and also sustained the plea of abandonment. In appeal Irving J.A. agreed with the trial judge; Martin J.A. thought the notice insufficient, but held the case was not one for specific performance on the authority of *Wallace* v. *Hesslein* (1); Galliher J.A. relied solely on the failure to tender conveyance, expressing no opinion as to the sufficiency of the notice given.

No doubt the intention of the parties when making the agreement was to provide for the giving, by post, of the notice demanding payment. It was also no doubt a mere accident that this provision of the contract was not complete, a material item in it being left blank. Personal service on the three purchasers, and on their assign, was the alternative method provided for giving notice of the demand in writing. The terms upon which a vendor is given such a contractual right of rescission and forfeiture must be strictly observed. *Marriott* v. *Mills* (unreported). Although he had not complied with the terms, the vendor, under the notice thus served on but one purchaser, proceeded to enforce the provision of the contract for rescission and forfeiture. His action, in my opinion, is clearly not justifiable under it.

Failing to establish compliance with the special contractual provision he now attempts to assert some right either to rescind by his own act on the purchasers' default or to have rescission decreed by the court. In his pleading he does not put the case in this way, relying apparently upon the sufficiency of his notice given to only one of the three purchasers, and

(1) 29 Can. S.C.R. 171.

1913

BARK-FONG v. COOPER.

Anglin J.

the continued default, to effect rescission under the special provision of the contract. By that very notice the vendor recognized the agreement as subsisting up to the 26th of April. He did not actually proceed to act upon the footing of rescission until the 10th of May, when he says in his pleading he re-took possession. The purchasers had paid one-half of the purchase money and they made tender of the balance on the 15th of May. Under these circumstances I do not think they had incurred the extreme penalty of forfeiture and rescission; but, if they had, the recent decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands, Limited*(1), establishes that they are entitled to relief. In that case and in the recent Ontario case of *Boyd* v. *Richards*(2), as in the case now before us, the provision for rescission and forfeiture was in the nature of a condition subsequent or of defeasance — not a condition precedent, as I, at all events, thought the condition dealt with in *Labelle* v. *O'Connor*(3), relied on by counsel for the respondent, was.

It may not be amiss to note in passing that in the judgment in the *Kilmer Case*(1), at page 322, it is said of *Re Dagenham Dock Company*(4), on the authority of which the decision of the Judicial Committee in the *Kilmer Case*(1) proceeds:—

> that was a case like this of forfeiture claimed under the letter of the agreement and a cross-action for specific performance.

A study of the report of the *Dagenham Case*(4), which came up on a motion by way of appeal from a

(1) [1913] A.C. 319.
(2) 29 Ont. L.R. 119.
(3) 15 Ont. L.R. 519.
(4) 8 Ch. App. 1022.

decision of the Master of the Rolls refusing to order delivery up of certain lands to the applicants, who were vendors asserting forfeiture, does not disclose the pendency of any cross-action for specific performance. The right to that relief is not referred to in the judgment. No doubt that case is a very strong authority in favour of the right of the present appellants, under the circumstances in evidence, to relief from the penalty of rescission and forfeiture. But their right to specific performance involves other considerations.

The principal grounds relied upon at bar in support of the defendant's right to have the court decree rescission and forfeiture, and in answer to the plaintiffs' claim for specific performance, were an alleged abandonment by the plaintiffs of their contractual rights, and their laches.

The testimony in my opinion fails to shew anything in the nature of abandonment or any facts from which an intention to abandon can fairly be inferred. The payment of one-half of the purchase money in cash and the provision in the re-sale agreement for payment of the balance by the sub-purchaser at the time and in the amounts called for by the plaintiffs' agreement with the defendant; Wing-On's request for time when the defendant demanded payment; and the tender of the balance of the purchase money and interest on the 15th of May are scarcely consistent with an intention to abandon. In the light of the testimony as to the reasons given for the default, the mere delay in payment, the sole ground averred in this plea, put upon the record only by amendment at the trial, will not support it. In *Wallace* v. *Hesslein*(1), the

(1) 29 Can. S.C.R. 171.

1913

BARK-FONG v. COOPER.

Anglin J.

court, perhaps, took what may appear to be an extreme view of the duty of a purchaser who claims specific performance to shew that he has always been "ready, prompt and eager to complete." But that decision really rested on the ground that the purchaser had abandoned his contract as was evidenced by his declaration made to the vendor that he would be unable to carry it out. In the present case, as already indicated, the circumstances rebut an intention to abandon.

Courts of equity have never formulated a hard and fast rule of universal application that any fixed period of delay in payment of purchase money will afford any insuperable bar to the relief of specific performance. Whether his default disentitles the purchaser to that relief always depends upon the circumstances, and it is a question to be determined in each case, as a matter of judicial discretion, whether under the circumstances the default has been such that it would be unjust and inequitable to enforce the contract specifically.

In the present case it is in the very clause providing for rescission by the vendor upon thirty days' notice to the purchasers, to be given after default, that time is declared to be of the essence of the agreement. It is clear that this stipulation as to time was intended to apply not to mere default in payment at the dates provided in the contract, but only to failure to pay within thirty days after a valid notice, in conformity with the provision for rescission, had been duly given. See *Webb* v. *Hughes* (1). That notice was never given. The abortive attempt to give it serves to shew that the vendor himself did not treat time as of the essence in

(1) L.R. 10 Eq. 281.

regard to the dates for payment fixed by the contract. At all events until he gave the notice of the 27th of March, and probably until, as he says in his statement of defence, he re-took possession on the 10th of May, he may fairly be regarded, if not as acquiescing in the purchaser's delay in payment, at least as not insisting upon any rights which that delay gave him. The entire delay in the present case was less than a year; the delay after notice to the only purchaser who was notified was forty-nine days; and only five days elapsed between the re-taking of possession alleged by the defendant and the tender to him of the balance of the purchase money on the 15th of May. The right to specific performance has been held not to have been lost by much longer delays. See cases cited in Fry on Specific Performance (5 ed.), page 541. In the *Dagenham Case*(1), if it should be regarded, as it seems to have been in the *Kilmer Case* (2), as an authority on the question of specific performance, the delay in payment was for over three years. In the present case it is obvious that any injury suffered by the vendor will be fully compensated by payment of interest. Under the circumstances disclosed in the evidence, and having regard to the terms of the contract, I do not think that specific performance should be refused on the ground of laches.

As to the failure to tender a conveyance for execution, the attitude taken by the defendant in his defence makes it quite clear that such a tender if made would have been useless. Tender of the purchase money — the really material thing to evidence the plaintiffs' readiness and willingness to complete the

(1) 8 Ch. App. 1022. (2) [1913] A.C. 319.

1913

BARK-FONG v. COOPER.

Anglin J.

contract — was sufficiently made. It was rejected not on the ground that it was unaccompanied by a tender of a conveyance for execution, but on the ground that the contract had been rescinded. That would amount to a waiver of the tender of a conveyance.

On the whole case I am, with respect, of the opinion that, in the sound exercise of judicial discretion, specific performance should not be refused. The judgment in appeal should be reversed with costs in this court and in the Court of Appeal and judgment should be entered for the plaintiffs for specific performance with costs in the form followed in the courts of British Columbia.

BRODEUR J.—I agree with Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appellants: *Tait, Brandon & Hall.*
Solicitor for the respondent: *W. H. Langley.*

1913

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

AND

ALEXANDER KERR AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

*Oct. 30, 31.
*Nov. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Action — Damages — Timber on pre-empted lands — Rights of pre-emptor—B.C. "Land Act," R.S.B.C., 1911, c. 129, ss. 77 et seq. and 132—Issue on appeal—Practice—Negligence—Fire set by railway locomotive—Assessment of damages—Findings of trial judge.

A pre-emptor of Crown lands, under the provisions of the British Columbia "Land Act," R.S.C., 1911, ch. 129, who has not forfeited his rights, is entitled to maintain an action for such damages as he has sustained in consequence of the destruction of timber growing upon his pre-empted lands.

As to the quantum of damages, the trial judge, following *Schmidt* v. *Miller* (46 Can. S.C.R. 45), held that the respondent was entitled to recover the full value of the standing timber destroyed. All evidence bearing upon the question of respondent's interest was omitted in printing the case on appeal and the point was not taken in the Court of Appeal or in the appellant's factum on the present appeal. The decision of the Supreme Court of Canada in *Schmidt* v. *Miller* was, subsequently, reversed on appeal to the Privy Council, and the point was raised upon the hearing of the present appeal that the respondent's damages should be reduced in consequence of his limited interest in the timber destroyed.

Held, that, in these circumstances, the contention in respect to the pre-emptor's limited interest in the property destroyed (the evidence bearing upon it having been omitted from the appeal case) was not open for consideration in the Supreme Court of Canada.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

The court refused to disturb findings of the trial judge, based upon sufficient evidence, or the assessment of damages made by him as limited by section 298 of the "Railway Act," R.S.C., 1906, ch. 37. The judgment appealed from (12 D.L.R. 425) was affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Clement J., at the trial, by which the actions of the plaintiffs, respectively, were maintained with costs.

The actions affected by this appeal were brought, respectively, by the five respondents, claiming damages for the destruction of timber growing upon their lands, in East Kootenay, B.C., by fire alleged to have originated from a locomotive engine of the appellant company. The trial judge found that the fire had been caused by sparks from an engine operated by the company on their line of railway, which passed the locality where the fire took place, shortly before the fire was observed; he also found that the engine was equipped with proper modern appliances, and he awarded damages in favour of the plaintiffs, respectively, aggregating $4,500, according to the limitation provided by section 298 of the "Railway Act," ch. 37, R.S.C., 1906. This decision was affirmed by the judgment now appealed from.

The issues raised on the appeal are sufficiently set out in the judgments now reported.

Hellmuth K.C. for the appellants.

Travers Lewis K.C. and *A. B. MacDonald* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. The plaintiff

(1) 12 D.L.R. 425.

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

The Chief Justice.

had a right of action although the *quantum* of damages might depend on the character of his title. (See ch. 129, sec. 132, R.S.B.C.) Also *Dinan* v. *Breakey* (1). Could that question be raised on this record? I am very doubtful. (See *Hamelin* v. *Bannerman* (2).)

The origin of the fire is fixed by the witness Anderson beyond dispute. The material elements of fact from which the inference of negligence was drawn were: an unusually hot Summer and a consequently parched surface in the immediate neighbourhood of the railway track. The engine went by the place at which the fire was first seen at ten minutes to two in the afternoon, when there was no fire. Ten minutes afterwards the fire was seen by Anderson, and five minutes later by the engineer of the next train. I think the fair inference was drawn by the judge and we should not interfere. *Vide Smith* v. *London and Southwestern Railway Co.* (3).

DAVIES J.—In my opinion the finding that the sparks which escaped from the appellants' engine which passed the locality at a quarter to two o'clock were the cause of the fire which subsequently destroyed the property of the plaintiff was a reasonable inference from the facts proved and was not, as contended, mere conjecture. The evidence of Anderson, the foreman of the company's fire brigade, and that of Johnson and Cummings as to the place where and when the fire was first seen, its size at that time, and the kind and condition of the woods and debris among which it started, the time when the train passed the

(1) 7 Q.L.R. 120. (2) 31 Can. S.C.R. 534.
(3) L.R. 5 C.P. 98.

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

Davies J.

spot before Anderson reached it, the absence of any proof whatever that any campers, fishermen or others were on that day seen in the vicinity combine to convince me that there was sufficient proof to enable such a reasonable inference to be drawn and to exclude any other fair inference.

I think, as a pre-emptor, the plaintiff, Kerr, had a right of action against the defendants for damages for the property burned upon his pre-emption. As to the quantum of such damages, we have not the evidence before us to pass judgment upon. — It is not in the record. — We cannot say that the amount allowed was clearly excessive.

The concurring judgment of the trial judge and the Court of Appeal should not be disturbed.

IDINGTON J.—When a plaintiff complaining of the destruction of property by a fire started by a railway-locomotive proves that the fire in question was not apparent to any one there present until after the locomotive charged with being the cause thereof had passed the place of the fire's origin, and immediately, or within half-an-hour thereafter, the fire is discovered to have been but recently started within a hundred feet or so of the railway track so run over, and no other cause thereof is visible, a *primâ facie* case has been established which must be met by something more than idle suggestion or guesses about the effect of the ordinary currents of the wind in collision or conflict with the current created by the speed of the train and that radiating from the smoke-stack; or the possibilities from the pipe ashes of a possible hunter, where no one hunted, or of the cigarettes or matches of a possible fisherman, where there were no fish, or other imaginary causes of the fire.

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

Idington J.

Nor is such a cause of action so proven to be defeated by the adoption by the railway company of "modern and efficient appliances."

In such latter case and in the absence of being guilty of any negligence the company complained of is absolved from any greater liability than five thousand dollars.

I think the learned trial judge and the Court of Appeal appreciated the evidence and applied the law correctly in this regard.

We are asked now, though no such ground was taken in the appeal below and it is not even mentioned in the appellants' factum, to entertain an appeal in regard to respondent Kerr's damages because he is only a resident pre-emptor.

He sued as such and claimed damages accordingly.

The learned trial judge, as well as the parties, proceeded throughout upon the basis of the party entitled to recover having his damages assessed according to the value of the timber destroyed on his land.

Kerr, being in occupation of his land and in good standing as pre-emptor, clearly was entitled to most substantial damages for the destruction of the timber. Whether the mere speculative chance that he might fail to complete his purchase or not should affect or lessen the claim for full value of the timber never entered the minds of any of those concerned at the trial.

Such a view or possibility should not be entertained now after all that has transpired.

The alleged reversal of this court in the recent case of the *National Trust Co.* v. *Miller*(1), apparently relied upon by the learned trial judge, does not affect the matter of such a claim as, I assume, the plaintiff here sets up by his pleadings.

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

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

Idington J.

For my part, in that case, I happened to dissent from the majority, yet pointed out the possibility of a claim being so founded even by the owner of a licensed location.

I agree with the learned trial judge, the pre-emptor in good standing and in possession stands on much higher ground, and I think his claim in such case can fall little below that of an absolute owner; at all events, so near to that as to render it necessary to have raised the distinction at the trial.

I may point out he is given, by section 132 of the "Crown Lands Act," an action for trespass as if absolutely seized of the land, indicating how extensive the rights are which he holds in relation to the timber on the land.

In my view, it is not necessary to pursue the inquiry further and determine exactly how far his contract, read in light of this section, might carry the respondent, though this is not an action for trespass.

The appeal should be dismissed with costs.

DUFF J.—I think there is sufficient evidence to support the inference drawn by the learned trial judge as to the origin of the fire.

A point is raised by Mr. Hellmuth as to the damages. Kerr appears to have held his land as a pre-emption under the British Columbia "Land Act." The learned trial judge upon the authority of the judgment of this court in *Schmidt* v. *Miller*(1), held that Kerr was entitled to the value of the timber destroyed; in other words the learned trial judge held that the decision in question involved the proposition that where standing timber is destroyed or taken away

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

through or by a wrongful act, the person who is in possession of the land upon which the timber stands is entitled to recover the full value of it from the wrongdoer, notwithstanding the fact that he has only a limited interest in the timber, such, for example, as a non-exclusive right to make use of it for a limited purpose. Assuming that to be the proper interpretation of the decision of this court in that case, the proposition cannot, I think, in view of the decision of the Privy Council reversing the judgment of this court, any longer be maintained. On the other hand, there can be no doubt that, subject to the special provisions of section 298 of the "Railway Act," a plaintiff in the position of Kerr is entitled to recover the actual loss suffered by him through the destruction of timber on his pre-emption; in other words, he is entitled to recover the value of his interest in the timber destroyed.

Section 132 of the British Columbia "Land Act" applies only to actions for "the recovery of possession" and actions of "trespass." Kerr's action was not an action falling within either description unless "trespass" should be construed as including "trespass on the case." Further, it may be doubted whether section 132 deals with the measure of damages; and if so there would still remain the question whether or not the plaintiff's rights under section 298 of the "Railway Act" could properly be measured by the extent of his rights under the "Land Act."

It is unnecessary to pass upon this question of the effect of the provisions of the "Land Act" because, in my opinion, the point is not open to the appellant. The point was not raised in the Court of Appeal for British Columbia and all evidence bearing upon the question of the value of Kerr's interest in the timber

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

Duff J.

was excluded from the appeal book; it was mentioned in this court for the first time on the oral argument. As a general rule an appellant is entitled, no doubt, to bring before this court for the first time a point of law not raised at an earlier stage when all material necessary for the full examination of the point is before the court and the respondent has not been prejudiced by the course taken by the appellant. *McKelvey* v. *Le Roi Mining Co.*(1), at page 666. I concur, however, with the view of the majority of the court that, in the circumstances of this case, the contention Mr. Hellmuth now seeks to advance must be taken to have been abandoned.

I think the appeal should be dismissed with costs.

ANGLIN J.—There was ample evidence of facts upon which, without conjecture, but by what was not an unreasonable inference, the jury could properly find that the fire in question in this action was caused by the defendants' locomotive.

Under the authority of *Hamelin* v. *Bannerman* (2) I would be disposed to preclude the appellants from raising the question here as to the quantum of the interest of the respondent Kerr, that question not having been presented by him in the Court of Appeal or in his factum. Apparently, because no issue of this kind was to be presented, the evidence bearing on it was omitted from the record in the Court of Appeal and is not now before us. The question at the trial appears to have been not whether, because of his limited interest as a pre-emptor in the timber which was destroyed, the quantum of the plaintiff's recovery should be restricted, but whether he had any right of action or re-

(1) 32 Can. S.C.R. 664. (2) 31 Can. S.C.R. 534, at p. 537.

covery at all. Under section 123 of the Revised Statutes of British Columbia, chapter 129, the plaintiff, Kerr, as a pre-emptor, had a right of action against the defendants. It may be that the quantum of the damages to which he was entitled would be substantially less than if he had full ownership of the land which was burned or of the timber upon it; but, without the evidence which has been omitted from the record, we are not in a position to determine the proper quantum, or to say that the amount allowed is clearly excessive.

I would dismiss the appeal with costs.

BRODEUR J.—This is an action by different persons who claim damages from a railway company under section 298 of the "Railway Act."

Under the provisions of that section, if damages are caused to lands by fire started by a railway locomotive, the company shall be liable for such damages, whether there is negligence or not.

The plaintiffs had to prove that the fire had been set by a locomotive of the company defendant. It is a question of fact about which the trial judge and the judges of the Court of Appeal are unanimous. It would not do for us to reach a different conclusion than the one reached unanimously by the courts below. The jurisprudence of this court is to the effect that the finding of a trial judge, confirmed by the Court of Appeal, should not be disturbed.

Now, as to one of the plaintiffs, it is argued that he was not the owner of the property destroyed by the fire, but simply a licensee under the provisions of the "Crown Lands Act" of British Columbia. That question does not seem to have been discussed before

1913

CANADIAN PACIFIC RWAY. CO. v. KERR.

Brodeur J.

the Court of Appeal. We have been informed by counsel at bar that all the evidence in relation to that feature of the case was not printed by consent of the parties. The only inference to be drawn from that is that the parties were satisfied with the judgment of the Supreme Court of the province in that regard. It would not be fair to the parties to pass judgment on that issue that seems to have been abandoned.

In those circumstances, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. McMullin.*

Solicitors for respondents, Kerr and Cummings: *Lawe & Fisher.*

Solicitor for respondent Laidlaw: *A. B. MacDonald.*

Solicitor for respondents, Farquharson and Boisjoli: *H. W. Herchmer.*

GEORGE E. McPHEE (PLAINTIFF) ....APPELLANT;

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

1913

*Oct. 29, 30.
*Nov. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Employer's liability—Negligence—Answers by jury—"Volenti non fit injuria"—Issue undecided—Practice—B.C. Sup. Ct. Rules, O. 58, r. 4—New trial.

On the defence of *"volens,"* in an action for damages by an employee on account of injuries sustained in the course of his employment, the question which has to be considered is whether the plaintiff agreed that, if injury should befall him, the risk was to be his and not his master's. *Smith* v. *Baker & Sons* ([1891] A.C. 325) referred to.

In an action to recover damages for injuries sustained by the engineman in charge of the company's steam-shovel in use on the construction of their works, questions were submitted to the jury to which they gave answers negativing contributory negligence by the plaintiff and finding the company negligent in failing to provide a guard on part of the gearing and in leaving it uncovered, but they did not answer one of the questions submitted to them, viz.: "Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them?" The defence resting upon this issue was duly presented at the trial and evidence submitted to support it.

Held, that, although the Court of Appeal for British Columbia, under Order 58, rule 4, of the "Supreme Court Rules, 1906," has power to draw inferences of fact and to give any judgment and make any order which ought to have been made in the trial court, and to make such further or other order as the case in appeal may require, nevertheless, it should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence. Therefore, in the circumstances of the present case, there should be an order for a new trial to have the issue of *volens* decided. *Paquin* v. *Beauclerk* ([1906] A.C. 148) and *Skeate* v. *Slaters* (30 Times L.R. 290), referred to.

Judgment appealed from reversed.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment entered by Morrison J., at the trial, on the findings of the jury, in favour of the plaintiff, and dismissing the action with costs.

The plaintiff was engineman in charge of a steam-shovel in use by the company on works of construction on their line of railway, which was being removed under its own power from one part of the line to another. While the machinery was in motion, he attempted to lubricate a portion of the gearing which was uncovered and not protected by guard-rails. In doing this he entered a narrow passage in a stooping posture and, in backing out from the lubricator, he was caught in the gearing and severely injured.

On the trial evidence was adduced to shew that the plaintiff had been employed on the machine for a long time, that he was fully aware of the danger to be incurred in approaching the lubricator while the machinery was in motion, that he had made no request to have it protected and that he had carelessly gone into the dangerous position and assumed the risk at a time when it was not necessary to do the work in which he was engaged at the time of the accident. The jury made answers to some of the questions, as stated, in the head-note, but did not give any answer to the question on the issue of *volens,* which had been the principal defence of the defendants. Upon the answers returned by the jury, the trial judge entered judgment in favour of the plaintiff for $5,000, the amount of the damages assessed by the jury. The Court of Appeal for British Columbia, by the judgment now appealed from, set aside the trial judgment and dismissed the action with costs. In the court

below, the present respondents contended that the plaintiff had been guilty of contributory negligence, and that he knew and appreciated and voluntarily accepted the risk of performing the work in close proximity to the unguarded gear in which, in consequence of his own carelessness, he was injured.

S. S. Taylor K.C. for the appellant.
Hellmuth K.C. for the respondents.

THE CHIEF JUSTICE.—It is admitted that the proximate cause of the accident out of which the plaintiff's claim arises was the defective gear of the steam-shovel on which he was put to work. That defect consisted in the failure of the defendants to provide a proper guard for the gear, and, in consequence, there was a *primâ facie* liability on their part. Among other defences it was urged that the plaintiff assumed the risk incident to the use of the defective machinery.

The maxim *volenti non fit injuria* has its origin in the Roman Law. (*Nulla est injuria quæ in volentem fiat,*" Dig. 47, 10, 1, 5.) In the restricted sense in which it is sought to apply it here, that maxim has disappeared from the civil law on the very sound principle that it is contrary to public order to permit a master to relieve himself by express or implied contract of the legal duty to provide adequate appliances, to maintain them in a proper condition and, generally, to conduct his business in such a way as not to subject those employed by him to unnecessary risk. *"La Sécurité des personnes est d'ordre public."* Arts. 13, 1057, 1080, Civil Code of Quebec; Planiol, Revue Critique, 1888, Exam. Doctr., at page 286; Huc., 8, page 571, No. 431, and references.

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

The Chief Justice.

In the English common law, as I understand it, the maxim is gradually receiving a more limited application. In any event, it is quite permissible to say that it was more rigorously applied against the workman in *Thomas* v. *Quatermaine*(1), than in *Smith* v. *Baker & Sons*(2), and *Williams* v. *Birmingham Battery and Metal Co.*(3). In the first case the Court of Appeal took upon themselves to decide that the plaintiff was deprived of any cause of action because *volenti non fit injuria*. Since *Smith* v. *Baker & Sons* (2) it is a question of fact for the jury whether the workman by express or implied agreement undertook to suffer harm or run the risk of it.

In the case at bar there was a positive duty upon the defendants not to create or permit the continued existence of the particular source of danger and it was for them to prove affirmatively that the plaintiff had by express or implied agreement taken upon himself the risk of injury resulting from that breach of duty. That issue was squarely raised at the trial on the evidence and the appropriate question was put to the jury but remained unanswered because, presumably, of the very pardonable, if erroneous, assumption that the defence of *volens* was merged in that of contributory negligence which the jury negatived.

In these circumstances, having regard to the law of British Columbia, I would have been disposed to decide the issue of *volens* here, but I defer to the better opinion of Mr. Justice Duff, in whose conclusions I concur.

DAVIES J.—I will not dissent from the disposition

(1) 18 Q.B.D. 685. (2) [1891] A.C. 325.
(3) [1899] 2 Q.B.D. 338.

of this appeal proposed by my colleagues, though I acquiescence in it with difficulty and doubt.

I think it better, as there is to be a new trial on the question of *volens,* not to enter upon any discussion of the facts and circumstances out of which my doubts and difficulties arise as these facts will be submitted to a jury on the new trial.

It is not on the legal question that my difficulties arise, but on its application to the facts as proved, and the further fact that, while the jury did not pass upon the question of *volens,* it was open, under the law of British Columbia, as I understand it, for the appellate court to do so, and I find great difficulty in acceding to the reversal of the unanimous judgment of that court on the question.

IDINGTON J.—The case of the *Canada Foundry Co.* v. *Mitchell*(1), seems to have been overlooked by the Court of Appeal. It seems to me that this court in that case decided, though not in terms yet in principle, that a verdict of the jury must be had in order to exonerate the employer by reason of the employee having voluntarily assumed the risk incident to his employment.

The facts in that case seem to me quite as plain as in this calling upon the employee to determine for himself the risk he ran.

The case, as it appeared in this court, is imperfectly reported. But in the report in 3 Ont. W.R. 907, the answers of the jury to questions 12 and 13 are reported as follows:—

12. That deceased knew and fully appreciated the risk he ran in doing the work with the appliances which were used;

13. That he did not voluntarily incur the risk, but was working under protest.

(1) 35 Can. S.C.R. 452.

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

Idington J.

I have looked at the appeal case on file in this court to see if there was anything in that to explain the grounds of this answer to question No. 13, and am unable to find any personal protest on the part of the injured man and assume, therefore, that the answer was founded merely upon the inference that he had, rather than quit his employment, submitted to the risk he ran. It seems to have been merely an inference of a mental protest overborne by his circumstances. This court there felt bound by the verdict of the jury.

I, therefore, conclude that it must be taken that the question is one for the jury in almost any conceivable case save the one of an express contract and one that must be submitted to the jury.

Indeed, it seems to me that they are in such cases much more fitted to draw the correct inference than any tribunal of lawyers, where training leaves them in a measure unable to realize to the full just what the ordinary workman's appreciation of his condition and will must have been in any such given case, short of express contract evidencing it.

I might distinguish this case from that which I cite by relying upon the length of time the workman had to ponder over and decide. I do not think such distinctions are productive of a sound administration of justice. And I think, moreover, that there is a gross fallacy in the argument founded on the length of time that the workman had served under the conditions in question.

Each day he escaped from the danger he was running, instead of tending to enable him to appreciate the true nature of the risk he ran, lessened his appreciation of it.

It must be possible in such cases by an extreme

care beyond the ordinary care used, and bound to be used, to escape injury. That extreme care he is likely to apply at first, but may become unable to continue it on every occasion.

It is the difference between this necessity for extreme care, which the law does not impose on him, and the ordinary care that the ordinary man will use in his daily work and he is bound to use, which he must appreciate yet may not be able fully to do so together with the consequential results.

In the last analysis it is the long average chance he takes and must appreciate that is to be determined and willed by him if the rule of law is to be adhered to that is involved in the doctrine.

I think the jury must determine that as best they can according to the manifold circumstances arising in each case.

The jury's omission to answer the question was the fault of the respondent in not insisting upon an answer.

For the jury said they had answered the questions, yet counsel did not call attention to this omission.

I do not think the verdict rendered can be treated as a general verdict which might have covered the case.

I think, therefore, the appeal must be allowed and a new trial had, and costs as appear in the judgment of Mr. Justice Duff.

DUFF J.—On further reflection I have come to the conclusion that the view of the Court of Appeal, which was the view I was inclined to take at the close of the argument, cannot be supported. For reasons

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

Duff J.

I shall presently mention, I think there ought to be a new trial and, as in duty bound, I shall, therefore, refer to the facts only in so far as it may be absolutely necessary to do so in order to explain my reasons for differing from the Court of Appeal.

The maxim *volenti non fit injuria* indicates a principle of wide and various application in the English law. In relation to questions between employer and the employed, Lord Watson said in *Smith* v. *Baker & Sons*(1), at page 355, the maxim as now used generally imports

> that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is *not whether he voluntarily and rashly exposed himself to injury,* but whether he agreed that, if injury should befall him, the risk was to be his and not his master's.

An instance of the application of the principle would be the doctrine of common employment if the exposition of that doctrine in *Priestly* v. *Fowler*(2) contains the true account of it.

Where the principle is resorted to for affording a way of escape from liability by an employer, who has not performed his *primâ facie* duty to make reasonable provision for the safety of his employee, the question to be determined is a question of fact and the employer must shew, to use the language of Lindley L.J. in *Yarmouth* v. *France*(3), quoted with approval by Lord Halsbury in *Smith* v. *Baker & Sons*(1), at page 337,

> as a fact that the workman agreed to incur a particular danger or voluntarily exposed himself to it.

(1) [1891] A.C. 325. (2) 3 M. & W. 1.
(3) 19 Q.B.D. 647, at p. 661.

For the purpose of this appeal it may be taken as settled that there was negligent default for which the defendants would be responsible (unless the defences I am about to mention could be made good) in failing to provide a proper guard for the machinery in which the plaintiff received his injuries. The defence of common employment was pleaded, but not relied upon at the trial where it was not disputed that (in the event of the other defences specifically relied upon failing) appellants were answerable for the absence of such a guard. The defences to be considered are two. The first was that the operation of regulating the lubricator on the engine of which the plaintiff was in charge was one which could be efficiently performed at a time when the machinery in question was not in motion and, consequently, in perfect safety; and that, in performing this operation while the machinery was in motion, the plaintiff rashly and unnecessarily exposed himself to the danger of being injured as he was. This defence was really presented to the jury as contributory negligence and, doubtless, was dealt with by them as such. Without saying more, it seems to me to be quite indisputable that there was evidence upon which the jury might properly find for the plaintiff on this issue. The other substantial defence was that the plaintiff entered upon his employment and continued in it for two years with full knowledge of the danger arising from the absence of proper safeguards; and that his conduct in this respect was such as to preclude him from complaining of what otherwise might have been the actionable default of the defendants in not providing such safeguards.

It is to this defence that the Court of Appeal gave

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

Duff J.

effect in dismissing the action. Before coming to the facts, first let me note again the exact legal ground upon which the defence rests.

> The jury ought to be able to affirm that he, the employee, consented to the particular thing being done which would involve the risk and that he consented to take the risk upon himself. Lord Halsbury in *Smith* v. *Baker*(1), at page 338.

The question to be considered is: "Whether he agreed that, if injury should befall him, the risk was to be his and not his master's?" (Lord Watson, in *Smith* v. *Baker & Sons*(1).)

In *Williams* v. *Birmingham Battery and Metal Co.* (2), Lord Justice A. L. Smith says, at page 344, that the defence summarized by the maxim *volenti non fit injuria* is that the employee has

> contracted or consented or undertaken to run the risk of the defect

from which the accident arose. In the same case Lord Justice Romer says that in order to escape liability the master must shew that the servant "has taken upon himself the risk without precautions."

There was no evidence of express consent or agreement on the part of the plaintiff, and the question for the jury, therefore, was whether in all the circumstances the conduct of the plaintiff amounted to such consent. It was argued by Mr. Taylor that this is a question upon which the jury alone is competent to pass; in other words, that where consent is to be inferred from a course of conduct the employer must, in order to make good this defence, obtain a verdict from a jury or other primary tribunal of fact affirming it. I am quite unable to agree with this contention. There are, undoubtedly, expressions in text-books

(1) [1891] A.C. 325. (2) (1899) 2 Q.B. 338.

and judgments which seem to give some countenance to it; but it appears to me to be entirely opposed to principle. By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

The power given by O. 58, r. 4,

> to draw inferences of fact * * * and to make such further or other order as the case may require,

enables the Court of Appeal to give judgment for one of the parties in circumstances in which the court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously; *Paquin* v. *Beauclerk*(1), at page 161; and *Skeate* v. *Slaters*(2).

The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last mentioned ques-

(1) [1906] A.C. 148. (2) 30 Times L.R. 290.

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

Duff J.

tion judicial opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application.

It was argued by Mr. Hellmuth, on the authority of *Clarke* v. *Holmes*(1), and *Woodley* v. *Metropolitan District Railway Co.*(2), that, since, according to the plaintiff's own admissions, he entered upon his employment with a full appreciation of the danger occasioned by the lack of a guard and of the risk of injury arising therefrom and, as was contended, according to his own admission, with notice that his employers would not correct the defect, the appellant must be taken to have consented to his assumption of the risk as a term of his employment. I do not think it is necessary to examine the cases referred to minutely. When those cases were decided the doctrine of *volenti non fit injuria* had not undergone the elaborate examination to which it was afterwards subjected by the Law Lords in *Smith* v. *Baker & Sons*(3), and I think that in so far as any argument founded upon the earlier cases is inconsistent with the doctrine laid down in *Smith* v. *Baker & Sons*(3), as explained in *Williams* v. *Birmingham Battery Metal Co.*(4), and in *Canada Foundry Co.* v. *Mitchell*(5), that argument ought to be rejected. In *Williams' Case* (4), it is expressly stated by Romer L.J., at page 345, that the circumstance that the servant has entered

(1) 7 H. & N. 937.
(2) 2 Ex. D. 384.
(3) [1891] A.C. 325.
(4) (1899) 2 Q.B. 338.
(5) 35 Can. S.C.R. 452.

into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him; and that statement of the law was adopted by this court in *Canada Foundry Co.* v. *Mitchell*(1).

Whether the circumstances in any particular case amount to consent must depend upon the facts of that particular case looked at as a whole; and, considering the facts of this case as a whole, I cannot agree that the construction of them adopted by the Court of Appeal is the only construction they will reasonably bear.

I think, however, the respondents are entitled to a new trial on the ground that their plea *volenti non fit injuria* was not passed upon by the jury.

As to costs the appellant should have the costs of the appeal to this court; and, with respect to the costs of the Court of Appeal for British Columbia, the respondents are entitled to the costs of a successful motion for a new trial on the ground just mentioned, while the appellant is entitled to the costs attributable solely to the controversy raised by the respondents' contention in the Court of Appeal that the action ought to be dismissed on the ground that the issue in question was conclusively determined in their favour by the evidence. The costs of the abortive trial should abide the event of the new trial.

ANGLIN J.—The plaintiff appeals from the judgment of the Court of Appeal for British Columbia reversing the judgment of the trial judge and dismissing this action on the ground that the plaintiff was *volens,* that is, that he had undertaken to assume

(1) 35 Can. S.C.R. 452.

1913

McPHEE
v.
ESQUIMALT AND NANAIMO RWAY. CO.

Anglin J.

the risk of the defect in the defendants' machinery which was the cause of his being injured.

At the trial the jury found the defendants guilty of negligence in not having had a guard placed on the gear of the steam-shovel on which the plaintiff worked, and that such negligence was the proximate cause of the injury; and they assessed the damages at $5,000.

To the fourth question, put at the instance of counsel for the defendants,

> Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them ?

the jury did not give an answer.

The plaintiff had been working for five years and four months on the steam-shovel on which he was injured, for the first three years in a subordinate capacity, and for the last two years and four months as engineer in charge. He says the machine was always in the same condition, and that his predecessor had asked that the gear be guarded, but that nothing was done. The following questions and answers are taken from the plaintiff's evidence.

> Q. You always understood the importance of avoiding that gear ?
> A. Yes.
> Q. Well, what happened this time that you did not avoid it ?
> A. Well, I was avoiding the clearance, I thought I was avoiding it; I am sure I was avoiding it. I knew how dangerous it was.

Contributory negligence on the part of the plaintiff was negatived by the jury, and their finding on that issue cannot be successfully attacked.

For the plaintiff it is urged that upon the findings as we have them he is entitled to judgment, notwithstanding the failure of the jury to answer the fourth question. For the defendants it is contended that

upon the plaintiff's admission that he knew and appreciated the risk from the absence of the gear, the only reasonable inference is that he was *volens* and that the action should, therefore, be dismissed.

Had the defence of *volens* not been fought out at the trial — had the issue upon it not been clearly presented to the jury, I think the plaintiff's contention should have prevailed and the judgment in his favour should have been restored. But that issue was clearly presented at the trial and formed the subject of a specific question. It is impossible to say that the jury intended to deal with it either when they negatived contributory negligence or when they found negligence on the part of the defendants. Neither is it possible to maintain that the verdict should be taken to be a "general verdict" for the plaintiff. There is no finding upon the issue of *volens*. Without undertaking the functions of the jury we cannot make such a finding. I am, therefore, of opinion that, notwithstanding the power conferred on the Court of Appeal for British Columbia to supplement the findings of a jury, which we may exercise, judgment should not be entered for the plaintiff.

On the other hand, although it is clear that the plaintiff knew of the defect and, perhaps, also sufficiently clear that he fully appreciated the danger to which it exposed him, mere knowledge and appreciation of the danger does not conclusively establish that he contracted or consented or undertook to run the risk and to exonerate his employer from liability for any injury it might cause. As Lord Watson said, in *Smith* v. *Baker & Sons*(1) :—

(1) [1891] A.C. 325.

1913

McPHEE v. ESQUIMALT AND NANAIMO RWAY. CO.

Anglin J.

When, as is most commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But, assuming he did so, I am unable to accede to the suggestion that the mere fact of his continuing in his work with such knowledge and appreciation will in every case imply his acceptance.

As put by Lord Halsbury:—

> In order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to take the risk upon himself.

The same view is expressed by Romer L.J. in *Williams* v. *The Birmingham Battery and Metal Co.*(1):

> The circumstance that the servant has entered into or continued in his employment with knowledge of the risk and absence of precaution is important, but not necessarily conclusive against him;

and, as put by A. L. Smith L.J. in the same case:—

> that the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now, beyond question, been settled by the House of Lords.

These authorities make it clear that, assuming the plaintiff's knowledge and appreciation of the risk which he incurred to have been fully established, it was still open for a jury to consider whether, having regard to the "nature of the risk and the workman's connection with it" and the other circumstances of this case, it should be inferred that he "contracted or consented or undertook to run that risk" and to exonerate his employer from liability in connection with it.

The fourth question as propounded to the jury in the present case is open to some criticism as to its form. But, in the absence of an answer to it, the burden of obtaining which was upon the defendants, the

(1) (1899) 2 Q.B. 338.

judgment dismissing the action cannot be maintained. The jury having failed to determine a vital issue, with which it was within their province to deal, the only course open is to order a new trial.

Inasmuch as the defendants have come here to sustain the judgment dismissing the action, the plaintiff's appeal should be allowed with costs. The costs in the Court of Appeal and of the abortive trial should be dealt with as indicated by my brother Duff.

BRODEUR J. agreed with Duff J.

Appeal allowed and new trial ordered.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitor for the respondents: *J. E. McMullen.*

1913

*Oct. 23, 24.
*Oct. 27.

HENRY DONKIN (DEFENDANT).....APPELLANT;

AND

CLARENCE EDWARD DISHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and servant—Profit-sharing—Partnership — Evidence — Statutes—R.S.B.C. 1911, *c.* 153, *s.* 3; *c.* 175, *s.* 4—*Words and phrases —"Partnership."*

The "Master and Servant Act," R.S.B.C. 1911, ch. 153, by sec. 3, respecting profit-sharing by servants, declares that no agreement of that nature shall create any relationship in the nature of partnership. Section 4 of the "Partnership Act," R.S.B.C. 1911, ch. 175, provides rules for determining partnership and, by sub-secs. 2 and 3, declares that the sharing of gross profits does not, of itself, create a partnership, that the receipt of a share of the profits of a business is *primâ facie* evidence of a partnership, that the receipt of such share or of a payment varying with the profits does not, of itself, make the person receiving the same a partner, and that a contract to remunerate a servant by a share of the profits does not, of itself, make him a partner. The plaintiff, an employee of the defendant, by the terms of his engagement was to receive as remuneration for his services a one-half share of the profits of defendant's business and conversations took place regarding an arrangement whereby plaintiff might have a "share in the business," but no definite agreement was made. Plaintiff, claiming to have become a partner, wrote a letter to defendant asserting that he had an undivided interest in the business and asking him to execute articles of partnership. Defendant replied to this letter in an evasive and temporarizing manner and the business continued to be conducted without any change. Later on, the defendant served upon the plaintiff a notice of dissolution of partnership and, in the notice as well as in the correspondence, made use of the word "partnership" in referring to the relations between them.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

DONKIN v. DISHER.

Held, reversing the judgment appealed from (18 B.C. Rep. 230) that, under the statutes referred to, the onus was upon the plaintiff to shew that he had been admitted as a partner in the business in the strict legal sense and that the indefinite use of the term "partnership" in the correspondence and notice did not, in the circumstances, amount to evidence of an agreement that there should be a partnership.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Morrison J., at the trial(2), and maintaining the plaintiff's action.

The plaintiff's action sought a declaration of partnership, in the circumstances stated in the head-note. The learned trial judge held, on the evidence, that, as a matter of fact, the defendant had not agreed to admit the plaintiff as a partner in his business and dismissed the action with costs. By the judgment appealed from the action was maintained; it was held that the defendant's correspondence and the notice of dissolution amounted to an admission of an existing partnership, and the usual accounts and inquiries were directed.

Lafleur K.C. and *R. M. MacDonald* for the appellant. We submit that the judgment of the learned trial judge was right, and that no agreement constituting a partnership had ever been arrived at between the parties. The respondent submitted terms in the document he had prepared, but they were never assented to, and the appellant plainly stated that he would not assent to them. On the terms proposed by respondent, one-half of the capital and assets which the appellant had in the business would have been

(1) 18 B.C. Rep. 230. (2) 3 West. W.R. 1008.

1913

DONKIN v. DISHER.

handed over to the respondent, who never put a dollar of capital into the business. The verbal and only agreement between the parties was that the respondent was to receive remuneration by percentage of profits. The terms of any further arrangement were left to future settlement; there can be no completed *vinculum juris* until terms have been agreed upon. *Blackwoods, Ltd.* v. *Canadian Northern Rway. Co.*(1), at page 103.

The terms of an alleged agreement must be certain for the court must know what it is to enforce: *Taylor* v. *Brewer*(2); *Pearce* v. *Watts*(3). A final acceptance of terms must be distinguished from a preliminary negotiation as the basis for a formal agreement which alone is to be binding. Reference to a proposed formal document is not conclusive: *Rossiter* v. *Miller*(4); *Winn* v. *Bull*(5). To found estoppel, a representation must be of an existing fact, not of a mere intention: 13 Halsbury, "Laws of England," p. 377. Such a representation must be clean and unambiguous: 13 Halsbury, "Laws of England," p. 379. Such representation must not be induced by the party complaining: 13 Halsbury, "Laws of England," p. 381. It is necessary to estoppel by representation that, in acting upon it, the party to whom it was made should have altered his position to his prejudice: 13 Halsbury, "Laws of England," pp. 383, 384.

As respondent was an employee remunerated by an interest in the profits, the provisions of sections 3

(1) 44 Can. S.C.R. 92.
(2) 1 M. & S. 290.
(3) L.R. 20 Eq. 492.
(4) 3 App. Cas. 1124.
(5) 7 Ch. D. 29.

and 4 of the "Master and Servant Act," R.S.B.C. 1911, ch. 153, are applicable, and his arrangement is to be deemed to be within the provisions of the Act, unless "this may otherwise be inferred."

S. S. Taylor K.C. for the respondent. The evidence shews that during 1910 it was definitely arranged that partnership should be entered into for 1911 and that a definite partnership agreement was entered into in 1911, which is sustained by the appellant's actions and conduct; by the evidence and by all the surrounding circumstances; also by statements which the appellant had prepared at the time, which statements would be inconsistent with any other condition.

The evidence concerning the months of June to September, 1912, contained in the letters of the appellant, his telegrams, his notice of dissolution of partnership given under the "Partnership Act," and his admission to the manager of the Seattle agency of Libby, MacNeill & Libby, together with the evidence of the respondent, shews conclusively that a partnership existed from January 1st, 1911. The evidence on discovery of the appellant is consistent only with the existence of a partnership. See "Partnership Act," ch. 175, R.S.B.C. 1911, sec. 4.

The evidence, moreover, is sufficient to meet the requirements of the "Master and Servant Act," R.S. B.C. 1911, ch. 153, sec. 3; it is explicit and direct and conclusively supports the partnership arrangement.

THE CHIEF JUSTICE.—Both parties agree that, previous to 1911, they stood towards one another in the

1913

DONKIN v. DISHER.

The Chief Justice.

relation of master and servant. It is also admitted that, at the end of 1910, a new agreement was made applicable to the coming year. The dispute is as to the terms and legal effect of that agreement. The appellant says that it was made merely for the purpose of increasing the share in the profits which the respondent had been receiving out of the business as his remuneration for services rendered, that is to say, it was merely intended to modify the then existing agreement which was, undoubtedly, one of profit-sharing. On the other hand, the respondent submits that the relation of master and servant ceased at the end of 1910, and that he then became a partner in the business on the basis of a half-interest in the profits and that, with respect to the capital, stock-in-trade, etc., the appellant became a creditor of the new firm. The burden of proof was on the plaintiff and I do not think that he has satisfied it. Where there is doubt the conduct of the parties at the time is the best evidence of their intentions; especially when the version of the respondent involves a fundamental change in the relations of the parties.

In fact, no change was made in the management of the business or in the relations of the parties towards one another or towards their clerks; no new books of account were opened; the bank account was kept in the same way; cheques, drafts and notes were signed in the old name by the respondent as attorney and not as a partner. In fact, the conduct of the parties at the time corroborates entirely the appellant's position.

I will add nothing to what my brother Duff says as to the two letters relied upon in the Court of Appeal. He conclusively establishes that, read in the light of

1913

DONKIN v. DISHER.

The Chief Justice.

all the surrounding circumstances, their probative effect is of little value. Neither party was very disingenuous and, in that respect, honours are easy between them.

I would maintain the appeal with costs.

DAVIES J. agreed with Anglin J.

IDINGTON J.—I think that the learned trial judge correctly interpreted the language and conduct of these parties and defined their relations founded thereupon and applied the appropriate remedy for such relief as respondent was and is entitled to.

With great respect, I do not think the correspondence relied upon by the Court of Appeal can, when read in light of the acts of the parties both before and after the same, justify the variation of the trial judgment.

The word "partnership" is capable of many meanings and we ought not to fix upon it, as used by these parties, the one legal technical meaning it may bear when obviously the parties have not reached that stage in their protracted negotiations, where such technical meaning would represent their understanding.

The appeal should be allowed here and below, and the judgment of the learned trial judge be restored.

DUFF J.—It is a little important in considering this appeal to note what the foundation of the respondent's claim exactly is. The claim is based upon an oral contract of partnership alleged to have been made between the appellant and the respondent in the latter part of the year 1910 under which, accord-

1913

DONKIN v. DISHER.

Duff J.

ing to the respondent, the two parties actually carried on business under the name of H. Donkin & Co. from the 1st of January, 1911, until the 21st of September, 1912. The learned trial judge found that no such partnership existed. His judgment was reversed by the Court of Appeal, which held that certain correspondence which passed between the parties in January and February, 1912, contained an admission by the appellant of the existence of the partnership alleged by the respondent of such weight as to dispense with the necessity of considering the oral evidence upon which the judgment of the learned trial judge was founded. Reading this correspondence in light of the conduct of the parties, especially the conduct of the respondents, I am not able to agree with the conclusion at which the Court of Appeal arrived touching the effect of it, and I think, after an examination of the evidence as a whole, that there is no sufficient ground for disturbing the findings of the learned trial judge, but that, on the other hand, the evidence preponderates in favour of his view.

Prior to the year 1910, the respondent had been for some years in the employ of the appellant, who had been carrying on business in Vancouver under the name of H. Donkin & Co. The respondent was first remunerated by a salary alone, but later received a share of the profits as well. The agreement, as he now alleges, made in 1910, was to the effect that a partnership was formed between himself and the appellant to take over the business, including all the assets of H. Donkin & Co., and carry on that business during the year 1911 without change in the firm name, the partners sharing the profits equally. There was, he says, a valuation of the assets of H. Donkin & Co.,

and it was a part of the arrangement that the appellant was to be paid from these assets according to this valuation. The appellant denies that any agreement for partnership was entered into. He admits that a fresh agreement was made in 1910; he says it was limited to a single point, viz., that, beginning with the 1st of January, 1911, the appellant should receive half the net profits of the business as his remuneration. Disher's status as an employee was, he says, to remain unchanged.

There is a good deal in the evidence, no doubt, to shew, and I think it is probable, that Disher proposed to the appellant that he should be admitted as a partner in the strict sense, that is to say, that he should cease to be an employee and become joint owner of the business with Donkin. I think it is also likely that Donkin did not expect to retain Disher permanently in association with him without ultimately effecting some re-adjustment of their relations by which Disher should become entitled to a proprietary interest in the business. There is no doubt that the question of partnership in this sense was considered by Donkin. He appears, however, to have found it very difficult to overcome his objection (a very substantial one in the circumstances) that, Disher being engaged extensively in speculations, the suggested arrangement might expose the business to disorganization at the instance of Disher's creditors in the event of his speculations proving unfortunate. He had under consideration apparently an alternative plan of incorporating a company to take over the business.

The learned trial judge, as I have already said, ac-

1913

DONKIN v. DISHER.

Duff J.

cepted the appellant's evidence upon these points. The correspondence which influenced the judgment of the Court of Appeal, does not appear to me to be inconsistent with the view of the learned trial judge that Donkin had not assented to Disher's proposal that he should be admitted to the status of a partner. On the contrary Donkin's letter of the 12th of February, upon which the learned Chief Justice based his conclusion, appears to me to fit in with the theory that Donkin had not yielded to Disher's efforts to induce him to make the proposed change better than with the alternative theory that more than a year before Disher had become owner of a half-interest in the business and that, during the intervening period, they had been carrying on that business together as partners. On the latter hypothesis there are many things in Donkin's letter which would be both unmeaning and foolish. Then if we consider the conduct of Disher himself, it does not appear to be that of a person who had been recognized as having the status of a partner in this concern for more than a year. If his situation had been such as he describes, he would not, I think, have waited until Donkin had actually left Vancouver with the expectation of being absent several months before insisting that he should be recognized as a partner in the firm's dealings with their bankers or that the terms of the partnership should be definitely reduced to writing. Donkin's letter of the 12th of February ought to have apprised him of the fact that Donkin was not recognizing him as co-proprietor of the business and yet there is no answer to that letter and, on Donkin's return to Vancouver, not a word is addressed to him by Disher on the subject. One ought, perhaps, to note the use of the word

"partnership" in Donkin's letter of the 12th of February. I entirely agree with the learned trial judge that the term "partnership" is often loosely used as descriptive of such arrangements as that which Donkin admits he had with Disher. But the letter appears to me to make it abundantly clear that, in using the term, Donkin had no idea that he was employing a word which implied co-proprietorship. I see no reason to disagree with the view of the learned trial judge that Disher was not deceived by the use of this phraseology. It is perhaps needless to refer to the point taken, not very seriously I thought, by Mr. Taylor that by force of the provisions of the British Columbia "Partnership Act," section 4, chapter 175, (1911) R.S.B.C., the arrangement with regard to profits is *primâ facie* evidence of the existence of partnership. These provisions of the "Partnership Act" must be read with section 3, chapter 153, R.S.B.C. (1911), "Master and Servant Act," which plainly enacts that, in the circumstances existing in this case, the onus rests upon the employee who alleges that he has been admitted as a partner in the strict sense.

The appeal should be allowed.

ANGLIN J.—Upon conflicting evidence the learned trial judge found that the arrangement made between the parties to this action, about the end of the year 1910, was not a partnership, but an agreement whereby the plaintiff, while remaining an employee of the defendant, should for the future be entitled to receive, as his remuneration, a 50% share in the profits of the defendant's business instead of the salary of $1,200 a year and a 10% share of the profits, which

1913

DONKIN v. DISHER.

Anglin J.

he had theretofore been paid. That conclusion was reversed by the British Columbia Court of Appeal solely on the ground that a letter written by the defendant, in reply to a letter sent him by the plaintiff asserting that he "had an undivided half-interest" and asking the defendant to execute partnership articles, affords convincing evidence of "a partnership such as the plaintiff alleges," because, instead of writing a "frank, fair letter" denying that "there was any partnership," the defendant wrote a "temporizing" and "indefinite" reply. Far from being able to find in the letter so much relied upon conclusive proof of the partnership alleged by the plaintiff, giving due weight to the circumstances under which it was written, I am, with respect, of opinion that it affords no evidence of any real value against the defendant. He was then *en route* to the Orient on a trip of several months' duration. He had already travelled from Vancouver to Montreal. He had left the care of his business in the hands of the plaintiff, who had a comprehensive power of attorney. It was of vital importance to him at that moment that the plaintiff should not be antagonized, as he probably would have been, by such a distinct and emphatic repudiation of his partnership pretensions as the learned appellate judges seem to have thought it was the defendant's paramount duty to have made.

The arrangement now claimed by the plaintiff is in itself improbable. That provided for in the document which he had prepared and to which he sought to procure the defendant's signature on the eve of his departure differed very materially from what he now asserts to have been the agreement. That document provided for an arrangement still more improbable.

The conduct of the plaintiff in obtaining, in January, 1912, a written opinion from his own solicitors as to the liability of one partner and his share in the partnership property for the debts of the other partner, and procuring a confirmation of that opinion from the defendant's solicitors for the purpose of satisfying the defendant is scarcely consistent with their having been a concluded agreement for partnership in December, 1910, or January, 1911, as he now asserts. The fact that no partnership books or accounts were opened, although the plaintiff claims that the partnership was in operation for over a year, is also significant. The sending by the defendant to the plaintiff contemporaneously of two notices, one terminating the partnership, the other dismissing the plaintiff as an employee, was merely a precautionary measure and affords no evidence for or against the pretensions of either party. Apart from the letter of the defendant the case depends upon a weighing of conflicting oral testimony in the light of the circumstances. The learned trial judge would appear to have thought the defendant a more credible and reliable witness than the plaintiff and did not find in the rest of the evidence enough to turn the scale in the plaintiff's favour.

We are in precisely the same position as the learned judges of the Court of Appeal were to determine what inferences should be drawn from what the defendant wrote. I gather from their opinions that, but for this letter, they would not have differed from the conclusion reached by Morrison J. on the oral testimony. It is, therefore, with less than usual reluctance that I would reverse the judgment in appeal and restore that of the trial judge, with which on the whole case I agree.

1913

DONKIN v. DISHER.

The appeal should be allowed with costs in this court and in the Court of Appeal.

Brodeur J.

BRODEUR J.—We have to decide whether there was a partnership between the parties; or whether their relations were those of master and servant. The plaintiff, respondent, claims that he was a partner and the appellant on the contrary says that the respondent was entitled to a share in the profits of his business, and that he was not a partner in the ordinary sense of the word.

For some years previous to the 1st of January, 1911, the respondent was in the appellant's employ as salesman. At first his services were paid on straight salary, but later he got also a share of 10% and of 20% in the profits of the business. It was later on agreed that from the 1st of January, 1911, he would get 50% of the profits.

The appellant, who was doing business under the firm name of H. Donkin & Co., as a commission agent, had not a very large capital invested in his trade and he did not require also much money to run his affairs; but in order that the business should become the property of the two parties it was necessary that the capital invested should be determined and that the new partner should either acquire a share of that capital or should invest a similar amount or that some other agreement should be made to put them both on the same footing.

Even in assuming that the agreement reached by the parties was in the nature of a partnership, it was necessary that there should be an agreement as to the contribution of each of them to the partnership. The

respondent stated under oath that no contribution was to be put in by him, but that the capital then invested in the business by the appellant should stay and that he would be creditor for the amount that was to be ascertained as being the capital invested. No figure, however, is agreed upon. In the course of the year 1912, the respondent had a partnership agreement prepared by his solicitors and the capital that was fixed at $40,000 was declared to belong to the two alleged partners. It was never agreed as to what should be done with regard to the contribution of each party and specially as to the disposal of the capital invested in the firm business of the respondent.

But the appellant denies entirely the respondent's statement that they reached an agreement as to a contract of partnership. Their minds never met as to the contribution and as to the amount thereof and how it would be. The evidence is conflicting on those points and the story as given by the appellant was accepted by the trial judge.

It is true that in some letters and another document the appellant used the word "partnership" to qualify their relations. But he had in his mind the share profit arrangement agreed upon and he never pretended to be sure that such a word would cover their agreement or not. We should take the agreement as it has been proved and established and the evidence does disclose simply a profit-sharing arrangement that the appellant is willing to carry out.

The "Master and Servant Act," R.S.B.C. (1911), ch. 153, enacts in sections 3 and 4 the following:—

It shall be lawful in any trade, calling, business, or employment for an agreement to be entered into between the workman, servant, or other person employed and the master or employer, by which agreement a defined share in the annual or other net profits or pro-

1913

DONKIN v. DISHER.

Brodeur J.

ceeds of the trade or business carried on by such master or employer may be allotted and paid to such workman, servant or person employed, in lieu of or in addition to his salary, wages or other remuneration; and such agreement shall not create any relation in the nature of a partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favour such agreement is made shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer of the net profits or proceeds of the said trade, calling, business or employment on which he declares and appropriates the share of profits payable under the said agreement shall be final and conclusive between the parties thereto, and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever.

Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act unless it purports to be excepted therefrom, or this may otherwise be inferred.

There is then, under the provisions of those sections, a presumption that an employee who receives as remuneration a share in the profits is not a partner. The relations of partners in such a case are not to be inferred from the fact that the employee gets such a remuneration. Of course, that presumption can be destroyed if a formal agreement to the contrary is proved. But in this case there never was such an agreement. That is the finding of the trial judge and we should accept it.

For those reasons I am of opinion that the appeal should be allowed with costs and that the judgment of the trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *MacNeill, Bird, MacDonald & Darling.*

Solicitors for the respondent: *Taylor, Harvey, Grant, Stockton & Smith.*

HENRY HOWARD (DEFENDANT).....APPELLANT; 1913

AND *Nov. 3, 4.
*Nov. 10.

THOMAS B. GEORGE (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of lands—Agreement to pay commission—Named price—Introduction by agent—General retainer—Sale at lower price—Right of action—Alberta statute, 6 Edw. VII., c. 27, s. 1.

The Alberta statute, 6 Edw. VII. ch. 27, respecting sales of real estate, denies recovery by action, for services rendered in connection with such sales by way of commission or otherwise, unless upon a memorandum in writing signed by or on behalf of the person to be charged. In a letter to the plaintiff, signed by the defendant, the latter agreed to sell a hotel for $40,000 and added, "I will pay you 5% commission on purchase price." Defendant subsequently, sold the property to a purchaser introduced by the plaintiff for $34,000.

Held, affirming the judgment appealed from (10 D.L.R. 498; 4 West. W.R. 83), that "purchase price," as used in the letter, had reference to any price for which a sale might be made, and that, construed in connection with the conduct of the parties, the memorandum was sufficient, under the statute, to entitle the plaintiff to recover a commission at the rate mentioned for his services in regard to the sale made at the reduced price to the purchaser introduced by him. *Toulmin* v. *Millar* (58 L.T. 96), and *Burchell* v. *Gowrie and Blockhouse Collieries* ([1910] A.C. 614), referred to.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Beck J., at the trial(2), maintaining the plaintiff's action with costs.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 10 D.L.R. 498; 4 West. W.R. 83.

(2) 4 D.L.R. 257; 2 West. W.R. 443.

1913

HOWARD v. GEORGE.

The circumstances of the case are sufficiently set out in the head-note.

W. B. A. Ritchie K.C. and *J. Leslie Jennison K.C.* for the appellant.

Matthew Wilson K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion in this case that, on the facts in evidence, the trial judge was fully justified in the conclusion that the purchaser was found by George and that the appellants availed themselves of his services in that regard and also that the contract as to the commission of 5% subsisted up to the time the bargain was finally closed.

Under the terms of the agreement the respondent was entitled to his commission on the purchase price which the vendor ultimately agreed to accept. The sum of $40,000 is mentioned, as Lord Watson says in the case of *Toulmin* v. *Millar* (1), merely as a basis of negotiations.

The appeal should be dismissed with costs.

DAVIES J.—The language of the agreement is somewhat ambiguous but, in view of the conduct of the parties under it, I think the construction put upon the words "purchase price" as meaning the actual price or sum at which the property was sold, one which can fairly be accepted as that within the contemplation of both parties when the memorandum was signed.

IDINGTON J.—I am of the opinion that the document signed by the appellant and relied upon by the

(1) 58 L.T. 96.

respondent was not a mere option to him to buy or sell at only $40,000, but a general retainer enlisting his services to sell the property in question for either said sum or such other sum as appellant accepted.

It is capable of such construction and of being read as the court of appeal has read it.

Such doubt as we might possibly have from its ambiguity has been settled by the conduct of the parties.

The appeal should be dismissed with costs.

DUFF J.—Interpreting the memorandum in question by the light of the subsequent conduct of the parties (which one is entitled to do, because it is impossible to say that the memorandum is capable of only one necessarily exclusive construction) I think the respondent's agency was a general agency within the meaning of Lord Watson's language in *Toulmin* v. *Millar*(1), and that he is, consequently, entitled to recover. See *Burchell* v. *Gowrie and Blockhouse Collieries*(2), at page 626.

ANGLIN J.—The trial judge expressly accepted the evidence of the plaintiff. On his evidence he found that the plaintiff had introduced the purchaser and brought about the sale. Those findings of fact are sufficiently supported.

On the interpretation of the contract I agree with the courts of Alberta.

The plaintiff earned his commission and he had a

(1) 58 L.T. 96. (2) [1910] A.C. 614.

1913

HOWARD v. GEORGE.

Anglin J.

sufficient memorandum of his contract to meet the requirements of the Alberta statute.

The appeal, in my opinion, fails.

BRODEUR J.—This is an appeal from a judgment of the Supreme Court of Alberta confirming unanimously the judgment of the trial judge.

The version of the facts, as given by the plaintiff, respondent, having been accepted by the two courts below, it would be contrary to the jurisprudence of this court to find differently.

The appellant had given the respondent a letter that he would sell his property for $40,000, and had undertaken in that letter to pay him "5% commission on purchase price."

The respondent found a purchaser, put him in communication with the appellant, and the result was that the property was sold for $34,000. He is now suing for his commission on that sale. The appellant contends that he was bound to the payment of a commission on a sale of $40,000 and that, as no sale at that price was made he owes nothing.

It is to be noted that the agreement provided for a commission not on the $40,000, but on the purchase price. The introduction of a purchaser who was willing to enter into negotiations and who closed later with the appellant entitled the plaintiff to recover. The obligation of the plaintiff was not to find a purchaser at a certain figure; but he was entitled to a commission on the purchase price and this case is within the words of Lord Watson, in the House of Lords, in the case of *Toulmin* v. *Millar*(1), where he says:—

(1) 58 L.T. 96.

1913

HOWARD v. GEORGE.

Brodeur J.

When a proprietor with a view of selling his estate goes to an agent and requests him to find a purchaser, naming, at the same time, the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of those negotiations.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. H. Putnam.*

Solicitor for the respondent: *H. C. Moore.*

1913

*Nov. 10.
*Nov. 24.

WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ADELAIDE SCHWARTZ (PLAINTIFF) . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Findings of fact—Inferences by jury—Determining cause of accident —Evidence to support verdict—Practice.

Where the jury, drawing inferences, adopted one of several theories respecting the determining cause of the accident through which the plaintiff's injuries were sustained, and there was evidence to support their finding, the court refused to disturb the verdict.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of Prendergast J., at the trial, which, on the verdict of the jury, ordered that judgment should be entered for the plaintiff.

The circumstances of the case are stated in the judgments now reported.

W. N. Tilley for the appellants.
Cohen for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Appeal for Manitoba in an action for damages for personal injuries sustained by the plaintiff while travelling as a passenger in a tram-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 23 Man. R. 60.

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

The Chief Justice.

car of the defendants. The plaintiff's claim is based upon the allegation that her injuries were the consequences of a fall caused by the negligence of the motorman or conductor of the car which was started suddenly after having been brought to a stop to enable her to get off.

The plaintiff and one Winkler are the only witnesses who testify to the occurrence. At the close of the evidence for the plaintiff, counsel for the defendant company submitted there was no evidence of negligence. It appears that the plaintiff rang the bell as a signal for the car to stop at the corner of Bushnell street. Having failed, presumably, to attract the attention of the conductor or motorman, the car proceeded at high speed in the direction of Gunnell street when the plaintiff rang the bell a second time to manifest her desire to alight at that street. As the car was slowing down, plaintiff left her seat and moved in the direction of the door. When she reached that place the car was stopped; she says,

my right foot I put on the first step and after that I do not remember anything.

The witness Winkler deposed that he heard a woman's scream and ran to the scene of the accident, where he found the plaintiff lying on the road covered with blood and apparently dead. The car in which the plaintiff had been a passenger was seen to be in motion proceeding on its journey a very short distance ahead.

The question is: In these facts was there evidence enough of an apparent cause to leave the case for the decision of the jury ?

The point is not free from difficulty, but I am of

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

The Chief Justice.

opinion that, in the circumstances, the trial judge was justified in leaving it to the jury to say whether the company being under a duty to stop the car in answer to her signal for a sufficient time to allow the plaintiff to alight, the inference of negligence should be drawn.

It is to be assumed that if proper care is used by the company a passenger may alight in safety from a tram-car, and, in the circumstances of this case, there is a rule of evidence which calls upon the carrier in the first instance to exonerate itself by negativing negligence.

If there was doubt on the evidence of the plaintiff and Winkler, the conduct of the officials of the company at the time of the accident may have served to turn the scale. The plaintiff was undoubtedly a passenger on the car and in attempting to alight the accident occurred, and there is further evidence in the record. The rules of the company required that in cases of accidents the motorman and conductor should render assistance and make a report of the occurrence. They did neither, and the reasonable presumption is that their omission in that respect was due to the fact that the accident must have happened without their knowledge. The jury would be justified in taking this circumstance into account when considering the probabilities of plaintiff's theory that she was thrown from the step by a violent jerk when the car was started suddenly by the officials in ignorance of the position in which she then was.

On the whole I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—The question we have to determine is whether there was evidence to justify the findings of

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Davies J.

the jury with respect to the fact that the car had stopped when the plaintiff attempted to alight from it and had negligently started again and thrown her to the ground before she had alighted.

On the first point we have the positive evidence of the plaintiff that the car had stopped, with an apparently clear and connected statement of the circumstances leading up to the stoppage. The only possible doubt as to the correctness of her statements arises from the rather uncertain and doubtful evidence of the only other witness called who speaks of the fact of the stoppage of the car. The jury surely had the right to accept the clear and unqualified statement of Mrs. Schwartz on the point.

Then, as to the finding of the negligent starting of the car having been the cause of her falling or being thrown to the pavement, Mrs. Schwartz frankly states that the shock she received from her fall completely destroyed or benumbed her memory of the facts immediately connected with her falling and that she could recall nothing which happened from the moment she attempted to step from the car till after her recovery from the shock caused by her fall to the pavement.

The company, at the close of plaintiff's case, moved for a nonsuit and that being refused did not call any witnesses. The question is whether, in the absence of direct evidence on this point of negligence, there should have been a nonsuit, or whether it was open to the jury to draw as a fair and reasonable inference from such facts as had been proved that the car had stopped and had started negligently, causing the plaintiff's fall.

There were decisions given by this court before

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Davies J.

that of the Judicial Committee in the case of *McArthur* v. *The Dominion Cartridge Company* (1), to the effect that positive evidence of specific negligence causing the injuries complained of must be given to enable an injured person to recover damages. Since that decision, however, this court has followed the rule or principle there laid down, namely, that where the circumstances are such that positive and direct evidence on specific negligence cannot be given it is open to a jury, if the facts as proved are sufficient, to find such negligence as a fair reasonable inference from those facts. It was upon that rule we decided the case of *The Grand Trunk Railway Co.* v. *Hainer* (2), and many cases since then.

Now, in the case before us, what have we had proved ? First, the high speed at which the car was moving and its stoppage after the second signal from the plaintiff to permit her to alight. Secondly, the passenger's progress during the slowing-down of the car towards the door of exit and, on the stoppage, her attempt to step to the ground, in which attempt she either fell from, as is suggested by the appellants, a sudden attack of vertigo, or, as found by the jury, was thrown down by the sudden, negligent starting of the car. There was no evidence whatever of any negligence on the passenger's part or facts proved from which a fair inference of negligence could be drawn. Thirdly, the fact that the car rapidly moved on its way after stopping without those controlling it presumably having knowledge of the accident.

It is inconceivable that with such knowledge the car should have been allowed to proceed and no aid

(1) [1905] A.C. 72. (2) 36 Can. S.C.R. 180.

or assistance tendered the injured passenger left lying on or alongside of the car track. The presumption of ignorance of the accident on the part of the car-men is overwhelming; especially when considered in light of the fact that another car was following very close after them. They probably thought the passenger had safely alighted.

Under those circumstances, and without any other suggested possible inference than that the violent fall to the pavement might have been caused by a sudden attack of vertigo, I have no difficulty in concluding that the finding of the jury has a preponderating weight in its favour, because it is the more fair and reasonable inference from the proved facts. The other suggested inferences seem to me rather to be classed as conjectures than fair inferences.

A jury cannot, of course, select as between equally probable and fair inferences one which they prefer. It is essential that their finding should not only be fair and reasonable, but that it should be of preponderating weight over other possible inferences.

IDINGTON J.—This appeal ought to be dismissed with costs.

DUFF J.—I think there is evidence in support of the verdict. It is no part of my duty to say whether I think it is right or not.

ANGLIN J.—The sole question raised upon this appeal is whether there was evidence sufficient to warrant the finding of the jury that the plaintiff fell from the step of the defendants' car, as she was in the course of alighting from it at a proper stopping place

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Anglin J.

and while it was stationary, and their inference that this was due to the negligence of the defendants' servants in improperly starting the car before the plaintiff had reached the ground. From the plaintiff herself we have direct evidence that the car had stopped (the jury was entitled to disregard the evidence given by Winkler, if it is really in conflict with that of the plaintiff on this point), that she was in course of alighting and had one foot on the first step and the other either on the platform or in the air on its way to the second step. At that point her knowledge of what occurred ceased. That she fell violently to the ground is undisputed. That the company's servants in charge of the car from which she fell were ignorant of her fall is an irresistible inference from the fact that they proceeded on their way leaving her lying seriously injured on the ground, unless we are to assume on their part a callousness and disregard of the company's rules almost incredible. A moment or two later she is found lying dangerously near the track, so much so that the conductor of a following car moved her body out of the way. According to her evidence the plaintiff was proceeding to alight with care. There is no evidence to warrant any suggestion of vertigo, fainting, tripping or being run down by a passing vehicle as the cause of her fall and injuries. The inference that her fall was caused, as the jury have found, is not only fair and reasonable; it seems to be the most probable inference that could be drawn from all the facts. The negligence involved in starting a car from which a passenger is properly alighting before ascertaining that she has reached the ground is indisputable.

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Brodeur J.

The appeal fails and should be dismissed with costs.

BRODEUR J.—The only question is whether the jury could from the facts established infer that the street railway company is guilty of negligence.

The plaintiff, respondent, Mrs. Schwartz, was alighting from a street car of the company defendant. She states in her evidence that she rang the bell to stop the car; that the car stopped, and that she started to alight from the car, and she states, moreover, that from that moment until some days afterwards when she found herself on a hospital bed with serious injuries as a result of her fall on the street, she was unconscious.

The jury returned a verdict that the employees caused the car to start when the plaintiff was proceeding to alight.

The company did not find it advisable to bring those employees to testify that they had given to that lady all the time necessary to safely alight.

That lady fell on account of her fainting or on account of the starting of the car before she alighted. The accident is necessarily due to one of those circumstances. The jury could draw the inferences from all the circumstances of the case that the company was negligent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Moran, Anderson & Guy.*
Solicitors for the respondent: *Crichton, McClure & Cohen.*

1914

*Jan. 1.
*Feb. 3.

JOHN J. DORAN AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

FRANK JEWELL (PLAINTIFF) ..... RESPONDENT.

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

Appeal — New right of appeal — Statute — Application to pending actions.

An Act of Parliament enlarging the right of appeal to the Supreme Court of Canada does not apply to a case in which the action was instituted before the Act came into force. *Williams* v. *Irvine* (22 Can. S.C.R. 108); *Hyde* v. *Lindsay* (29 Can. S.C.R. 99) and *Colonial Sugar Refining Co.* v. *Irving* ([1905] A.C. 369) followed.

MOTION referred to the court by the registrar for an order to have the jurisdiction of the court to hear the appeal affirmed.

The action was to obtain possession of goods or to recover their value. In the court of first instance judgment was given for the plaintiff with a reference to ascertain the value of the goods and report. This judgment was affirmed with a variation by the Appellate Division. Under the jurisprudence no appeal would lie to the Supreme Court of Canada unless the amendment to the "Supreme Court Act," which came into force on June 6th, 1913, applied to the case. The judgment of the trial judge was delivered on July 4th, 1913, and that of the Appellate

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

Division on Nov. 21st, 1913, but the action was commenced before the Act came into force.

W. L. Scott for the motion referred to *Couture* v. *Bouchard*(1), and attempted to distinguish *Colonial Sugar Refining Co.* v. *Irving*(2).

Caldwell, contra, cited *Williams* v. *Irvine*(3); *Hyde* v. *Lindsay*(4); *Colonial Sugar Refining Co.* v. *Irving*(2).

THE CHIEF JUSTICE and DAVIES J. were of opinion that the motion should be refused.

IDINGTON J.—Having regard to the principles upon which this court proceeded in the case of *Hyde* v. *Lindsay*(4), and other cases cited therein, and the Judicial Committee of the Privy Council in the case of *Colonial Sugar Refining Co.* v. *Irving*(2), I do not think this motion should succeed.

DUFF J.—I should refuse this motion.

ANGLIN J.—This motion is concluded adversely to the appellant by the authority of *Williams* v. *Irvine* (3), and *Hyde* v. *Lindsay*(4). See, too, *Colonial Sugar Refining Co.* v. *Irvine*(2).

BRODEUR J.—This is an application to affirm the jurisdiction of this court.

The whole point is whether the amendment of 1913 to the "Supreme Court Act" as to final judg-

(1) 21 Can. S.C.R. 281.
(2) [1905] A.C. 369.
(3) 22 Can. S.C.R. 108.
(4) 29 Can. S.C.R. 99.

1914

DORAN v. JEWELL.

Brodeur J.

ments applies to a case in which the action began prior to the amendment, but where the judgment appealed against was rendered after the passing of the amendment.

That amendment has virtually created a right of appeal which did not exist before.

This court had decided in those last years that judgments ordering a reference were not final judgments and could not be appealed.

Clarke v. *Goodall*(1); *Crown Life Ins. Co.* v. *Skinner*(2).

The Parliament at its last session declared that those judgments could be brought before this court.

I would have been inclined to think that the right of appeal should be determined by the law in force at the time of the judgment and not by the date of the action. However a contrary jurisprudence of this court exists: see *Hyde* v. *Lindsay*(3); *Williams* v. *Irvine*(4); *Mitchell* v. *Trenholme*(5); and I am bound by it.

The motion should be dismissed.

Motion dismissed with costs.

Solicitor for the appellants: *V. McNamara.*

Solicitors for the respondent: *Hearst, Rowland & Brown.*

(1) 44 Can. S.C.R. 284.
(2) 44 Can. S.C.R. 616.
(3) 29 Can. S.C.R. 99.
(4) 22 Can. S.C.R. 108.
(5) 22 Can. S.C.R. 333.

1913

ARTHUR C. WILKS *et al.*, ÈS QUALITÉ (PLAINTIFFS) ..... APPELLANTS; *Nov. 19. *Dec. 23.

AND

STEPHEN C. MATTHEWS (DEFENDANT) ..... RESPONDENT.

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

Payment by insolvent—Preference—Recovery back by curator—Gaming transaction—Illegal contract—Right of action—Arts. 1031, 1032, 1036, 1927 C.C.—*Arts.* 853 *et seq., C.P.Q.*

An action by the curator of an abandoned estate to recover back moneys paid by an insolvent to one creditor to the prejudice of the others, on the eve of insolvency, is not barred by the provisions of article 1927 of the Civil Code of Lower Canada denying a right of action in respect of gaming contracts. Judgment appealed from (Q.R. 22 K.B. 97) reversed.

Owing to suspicions aroused by the exposure of the insolvent's methods of business, a creditor who had deposited money with him for investment in anticipation of obtaining large profits through his operations on the stock market by urgent demands secured re-payment of the sums so deposited together with a large amount of alleged profits on the day preceding that on which the insolvent absconded.

Held, that, as the creditor must be deemed to have had knowledge of the insolvent circumstances of the debtor at the time of the payment, the curator to the abandoned estate of the insolvent was entitled to recover back the amount so paid, under the provisions of article 1036 of the Civil Code of Lower Canada.

The judgment appealed from (Q.R. 22 K.B. 97) in its result affirming the judgment at the trial (Q.R. 41 S.C. 155) was reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) Q.R. 22 K.B. 97.

1913

WILKS v. MATTHEWS.

Greenshields J., in the Superior Court, District of Montreal(1), by which the plaintiff's action was dismissed with costs.

The plaintiffs, who are the curators appointed to the abandoned estate of one Charles D. Sheldon, an insolvent, brought the action to recover back, as part of the insolvent's estate, the sum of $13,743, which had been paid by the insolvent to the defendant on the day previous to that on which he absconded. Sheldon had carried on business, in Montreal, as an investment broker, the defendant being one of his customers who, as such, had, previous to the 10th of September, 1910, deposited for investment by him certain sums of money aggregating $7,102 for the purpose of sharing in profits made or supposed to be made in stock transactions by Sheldon. On 30th September, 1910, Sheldon's books of account shewed the amount of $13,743 to the credit of the defendant, being the amount of the deposits which had been made by the defendant within some months previously together with profits accrued upon investments alleged to have been made in the purchase and sale of fluctuating stocks. In the circumstances mentioned in the headnote the defendant obtained from Sheldon the payment of the amount so shewn as standing at his credit, after banking hours, on the 10th of October, 1910, the eve of the day of Sheldon's departure from Montreal for an unknown destination. By their action the plaintiffs claimed the amount thus paid to the defendant on the ground that it was a preferential and illegal payment to the prejudice of all the other creditors of the insolvent and had been made at a time

(1) Q.R. 41 S.C. 155.

1913

WILKS v. MATTHEWS.

when Sheldon's insolvency was notorious and known of the defendant. The defendant pleaded good faith and that, at the time of the payment, he believed that the profits he received had been earned through the investment of his money and that Sheldon was solvent at the time he made the payment. In the Superior Court Mr. Justice Greenshields dismissed the action on the ground that the evidence did not shew that the defendant was aware of Sheldon's insolvency at the time he received payment. By the judgment appealed from, the Court of King's Bench held that this view was erroneous, but refused to reverse the order dismissing the action because recovery of the amount so paid was denied by article 1927 of the Civil Code on account of the transactions between the defendant and Sheldon being in their nature gaming contracts.

The questions in issue on the present appeal are stated in the judgments now reported.

Atwater K.C. and *Chauvin K.C.* for the appellants.

C. H. Stephens K.C. and *A. Maillot* for the respondent.

THE CHIEF JUSTICE.—I do not think we are called upon in this case to inquire into the nature of the agreement made between the defendant and Sheldon with respect to the investment by the latter of the funds entrusted to him. That it was either illicit or immoral is not absolutely free from doubt, and I am not at all sure that the defendant could not have enforced her claim against Sheldon for money had and received. Vide S.V. 1913,1,285 (cas d'un mandataire chargé d'employer une somme d'argent en jouant aux

1913

WILKS v. MATTHEWS.

The Chief Justice.

courses) S.V. 1912,2, sup. 422 (cas d'un gérant de cercle refusant de rendre ses comptes). It must also be observed that if this were a suit arising out of that agreement, the position of the plaintiff would be different from that of either of the parties to it. I quote the following "considérant" from a judgment of the Court of Appeal at Paris:—

> Vainement on allèguerait, pour écarter la demande en restitution, la règle "nemo auditur propriam turpitudinem allegans," alors que la demande en restitution est formée *non par la parties qui a pris part à la convention, mais par son liquidateur judiciaire, agissant au nom de la masse des créanciers,* qui n'ont pas participé à la convention illicite. (S.V. 1905,2,206.)

But those interesting questions do not arise here. This action is brought by the plaintiff as curator to the insolvent estate of Sheldon under the instructions of the court, not to enforce the contract which the defendant made with Sheldon, but to recover a sum of money alleged to have been paid to the defendant by Sheldon in fraud of the general creditors of the latter now represented by the plaintiff.

This is an action *sui generis* entirely distinct and independent of any claim which Sheldon might have had against the defendant. It arises not out of the agreement or arrangements which they may have entered into or out of any claim accruing to Sheldon by reason of the payment hereinafter referred to. It takes its rise in the fraud which it is alleged Sheldon practised on his creditors when he parted with the money. Planiol describes the origin and nature of the action so clearly that I will be pardoned this quotation from his "Droit Civil" (vol. 2, No. 319 (5 ed.)):—

> S'il (le débiteur) commet une fraude, s'il cherche à faire disparaître son actif pour éviter de payer ses dettes, sa conduite fait

naître, au profit du créancier, une action nouvelle, distincte de la première (under art. 1031, C.C.), car la fraude est un *délit civil*, et comme telle elle a la force de produire une obligation qui a pour objet la réparation du préjudice causé. Le créancier *armé dès lors d'une action spéciale*, cesse de subir l'effet de l'acte frauduleux. Aussi dit-on que le débiteur qui agit par fraude *cesse de représenter ses créanciers*, langage un peu énigmatique, qui désigne simplement la possibilité pour les créanciers de se soustraire aux effects d'un acte déterminé.

The sole question here is: Can an action be maintained on the facts proved in this record. Those which are relevant to the issue are few and undisputed. On the 10th of October, 1910, when it is admitted he was hopelessly insolvent, Sheldon paid the respondent, after office hours, the sum of $13,738. This sum represented $7,102, capital invested with Sheldon by the defendant at different times during the preceding months, and $7,836, profits alleged to have been earned on that investment. The night of that same day Sheldon fled the country, leaving behind him creditors whose claims, in the aggregate, amounted to over $2,000,000. They included not only the business customers, but also trade creditors from whom he had bought his household supplies, carriages, horses, etc. Sheldon's assets at that time were estimated at about $19,951.29; there is, therefore, no doubt as to the fact of his insolvency.

The circumstances surrounding the payment, the subsequent flight, the fact that defendant's son and a former employee of her husband were in Sheldon's service, the press campaign in which Sheldon's financial methods were vigorously attacked, all combine to convince me that the defendant had good reason to know, when she received the money, that Sheldon was insolvent. I entirely agree with Mr. Justice Cross when he says,

1913

WILKS v. MATTHEWS.

The Chief Justice.

that there is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money,

and with Mr. Justice Gervais, who, referring to the finding of the trial judge that the defendant was ignorant of Sheldon's financial condition, said:—

L'on peut avoir des doutes sur l'exactitude du motif de la cour de première instance.

Assuming, therefore, that we have those facts proved: 1. The insolvency of Sheldon; 2. The knowledge of that insolvency by the defendant when the money was paid to her; 3. The appointment of the plaintiff as curator to the estate of the insolvent; 4. The authority of the court to bring this action in the interest of the mass of the creditors — what is the law applicable? If the question was not unnecessarily complicated by the issue as to the nature of the agreement between Sheldon and Mrs. Mathews, could there be any doubt about the right of the plaintiff to succeed in this action? I submit that the point would not be arguable (art. 1032 *et seq.* C.C.), and I am at a loss to understand how the issue between the parties can be, when properly understood, affected by the fact that the original transaction between Sheldon and Mrs. Mathews may have been either illicit or illegal as alleged. Let us apply this test: assuming that there had been no abandonment of property, then any one of Sheldon's creditors might have brought this action under article 1032 C.C., and if taken by one of those who had furnished Sheldon supplies for his household, could the defence of "nemo auditur propriam turpitudinem allegans" be set up against that creditor? How could that maxim be made to apply in such a case? What would be the "turpitudo" chargeable against that creditor or how could article 1927 C.C.,

1913

WILKS v. MATTHEWS.

The Chief Justice.

relied on in appeal, be held to be a defence to an action to impeach the payment made to Mrs. Mathews by Sheldon in fraud of the rights of that creditor? As I said before, that would be an "actio pauliana oblique," *i.e.*, an action which is given to creditors to obtain the revocation of the acts done by their debtor in fraud of their rights (Planiol, vol. 2, No. 296 *in fine*), and not an action for the recovery of money under a gaming contract or a bet, as the judges in appeal have assumed this action to be. If the objection relied on below could be set up against a creditor of Sheldon, how can it avail against the curator, an officer of the court

who exercises all the rights of action of the debtor and all the actions possessed by the mass of the creditors

(877, C.P.Q.), including, of course, the trade creditors? It is said by one of the judges below

that the curator to an abandonment in insolvency is an officer of the Superior Court and should not be required to act as "croupier" to the patrons of a gaming house.

That is undoubtedly a very pretty sentiment. The question at issue is not, however, one of ethics or propriety to be solved in a court of honour. It is a question of law which courts of justice must decide in accordance with what I submit with all deference are settled legal principles. The money sued for, when collected, will be distributed under the eye of the court among the general body of creditors as their interests may appear. The question of the right to share in the fund as well as all priorities will then be settled. For the moment we are called upon purely and simply to say whether by the payment to Mrs. Mathews, or as a result of it, the general creditors of

1913

WILKS v. MATTHEWS.

The Chief Justice.

Sheldon, who are represented by the plaintiff, have been prejudiced; or in other words: Was the payment complained of made by the insolvent debtor to a creditor knowing his insolvency? If, as argued here, the contract between Mrs. Mathews and Sheldon was so tainted with illegality that no action could be brought upon it, then the payment by Sheldon must be deemed to have been gratuitous and, in that case, it is presumed to have been made with intent to defraud and the amount is recoverable at the suit of any creditor at least to the extent of his interest (1034 C.C.). If in the other alternative Mrs. Mathews' claim was legal and enforceable at law, then the payment complained of was made by an insolvent to a creditor who, as found by the Court of Appeal, must have known of the insolvency; in which case it is deemed to have been made with intent to defraud and is voidable under article 1036 C.C. So that if the position of the curator is that of a creditor of the insolvent who was not a party to the illegal agreement, his right to recover in either alternative is undoubted.

It is important, therefore, to clearly state again the nature of this proceeding. The action is taken by the curator. By the fact of his appointment he entered into possession of the whole estate of the insolvent (870 C.P.Q.), and is subject to the summary jurisdiction of the court (875 C.P.Q.). He exercises all the rights of action of the debtor and all the actions possessed by the mass of the creditors (877 C.P.Q.) and the sums realized are distributed under the eye of the court (880 and 881 C.P.Q.). It is specially important to observe in a case like this that the curator represents not only the debtor, but also the mass of the creditors, for this very obvious reason. If the curator

represented only the insolvent debtor, then he would be obliged to rely on article 1031 C.C., in which case all the pleas available in an action taken by the debtor himself might be raised, such as *"in pari causâ turpitudinis cessat repetitio"* or *"in pari delicto potior est conditio defendentis"* or, again, the defence under article 1927 C.C. But when the action is brought as in this case under both articles 1031 and 1032 the issues are different and the legal principles applicable are well settled. If the payment complained of prejudiced the other creditors in that it decreased the estate of their insolvent debtor diminishing *pro tanto* their security and it is proved that the payee knew, when she received the money, that the payer was insolvent, that payment is deemed to have been made with intent to defraud, in which case the recipient of the money may be compelled to restore the amount received for the benefit of the creditors of the insolvent according to their respective rights (1036 C.C.).

That the curator as representing the creditors may invoke both articles 1031 and 1032 C.C. in support of their claim can no longer be doubted.

Un créancier peut exercer cumulativement l'action de l'article 1166 et celle de l'article 1167. En vertu de la première action, il peut exercer les droits de son débiteur, mais il se voit opposer les désistements, renonciations de celui-ci. Aussi peut-il à ce moment les attaquer par l'action Paulienne s'il prétend qu'ils sont frauduleux. C'est ce qu'a jugé la Cour de Lyon, le 8 déc., 1908; Gaz. Pal., 17-18 janv., 1909; v. de même Trib. de Nantes, 12 juill., 1906, Gaz. Pal., 1906.2.366.

This appeal should be allowed and the action maintained with costs.

1913

WILKS v. MATTHEWS.

Idington J.

IDINGTON J.—I agree with the learned judges in appeal upon the monstrous absurdity of any sane person of intelligence believing that a man could go on for years or even for months, making as an investment broker twenty-five to forty per cent. monthly profits on money given him for investment.

I, however, do not see my way to found upon such facts as before us the inevitable conclusion that all the creditors of such a man were gamblers, or that all their claims are founded upon that or some other consideration tainted with illegality.

No such defence is set up in the pleading. Nor was any such case made by the evidence.

It is no violent presumption to suppose that the curator may in fact represent honest creditors regarding whose claims no such imputation can be made.

And such as I take it must be the legal presumption on behalf of the curator herein till the contrary is shewn.

If there are claims made upon the estate by creditors who cannot, by reason of their contracts being founded on some illegality, recover in law, future inquiries must determine any questions so raised.

It seems to me that the only questions herein respecting which there can be any doubt are whether or not respondent's receipt of $13,743, from Sheldon, can be said to have fallen within the meaning of either articles 1034, 1035 or 1036 of the Code.

The incredible suggestion that Sheldon was making for respondent and his wife and others trusting him such enormous profits as alleged renders it easier to impute knowledge of his insolvency to respondent or his wife than might be possible in the case of an ordinary business.

It only needed very ordinary business intelligence to comprehend that such distribution of alleged profits must end in insolvency, and that within a very limited time.

People possessed of such intelligence must inevitably have been on the lookout for the bursting of such a financial bubble.

And when such a course of dealing, having gone on for months, was publicly assailed and had become the subject of discussion in leading newspapers, the collapse was at hand.

The condition of mind of the respondent's wife on the 9th and 10th of October—the eve of Sheldon's flight — indicating such a desperate determination to obtain the money in question is betrayed in too many ways to permit of our attributing it to anything else than a deep conviction that disaster awaited her venture, and that the only hope of rescue was to get the money on that evening, the 10th of October. The cashing of his cheque could not await the next morning. And when nearly eight thousand dollars of this money was supposed to be the result of a few months of fabulous profits to make up which somebody else must certainly be robbed, I need not multiply harsh words to describe such a transaction. As to the part of it covering such mythical profits it might, if it had stood alone, have fallen within art. 1034. Therefore, I must hold that when joined to the rest of the transaction such connection of the obviously illegal with the otherwise possibly legal has, if nothing else has done so, stamped the entire transaction as illegal and void within art. 1036.

The kind of knowledge meant therein is not literally a stock-taking of a man's assets as means of pay-

1913

WILKS v. MATTHEWS.

Idington J.

ment, but the conviction that if that were done it would demonstrate insolvency, and sooner than face that issue the person possessed of such conviction has decided to take all chances and get ahead of fellow creditors.

It is not necessary to follow in detail the many circumstances which, added to the inherent nature of the transactions in this peculiar case, demonstrate such belief as irresistibly the equivalent of actual knowledge directly proven.

The insolvency seems abundantly proven. And the suggestion that the estate of the insolvent had not been deprived in fact of the sum in question was not part of the defence in pleading or otherwise.

Whatever merits in law might be found in such a contention if it had been so gone into and the securities given proved worthless, is something I need form no opinion upon.

The *primâ facie* case is entirely the other way. I think the appeal must be allowed with costs throughout, and judgment given the appellant as prayed with costs.

DUFF J.—Article 1036 of the Civil Code is as follows:—

> 1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.

The principal question presented by this appeal as I view it is the question whether or not the payment made by Sheldon to the respondent through his wife was "a payment by an insolvent debtor to a creditor

knowing his insolvency," within the meaning of this article. As to the insolvency of Sheldon whatever plausible suggestions might be made as to possible defences by Sheldon in answer to the claims of his clients, so-called, there was undeniably a strong *primâ facie* case of insolvency to which no solid or even substantial answer has been made.

The real controversy concerns the allegation which the appellant must make good that the payment was made to a creditor "knowing of" Sheldon's "insolvency." Did the respondent or his wife "know of" Sheldon's insolvency within the meaning to be attributed to those words in this article? The question is not, as it appears to me, whether the respondent ought to have known in the sense that persons of reasonable judgment in his situation, or in the situation of his wife would have known of Sheldon's position, but whether in fact that was or was not the state of mind of one or other of them at the time the payment was made. The tribunal passing upon the question must be able to reach the conclusion upon the evidence before it that the state of mind denoted by "knowledge" in this connection, did in fact exist. The first point to consider is, what is meant by "knowledge" here? One may perhaps be permitted to observe at the outset that there is, of course, no sort of warrant for introducing here ideas drawn from the English doctrine of "notice" according to which knowledge of a state of facts may in certain circumstances be imputed to one, although everybody admits that in point of fact one was quite ignorant of it. It may be observed, however, that the terms "know" and "knowledge" are very elastic terms, capable of a broad range of signification varying with the context and the sub-

1913

WILKS v. MATTHEWS.

Duff J.

ject-matter in connection with which they are employed. And one, of course, must not, if it can be avoided, give to such phrases a meaning which, in practice, would frustrate the purpose of the enactment in which they occur. Without further analysis and without attempting to lay down or even suggest a rule of anything like of universal application I think that where you have a belief on the part of the creditor that insolvency exists and that belief is founded on facts which to a person ordinarily conversant with affairs would point to insolvency there you have a state of facts which constitutes knowledge within the meaning of this article. *Ex hypothesi* in every case in which the question arises, of course, there is insolvency in fact. I am not prepared to say that given insolvency in fact the additional fact that the creditor entertained a suspicion or strong conviction that such was the state of affairs without any objective of grounds for that conviction would in itself be sufficient to bring the case within the article. But I think that where you have such a belief based upon solid objective grounds then the case is made out.

In the present case there is ample evidence to shew that none of these elements was wanting. I will not go into the evidence in detail, but I think the natural inference from what was done by the respondent's wife is that she was actuated by a very pressing sense of the fact that the least delay would be fraught with signal risk of the loss of her husband's money; and in view of all the facts in evidence I think that is the proper inference. As in my conclusion upon this question of fact I am differing from the opinion of the learned trial judge, I think it is right to point out first, neither the respondent nor the respondent's wife, although

called as witnesses, made any direct statement as to the state of their knowledge or suspicions touching Sheldon's affairs. Secondly, this question, though a question of fact, turns upon the proper inference to be drawn upon the facts proved and the answer to be given to it would not, in my view of those inferences, in any material degree, be affected by any opinion that one might have formed as to the credibility of the witnesses who gave evidence at the trial. Thirdly, the judgment of the learned trial judge which I have considered with care, and of which I desire to speak with the greatest respect, seems to me to be open to the observation that the learned judge has not given sufficient weight to the circumstance that the respondent was a man of affairs and that the character and circumstances of Sheldon's operations may be taken in absence of some explanation by him to have marked them, for a man of his experience (I think I am putting it very moderately) as both irregular and extremely hazardous. I think, with respect, that the learned trial judge has fallen into some error in failing to give sufficient weight to this circumstance in interpreting the subsequent conduct of the parties.

On this question of fact the Court of Appeal appears also to have been unable to accept the conclusion of the learned trial judge, but held the appellant to be barred from recovery by the provisions of article 1927 C.C. As I understand the view of the Court of Appeal touching the application of that article it is this: the persons who entrusted their money to Sheldon were partners with him in a series of gambling transactions, and all parties must be presumed, in view of the facts, to have contemplated transactions forbidden by the law. Then it is said

1913

WILKS v. MATTHEWS.

Duff J.

that according to article 1927 C.C. (the moneys in question having been paid to the respondent as moneys to which he was entitled as the profits arising from operations including such transactions) the recovery of these moneys is barred by the express language of the article in question. With great respect I have been unable to convince myself that the reasoning upon which the Court of King's Bench proceeded is sufficient to support their conclusion. The nullity with which a payment to which article 1036 C.C. applies is affected by the rule embodied in that article rests upon the fraud upon the rights of creditors which the payment made in such circumstances is presumed to involve; and the right of recovery given by the article is shewn by the express words of it to be primarily, at all events, a right conferred in the interests and for the benefit of the creditors who have thereby been wronged. It would appear, therefore (assuming Sheldon himself to have been disabled from recovering the moneys paid by reason of the provision of article 1927 C.C.) that this circumstance would not necessarily be conclusive against the claims of creditors under article 1036 C.C. Indeed, if I am right in my construction of the view taken by the Court of Appeal (assuming the hypothesis upon which that view is founded to be correct, viz., that the moneys in question were paid to the respondent as profits arising out of illegal transactions in which he was a partner) it would appear to be susceptible of plausible argument that the claim of the curator could be sustained under article 1034 C.C. If, indeed, it had been shewn that the nature of Sheldon's transactions and of his relations with those who entrusted their money to him was such as to disentitle any of them to sustain

any claim against him in a court of law in respect of their transactions with him, then a totally different question might have arisen, viz., the question whether in truth Sheldon was insolvent, within the meaning of article 1036 C.C., at the time the payment under consideration was made. But to support such a conclusion it would be necessary to go far beyond anything justified by the record before us, and I do not understand the Court of Appeal to have put their judgment on any such ground.

For these reasons, I think the curator was entitled to succeed in his action and that the appeal ought to be allowed.

ANGLIN J.—I agree with the view apparently taken by the learned judges of the Court of King's Bench that enough was established in evidence to raise a presumption that the defendant's wife believed that Sheldon was insolvent when she obtained the money in question from him. As he was in fact insolvent, that belief, in my opinion, constituted knowledge of his insolvency within the meaning of article 1036 C.C. But, with respect, I cannot accept the conclusion reached by the learned appellate judges that the plaintiff's action is barred by article 1927 C.C.

His right as curator is to recover all the property of the insolvent debtor, including what he has alienated in fraud of his creditors. Money paid gratuitously by an insolvent is deemed to have been paid in fraud of creditors (art. 1034 C.C.). This applies to the sum of $7,841, fictitious profits paid to the defendant's wife, which would, therefore, be recoverable without proof of the knowledge required by article 1036 C.C., under which the balance of $5,942, paid to re-

1913

WILKS v. MATTHEWS.

Anglin J.

coup moneys deposited with Sheldon by the defendant, is claimed.

The curator represents the creditors as well as the insolvent debtor. But I cannot think that his right to get in the assets of the insolvent estate depends upon the enforceability of the claims of any or of all of the insolvent's creditors. At all events, in the absence of conclusive proof that no creditor of the insolvent estate has an enforceable claim, the curator's right to recover in this action cannot be questioned. Assuming that the claims of all the business creditors of Sheldon should fall within the bar of article 1927 C.C. (something which may not be assumed, but must be proved as against each creditor when he seeks to enforce his claim) the claims of his other creditors would have to be met and the expenses of the curatorship provided for. There is no evidence that Sheldon had not creditors other than the customers of his business; and that again may not be assumed. It may be that on the distribution of the estate many or all of the claims of the "clients" of the insolvent will turn out to be so tainted with the vice of gaming that article 1927 C.C. will preclude their recovery. But the time for considering such questions is when the period arrives for determining who are entitled to share in the distribution of the estate — not before it is realized.

It should also be noted that the defence of gaming is not even hinted at in the defendant's plea.

No other defence to the curator's claim has been suggested.

I would, therefore, allow the plaintiff's appeal with costs in this court and the Court of King's Bench and

would direct judgment for the amount of his claim also with costs.

BRODEUR J.—Il s'agit d'une action Paulienne instituée par le curateur aux biens de l'insolvable Sheldon par laquelle il demande l'annulation d'un paiement fait par ce dernier à l'intimé la veille du jour où Sheldon a laissé le pays.

Sheldon a eu pendant un temps beaucoup de notoriété à Montréal. Il avait réussi à convaincre un certain public que, par des spéculations dont il avait seul le secret, il pourrait réaliser des profits fabuleux sur les sommes qu'on voudrait lui confier. Ses opérations durèrent pendant quelques mois, lorsqu'un jour des journaux s'avisèrent de le dénoncer et de publier que tout cela devait nécessairement se terminer par un désastre. Cette campagne de presse naturellement affecta sa position financière et plusieurs de ses déposants se sont présentés pour retirer leur argent. Il parut faire face pendant quelques jours assez facilement à l'orage.

L'intimé était l'un de ces déposants. Dans le cours de la semaine qui a précédé le 10 octobre, 1910, il fut appelé par ses affaires en dehors de Montréal. Sa femme, qui était au courant de ses relations avec Sheldon, alarmée de cette campagne de presse qui se poursuivait avec plus de vigueur que jamais contre Sheldon, se présenta à son bureau le 10 octobre, 1910, pour retirer l'argent de son mari. Elle avait un fils employé chez Sheldon et il y avait aussi là parmi les employés un ancien commis de son mari, un nommé Hunton.

Elle s'adressa au commis Hunton qui prépara un chèque pour la faire signer par Sheldon mais comme

1913

WILKS v. MATTHEWS.

Brodeur J.

elle était énervée ou indisposée et que Sheldon était alors absent, elle est allée pendant quelque temps se reposer au bureau de son mari, qui se trouvait dans les environs. Elle revint plus tard et Sheldon lui aurait alors promis, suivant elle, d'envoyer son chèque par son fils.

Peu satisfaite de cette promesse, elle s'est adressée à un ami, M. Cooper, et revint avec ce dernier un peu après deux heures dans l'après-midi. Là Sheldon lui donna un chèque daté du lendemain sur Garand & Terroux, banquiers privés de Montréal.

Le chèque fut pris par Mde. Mathews; mais après avoir conféré à la porte du bureau avec M. Cooper elle est rentrée de nouveau.

Alors Sheldon partit avec Mde. Mathews et M. Cooper pour aller voir ses banquiers, Garand & Terroux. Il fit un arrangement avec eux et Garand & Terroux donnèrent alors un chèque qui fut accepté par Mde. Mathews. Quelques heures après, Sheldon remettait entre les mains de Garand & Terroux des valeurs au montant de cent trente et quelques mille piastres.

Le lendemain Sheldon avait pris la fuite et laissé un déficit énorme. Ses dettes se seraient montées à au-delà de deux millions, tandis que son actif représentait à peu près vingt et quelques mille piastres.

Il s'agit de savoir si ce paiement fait par Sheldon à Mde. Mathews, dans les circonstances que je viens de relater, constitue un paiement frauduleux.

La Cour Supérieure, présidée par l'Honorable Juge Greenshields, a décidé qu'il n'y avait pas lieu d'annuler ce paiement parce qu'il n'est pas établi que Mathews connaissait alors l'insolvabilité de Sheldon.

La Cour d'Appel a été d'opinion que la connais-

sance de l'insolvabilité était prouvée; l'honorable juge Cross dit ceci:—

There is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money, and that the defence is, consequently, unfounded.

mais que le curateur ne pouvait pas exercer d'action pour recouvrer le montant qui avait été payé parce qu'il s'agissait d'une dette de jeu; et qu'en vertu de l'article 1927 du code civil,

Il n'y a pas d'action pour le recouvrement de deniers ou autres choses en vertu d'un contrat de jeu ou d'un pari; mais si les deniers ou les choses ont été payés par la parties qui a perdu, ils ne peuvent être répétés, à moins qu'il n'y ait preuve de fraude.

Après avoir lu la preuve, je suis d'opinion que Sheldon était insolvable lorsqu'il a fait le paiement en question et que Mathews et sa femme qui agissait en son nom connaissaient son insolvabilité.

Cette connaissance de l'insolvabilité de Sheldon résulte de plusieurs circonstances. Il est assez étrange cependant qu'on n'ait pas demandé directement à Mde. Mathews, lorsqu'elle a été examinée comme témoin, si elle connaissait ou non cette insolvabilité. Mais je suppose qu'elle aurait déclaré, comme cela se fait d'ailleurs souvent dans des circonstances semblables, qu'elle n'en connaissait rien.

D'un autre côté, quels sont les faits? Voici un homme dont les opérations étaient dénoncées dans la presse depuis plusieurs jours. Il avait, il est vrai, répondu à ces attaques; mais la nature de ses réponses avait ébranlé la confiance du public. On représentait dans les journaux que ses opérations devaient nécessairement conduire au désastre, qu'il était impossible qu'il pût payer les profits considérables qu'il prétendait et qu'un de ces jours les déposants seraient exposés à perdre l'argent qu'ils auraient placé là.

1913

WILKS v. MATTHEWS.

Brodeur J.

Cette femme a été profondément affectée par ces dénonciations; elle déclarait le samedi, le 8 octobre, que si elle vivait jusqu'au lundi (sachant qu'aucune opération ne pouvait se faire le dimanche) elle irait certainement chercher son argent.

Nous la trouvons le lundi suivant au bureau de Sheldon; nous la voyons insister pour être payée; on veut la faire temporiser mais elle revient à la charge à deux ou trois reprises. On lui donne en définitive un chèque payable le lendemain. Elle n'est pas satisfaite de cela; il lui faut son argent de suite. On la mène chez les banquiers privés sur qui le chèque est tiré; et, chose singulière, elle accepte de préférence le chèque de ces banquiers privés à celui de Sheldon.

Maintenant il ne faut pas oublier qu'elle avait là dans le bureau un ami dans la personne de Hunton, un ancien employé de son mari. Elle avait aussi son fils qui devait nécessairement connaître quelque peu la situation financière de Sheldon et les difficultés auxquelles il était en butte.

Mais laissons de côté la connaissance qu'elle pouvait avoir acquise par ces deux personnes. Il est évident qu'elle avait perdu confiance dans la solvabilité de Sheldon et la présomption raisonnable à tirer de toutes les circonstances c'est qu'elle connaissait son insolvabilité.

Maintenant la Cour d'Appel a décidé que c'était une dette de jeu pour laquelle il n'y avait pas d'action en répétition. Examinons ce point.

Je ne crois pas qu'on puisse traiter de contrat de jeu les relations de Mathews et de Sheldon; mais en supposant même que ce serait une dette de jeu que le failli a payé, est-ce que l'action Paulienne ne compète pas aux créanciers, ou à leur représentant, le curateur,

dans ce cas-là ? Je suppose pour un instant le cas d'un débiteur insolvable qui a une dette de jeu et une dette légitime et qui paie ces deux dettes-là à des créanciers qui connaissent son insolvabilité. Il n'y a pas de doute que sous les dispositions de l'article 1036 C.C. le paiement de la dette légitime doit être annulé et le créancier peut être forcé de remettre la chose reçu. Serait-ce à dire que le paiement de la dette de jeu ne serait pas susceptible d'être soumis à l'action révocatoire de la part des autres créanciers ? Il me semble que poser la question c'est la résoudre.

Si le créancier légitime est exposé à voir annuler son paiement, il doit en être de même du créancier dont la dette repose sur une illégalité; autrement ce serait le créancier illégitime qui serait plus favorisé que le créancier légitime.

L'article du code civil qui prohibe l'action en répétition dans le cas d'une dette de jeu ne dit pas que l'action Paulienne par les créanciers du débiteur ne peut pas être exercée. Je vois que la Cour d'Appel a confondu ces deux actions qui sont régies par des principes différents.

Le débiteur qui a fait un paiement ne peut pas lui-même réclamer l'argent qu'il a payé, même si en faisant ce paiement il a fraudé ses créanciers. Il ne peut pas non plus répéter l'argent qu'il a donné pour une dette de jeu. Mais si en payant sa dette de jeu ou en acquittant ses créances légitimes il était insolvable à la connaissance de ceux qui ont reçu ces paiements, alors ses autres créanciers et le curateur à la faillite peuvent, sous les dispositions de l'article 1036, non pas exercer l'action en répétition, mais prendre une action Paulienne pour faire annuler ses paiements et en faire

1913

WILKS v. MATTHEWS.

Brodeur J.

rentrer le montant dans la masse pour le bénéfice de tous les créanciers.

Je suis donc d'opinion que l'appel est bien fondé et qu'il doit être maintenu avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Chauvin, Baker & Walker.*

Solicitors for the respondent: *Elliott & David.*

ROSE WADSWORTH (PLAINTIFF) ....APPELLANT; 1913

AND *Dec. 2,3.

THE CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY (DEFENDANTS) ..... RESPONDENTS. 1914 *Feb. 3.

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

Accident insurance—Construction of policy—Special conditions—Increased and diminished indemnity—Injuries from fits causing death.

In an accident policy an insurance company agreed to pay the insured the principal sum in case of death or specified injuries, double that sum if such death or injuries occurred under certain conditions and one-tenth for "injuries happening from * * * fits causing death." * * * W., holder of the policy, went at night with a lantern to an outbuilding of the fishing club which he was visiting. Shortly after the outbuilding was seen to be on fire. The fire was extinguished and W. brought out badly burned, from the effects of which he died the next day. In an action on the policy the trial judge found as a fact that W. had been seized with a fit and in that condition caused the fire. This finding was concurred in by the two provincial appellate courts. The trial judge held that the company was liable for one-tenth only of the insurance. The Divisional Court reversed this ruling (26 Ont. L.R. 55, 3 D.L.R. 668), but it was restored by the Appellate Division (28 Ont. L.R. 537, 13 D.L.R. 113).

Held, affirming the judgment of the Appellate Division, Duff and Anglin JJ. dissenting, that the injuries causing the death of W. happened from a fit within the meaning of the clause in the policy diminishing the indemnity to be paid. *Winspear* v. *Accident Ins. Co.* (6 Q.B.D. 42), and *Lawrence* v. *Accidental Ins. Co.* (7 Q.B.D. 216), distinguished.

Held, per Fitzpatrick C.J.—The clause diminishing the indemnity payable is not an exempting clause but one of the three separate

*PRESENT:—Sir Charles Fitzpatrick C.J., and Davies, Duff, Anglin and Brodeur JJ.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

contracts between the insurers and insured as to amount of liability.

Per Anglin J.—It does not create a new liability, but is a clause of limitation in favour of the company and to be strictly construed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment of a Divisional Court(2), by which the amount awarded to the plaintiff at the trial was increased.

The substance of the material portions of the policy held by appellant's husband and sued on in this case is stated in the head-note. The clauses thereunder are set out in full in the opinions of the judges given on this appeal.

The insurance company in defending the action claimed to be liable for one-tenth only of the principal sum insured, on the ground that the injuries causing the death of the insured happened through a fit. The trial judge agreed with this contention and gave judgment accordingly. The Divisional Court held that the fit was a remote, and not the direct, cause of the injuries and awarded the principal sum for which deceased was insured. The Appellate Division restored the judgment given at the trial.

Aylen K.C. and *R. V. Sinclair K.C.* for the appellant. The decision of the courts in England strongly support the view of the Divisional Court that the fit was only a remote cause of the injuries. See *Pink* v. *Fleming*(3); *Winspear* v. *Accident Ins. Co.*(4); *Lawrence* v. *Accidental Ins. Co.*(5), and the reasoning in

(1) 28 Ont. L.R. 557.
(2) 26 Ont. L.R. 55.
(3) 59 L.J.Q.B. 559.
(4) 6 Q.B.D. 42.
(5) 7 Q.B.D. 216.

Manufacturers' Accident Indemnity Ins. Co. v. *Dorgan*(1), at pages 947 and 954. See also *Canadian Casualty and Boiler Co.* v. *Boulter, Davies & Co.*(2).

The appellate courts are not bound by the finding of the trial judge that the insured caused the fire while in a fit. That is not a finding of fact, but merely an inference from the evidence and, we submit, an unwarranted inference. See *William Hamilton Mfg. Co.* v. *Victoria Lumber and Mfg. Co.*(3).

Hellmuth K.C. and *McConnell* for the respondents referred to *Mendl* v. *Ropner & Co.*(4), and contended that the finding of the trial concurred in by both appellate courts below must be accepted, and being accepted the judgment in appeal must stand.

THE CHIEF JUSTICE.—In December, 1907, the respondent company entered into two contracts to insure the husband of the appellant each in the principal sum of $5,000

against bodily injuries caused solely by external violent and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained).

In October, 1910, Wadsworth dies.

The finding of the trial judge was that deceased took a fit, that while in that fit, he either dropped or knocked over a lantern, the lantern exploded or was spilled or broken in the fall. The result was that the oil escaped, and there was almost immediately a very extensive flame which enveloped the deceased and inflicted the very serious injury from which he died.

(1) 58 Fed. R. 945.
(2) 39 Can. S.C.R. 558.
(3) 26 Can. S.C.R. 96.
(4) 29 Times L.R. 37.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

The Chief Justice.

That finding has been concurred in by both courts below.

This appeal turns upon the question whether the injuries sustained by the deceased causing his death happened from fits within the meaning of the policies (clause G). The parts of the policies most material are parts C, G. and H. Part C reads as follows:—

> If such injuries are sustained while riding as a passenger in a passenger steamship or steamboat, or in any steam, cable or electric passenger railway conveyance, or in a passenger elevator, *or are caused by the burning of a building in which the insured is therein* at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the claim arises.
>
> Part G.—
>
> In case of injuries *happening from* any of the following causes, viz: intentional injuries inflicted by the insured, or any other person (other than burglars or robbers), *fits*, vertigo, sleep-walking, duelling, war or riot, exposure to unnecessary danger, engaging in bicycle, automobile or horse-racing, or while under the influence of intoxicating liquors or narcotics, causing death, loss of sight or limb as stated in Part "A," the company will pay one-tenth of the amount payable for bodily injuries as stated in Part "A," under which claim arises; or if such injuries result in total or partial disability as provided in Part "B," the Company shall pay one-tenth of the amount payable for weekly indemnity as stated in said Part "B," under which claim arises.
>
> Part H.—
>
> In case of the happening of injuries mentioned in Special Indemnity Clauses D, E, F and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the Company's liability, and such claim will not be entitled to double benefit as provided in Part "C."

There are a number of cases in which accidental insurance policies have been construed by the courts, and they are practically all dealt with in the various judgments below and here. In every policy, however, which has been construed in those cases, the excepted clause was construed as a clause exempting from all liability.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

The Chief Justice.

Here the respondents argue: the policy is based on the hazard of the risk and provides a schedule of indemnities first, for bodily injuries caused solely by external violent and accidental causes (Part A): second, for injuries sustained in the circumstances enumerated in Part C, and third, if the injury is fairly attributable to some constitutional defect in the insured — fits, vertigo or sleep-walking — or the assumption by him of some extra risk, such as duelling, then the indemnity is fixed by clause G at "one-tenth of the amount payable for bodily injuries, as stated in Part A under which claim arises." In such case, the liability of the company varies. If the death is caused solely by external violent and accidental means, then the capital sum of $5,000 is due under each policy (Part A). If the death occurs in the circumstances enumerated in Part C double payment is provided for, and finally if the injury is fairly attributable to some constitutional defect, then the indemnity is fixed at one-tenth, as provided for by clause G. The case turns upon the meaning of this clause. It is not an exempting clause, but is one of several clauses fixing the liability of the company at different sums according to the different risks, and making the sum in each case proportionate to the risk run. The words to be construed are:—

In case of injuries *happening from* any of the following causes * * *

I construe them to mean that the company undertakes, in case the injury, as in this case, comes to pass by chance or otherwise as a result of the fact that the insured had a fit, to assume an obligation to pay one-tenth of the amount which would be payable for bodily injuries under Part A, as it would be obliged

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

The Chief Justice.

to pay double the amount of the capital sum if the injury was sustained in any one of the cases enumerated in Part "C." In other words, if the bodily injuries are not caused solely by external violent and accidental means, but arise as a result of any one of the causes mentioned in Part "G," the liability is fixed at one-tenth. Shortly stated, the proximate cause of the death was the injuries received from the burning oil which was set on fire as a result of the fit with which the deceased had been previously seized, and this brings the claim within Part "G."

I would dismiss the appeal with costs.

DAVIES J.—This was an action brought by the widow of her deceased husband who had been insured under a policy issued by the company defendant

against bodily injuries *caused solely by external violent and accidental means* as specified in the following schedule.

That the death of the assured was within the terms of the policy was not denied. The substantial question in dispute was as to the amount of the company's liability, and the company's contention was based upon Part G of the schedule, which provided that:—

In case of injuries happening from any of the following causes, viz.: Intentional injuries inflicted by the insured or any other person (other than burglars or robbers), fits, vertigo, sleep-walking * * * causing death * * * the company will pay one-tenth of the amount payable for bodily injuries as stated in Part "A."

There was no dispute as to the amount payable in case it was held that the death of the assured came within this clause G, as having been caused from injuries happening from fits.

The findings of the trial judge on the facts were as follows:—

Now this was an injury happening from a fit which this unfortunate man had. He took a fit when he was in the closet, and I think the proper finding of fact is that while in that fit he either dropped or knocked over the lantern, the lantern exploded or was spilled or was broken in this fall—the result was that the oil escaped and there was almost immediately a very extensive flame which enveloped him and inflicted the very severe injuries from which he died, and I think it is the very kind of case that falls within this clause.

These findings of fact were concurred in by the Divisional Court, and also by the Appellate Division, and I think are amply sustainable from the evidence. I fully agree also with the conclusions that the injuries which the deceased received and which caused his death were not caused by the burning of a building at all and that the double liability of the company provided in Part C does not arise in this case. The question to be determined by us is whether under these findings of fact the case is one within Part G of the policy.

There has been much conflict of judicial opinion upon the point. The learned trial judge held that

it was the very kind of case that falls within this clause.

A majority of the Divisional Court (the Chief Justice with much hesitation) reached the conclusion stated by Mr. Justice Riddell that

the injuries which caused the death are the burns,

and that

the burns were caused primarily and immediately by the fire,

the fire was "the proximate cause," or as Chief Justice Falconbridge put it, that

the injuries happened not from the fit but from the fire.

Hodgins J. dissenting in the Appellate Division based

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Davies J.

his judgment on the same grounds, namely, that the injuries "happened from a flame."

A majority of the Appellate Division held with the trial judge and Mr. Justice Latchford of the Divisional Court that the case was one clearly within Part G of the policy, and that a fit was the proximate and efficient cause of the happening of the injuries causing death.

I have read carefully all the cases cited by the learned judges in their judgments, but I cannot find that any of them afford us much assistance in the construction of this clause G. In those cases the question under the special terms of the assurance policies was: What was the cause of the *death* of the assured? Here that is not the main or controlling question, which is: What was the cause of the *happening of the injuries which caused death?*

It is not then a question as it was in the two English cases cited: *Winspear* v. *Accident Ins. Co.,* in 1880 (1), and *Lawrence* v. *Accidental Ins. Co.,* in 1881, (2), where the *cause of death* was considered. It is a question of the *cause of the happening of the injuries* which caused death.

The cause of the happening of these injuries is found explicitly stated in the findings of fact of the trial judge accepted by all the courts as sustainable under the evidence. The fit was the efficient cause of the injuries received by the deceased assured and from which he died. I agree with the judgment of the Appellate Division stated by Meredith J.A. that this fit was the predominate and proximate cause of the injuries, the scorchings or burnings of the body of the

(1) 6 Q.B.D. 42. (2) 7 Q.B.D. 216.

assured, which caused his death, and that

the fit set the fire free and bound the man while it burned him.

It does seem to me that to hold such a case as this not to be within Part G of the policy would be to disregard its plain words and leave it practically meaningless. Construing the policy as a whole, it seems clear that no liability arises under it at all except in those cases of

bodily injuries caused solely by external, violent and accidental means.

The plaintiff brought herself within that risk and satisfied the onus which lay upon her when she proved that the death of her husband was caused by the burning of his body from the upset lamp. Now, if she had proved that her husband had died simply from a "fit" and had failed to prove any

bodily injuries caused solely by external, violent and accidental means

which in themselves caused his death she could not have recovered under the policy at all. It was common ground that this onus had been satisfied.

Then comes the next question as to the amount recoverable. It seems to me it was just such cases as this of bodily injuries caused by fits and in turn themselves causing death that this clause G was intended to cover.

To my mind the language of the clause itself is not ambiguous. If it was so the court might be justified in straining the language used against the company which, of course, prepared the policy. It appears to me the clause clearly expresses and limits the company's liability in cases of injuries happening from fits and causing death. With great respect I think

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Davies J.

it is putting a forced construction upon the clause to say that the injuries of burning and scorching of his body were not "injuries happening from fits." Of course, the "flame" or the "fire" caused the injuries, but they none the less "happened" from the fits which were in my judgment the proximate and efficient cause of the injuries from which death resulted.

The clause did not limit or affect the company's liability in cases of death arising directly from fits and without any "external, violent and accidental means." Such a death was not covered by the policy at all which was one of accident insurance simply. It did, however, cover, and was intended to cover, cases of death caused by bodily injuries happening from fits which in my judgment is the case before us.

The object, purpose and intent of the clause can be gathered from reading the collocation of other causes than "fits" mentioned in it. Such purpose was to provide a limited liability only in cases of injuries happening to the person assured from any of the several causes mentioned and causing death. Once that conclusion is reached as to the object and intent of the clause, then it follows, to my mind at any rate, that not only are the cases relied upon by the appellant on policies which raised the question of the "cause of death" irrelevant, but that the findings of fact of the trial judge bring the case directly within clause G.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—After the most anxious consideration the view at which I have arrived is that the respondent has failed to shew that this case is governed by Part G. In order to bring the case within that

part the respondent must make it appear that the injuries which led to the death of the appellant's husband come within the description,

injuries happening from any of the following causes * * * fits.

Questions of legal causation, to use a very loose phrase, commonly give rise to marked differences of judicial view; and this case is no exception. When the term "cause" is used in common speech one does not, of course, use the word in any strictly logical sense, but (abstracting from the totality of the conditions) one indicates some class of facts or some relation brought into prominence by the practical interest of the moment; and such terms as "cause" and "proximate cause" when employed by lawyers in denoting the grounds for assigning legal responsibility or in defining the conditions of such responsibility ought to be interpreted in light of the known meaning usually attached to such phrases and their equivalents in similar circumstances. And, indeed, speaking more generally, in the case of insurance policies — prepared by professional men on behalf of an insurance company — where phrases that have been construed in well known cases are made use of, it may be presumed that the insurance company so employing them had such decisions in view.

Now it so happens that stipulations which, in my judgment, ought to be considered as in all relevant respects equivalent to that in question here have been interpreted by very high authority in reported decisions which have since been applied in other cases without a doubt as to the correctness of them; and adopting as I do the principle of construction above indicated, the real point for determination seems to be

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Duff J.

whether the circumstances of this case are so different from the circumstances of the cases in which the decisions referred to were pronounced as to require us to hold that this case falls on the other side of the line.

Those decisions have this in common; that the insured having, as the immediate consequence of being seized by a fit, been exposed to a noxious agency which destroyed his life, it was held that the injury that was the immediate cause of death was not "caused" by the fit within the meaning of the insurance policy. In the first of these cases, *Winspear* v. *Accident Ins. Co.*(1), the court held that the insured having been drowned as a result of falling into a stream while in a fit, the "cause" of death was not the fit. This decision was followed in *Lawrence* v. *Accidental Ins. Co.*(2), and in *Manufacturers' Accident Indemnity Ins. Co.* v. *Dorgan*(3), and was referred to seemingly with approval in *Accident Ins. Co.* v. *Crandal*(4), at page 532.

In delivering the judgment of the Supreme Court of the United States in this last mentioned case, Mr. Justice Gray discussing the case of suicide committed while in a state of insanity said:—

> If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes any injury or loss to its proximate cause only, and in view of the decisions in similar cases the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death. *Scheffer* v. *Railroad Co.*(5); *Trew* v. *Railway Passengers' Assurance Co.*(6); *Reynolds* v. *Accidental Ins. Co.*(7); *Winspear* v. *Accident Ins. Co.*(8), affirmed (1); *Law-*

(1) 6 Q.B.D. 42.
(2) 7 Q.B.D. 216.
(3) 58 Fed. R. 945.
(4) 120 U.S.R. 527.
(5) 105 U.S.R. 249, at p. 252.
(6) 5 H. & N. 211; 6 H. & N. 839, at p. 845.
(7) 22 L.T. 820.
(8) 42 L.T. 900.

rence v. *Accidental Ins. Co.*(1); *Scheiderer* v. *Travellers' Ins. Co.* (2).

I cannot satisfactorily distinguish in principle the *Winspear Case*(3) from the present. Accepting the trial judge's finding that the breaking or explosion of the lantern was in some way connected with the onset of an epileptic seizure, still the immediate cause of the injuries was the fire coming into contact with the insured or the insured coming into contact with the fire. The fall that led to the drowning of the insured in the one case seems no more remote from the suffocation that ensued than was the fall which it may be assumed in the case before us directly or indirectly brought the fire into contact with the body of the unfortunate victim. If the deceased being overtaken by a seizure had fallen into a fire and been burned in such a manner as to cause his death, the analogy with the facts of the *Winspear Case*(3) would be obviously complete. The analogy would not be less obviously complete if it had appeared that as the immediate result of falling upon the lantern or if in some other way as the immediate and direct consequence of the fit the clothing of the deceased had been brought into direct contact with and had caught fire from the flame of the lantern itself. It appears to me to be plainly impossible to affirm, upon the facts in evidence, that the burning of the insured's body from which he died was not solely attributable to some part of his clothing being brought into direct contact with the flame of the lantern by some movement which followed immediately upon his seizure. Holding this view, the decision

(1) 7 Q.B.D. 216, 221. (2) 58 Wis. 13.
(3) 6 Q.B.D. 42.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Duff J.

of the case appears to me to be governed by the decision of the Court of Appeal in the *Winspear Case*(1).

I am not overlooking the argument that this construction of Part G deprives some parts of that stipulation of all meaning, for example, in the application of the provision to "injuries happening from sleep-walking." I am not convinced that this is so. And a comparison of Part C with Part G shews that in framing the policy the distinction between injuries suffered while in a given situation and injuries attributable to a situation or a condition as a "cause" was not overlooked. At all events my view is that in dealing with the subject of injuries arising from fits it was easily possible for the insurance company to make it clear by apt language that the construction acted upon in the *Winspear Case*(1) was to be excluded. And the respondents having not only failed to do so, but having, on the contrary, used the words as I think indistinguishable in effect from the phrases construed in that and subsequent cases the considerations which prevailed in those cases ought to be given effect to here.

ANGLIN J. (dissenting).—The material facts and the relevant portions of the insurance policies sued on are sufficiently set out in the judgments of the provincial courts — particularly in the very careful opinion delivered by Mr. Justice Riddell in the Divisional Court.

That the injuries sustained by the injured were not

caused by the burning of a building, etc.,

(1) 6 Q.B.D. 42.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Anglin J.

was a conclusion accepted in both the provincial Appellate Courts, and, in my opinion, is the only reasonable conclusion to be drawn from the evidence. This disposes of the plaintiff's claim to recover double payments under Part C of the policies.

There is no doubt that the death of the insured was caused by burns. It is a legitimate inference from the evidence that the fire from which these burns were received was ignited as the result of a lantern being either dropped or knocked over by the insured owing to his loss of self-control while in a fit. As put by Latchford J., who dissented in the Divisional Court:—

> Mrs. Wadsworth was obliged to establish, and did establish that external, violent and accidental means caused injuries to her husband and that injuries caused by such means caused his death.

While the case is, therefore, covered by the policies, the question for determination is whether the burns, which caused death, sustained under these circumstances, were

> injuries happening from any of the following causes, viz., * * * fits

within the meaning of Part G of the policies, so that the plaintiff's recovery should be limited to one-tenth of the amounts which would be payable if death had been due to some accident wholly disconnected with fits or any of the other special matters included in Part G. Five judges — Middleton and Latchford JJ., and Garrow, Meredith and Magee JJ.A., have held that they were — and this was the opinion of the majority in the Appellate Division; while four judges, Falconbridge C.J., Riddell J., and Maclaren and Hodgins JJ.A., have held that they were not — and this view prevailed in the Divisional Court.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Anglin J.

Did the injuries, *i.e.*, the burns, which caused the death of the injured, happen from the cause — fits? Were fits in law the cause of these injuries?

Two opposite views of the construction of clause "G" are presented — both of them supported by cogent arguments. In one view the clause is dealt with without reference to canons of legal construction, and an effect is given to it which it may be supposed the insurers had in mind, although they may not have sufficiently expressed their intention. In the other view, the language employed is assumed to have been used in the light of rules laid down by the courts for the construction of insurance contracts — and only the expressed intention to be gathered from the terms used when given the meaning thus put upon them is taken into account.

If in construing these insurance policies we might assume that neither the insured nor the insurer was aware of the well-known legal rule embodied in the maxim *in jure non remota causa sed proxima spectatur,* or of its constant and special application in insurance law (17 Halsbury's Laws of England, 567, 437, 530; Broom's Legal Maxims (11 ed.), p. 179, *et seq.*), a very formidable argument could be made for the defendants that it must have been just such an occurrence as that now before us that they meant to cover by clause (G).

Fits, sleep-walking and several of the other "causes" mentioned in clause (G) do not, as a general rule, *per se* produce injuries. They often occasion and give rise to other secondary causes from which injuries result. Therefore, it is contended, it must be to injuries immediately produced by such secondary causes themselves resulting from the enumerated

causes that clause (G) was meant to apply. This aspect of the case is forcefully presented in the opinion delivered by Meredith J.A., concurred in by Garrow and Magee JJ.A.

But in construing the language of an insurance policy it is impossible to ignore a principle, of which the application is so well established in insurance law as is that embodied in the maxim now under consideration. To do so would be to introduce uncertainty in regard to the construction of contracts in daily use — a consequence to be avoided. ***Thames and Mersey*** *Marine Ins. Co.* v. *Hamilton, Fraser & Co.*(1), at page 490; *Philips* v. *Rees*(2), at page 21. The application of this maxim sometimes makes against the liability of the insurer: *Taylor* v. *Dunbar*(3); *Livie* v. *Janson* (4); it sometimes makes for it; *Walker* v. *Maitland* (5); *Redman* v. *Wilson*(6). In either case, whether he is contracting for liability or is providing to exclude, limit or reduce it, the insurer, when he refers to the cause of loss, injury or death, must be taken to mean the proximate and immediate cause: *Fenton* v. *Thorley & Co.*(7), at pages 454-5; *In re Etherington and The Lancashire and Yorkshire Accident Ins. Co.* (8), at pages 601-2; *Waters* v. *Merchants Louisville Ins. Co.*(9), at pages 223-4; unless he uses language which will clearly cover a remote cause and thus preclude the application of the ordinary canon, as was done in *Smith* v. *Accident Insurance Co.*(10).

(1) 12 App. Cas. 484.
(2) 24 Q.B.D. 17.
(3) L.R. 4 C.P. 206.
(4) 12 East 648, at p. 653.
(5) 5 B. & Ald. 171.
(6) 14 M. & W. 476.
(7) [1903] A.C. 443.
(8) [1909] 1 K.B. 591.
(9) 11 Pet. 213.
(10) L.R. 5 Ex. 302.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Anglin J.

No doubt the present case is distinguishable from two English cases much relied upon by counsel for the plaintiff—*Winspear* v. *Accident Ins. Co.*(1), and *Lawrence* v. *Accidental Ins. Co.*(2). In neither of these cases did the epileptic fit bring into activity the instrument which proximately caused the injuries or death. It was rather in the nature of a cause *sine qua non*. In the present case the fit was undoubtedly, though not the immediate cause of the injuries from which death ensued, a *causa causæ causantis*. Meredith J.A., says that the fit was in a double sense the predominative and proximate cause of these injuries — it caused the fire and it prevented the escape of the victim. In the *Winspear Case*(1), and also in the American case, *Manufacturers' Accident Indemnity Ins. Co.* v. *Dorgan*(3), cited by Riddell J., the fit undoubtedly prevented the escape of the assured quite as much as in the present case, yet in neither instance was the fit on that account regarded as the efficient or proximate cause of the injuries. See also *Reynolds* v. *Accidental Ins. Co.*(4). In *Taylor* v. *Dunbar,* already referred to, as in *Busk* v. *Royal Exchange Assce. Co.* (5), at page 80; *Walker* v. *Maitland*(6), at page 174, and *Bishop* v. *Pentland*(7), at page 223, cited by Riddell J., and in *Pink* v. *Fleming*(8), cited at bar, the causes relied upon to found, or to exempt from, liability were undoubtedly in the direct chain of causation; they were not merely *causæ sine quibus non;* they were *causæ causarum causantium;* but because they were remote and not the immediate causes of the

(1) 6 Q.B.D. 42.
(2) 7 Q.B.D. 216.
(3) 58 Fed. R. 955.
(4) 22 L.T. 820.
(5) 2 B. & Ald. 73.
(6) 5 B. & Ald. 171.
(7) 7 B. & C. 219.
(8) 25 Q.B.D. 396.

losses, they were deemed immaterial and were held insufficient in some of the cases to support liability, in others to exclude it. As put by Watkin Williams J., in the *Lawrence Case*(1) :—

> It is essential * * * that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death before the company are exonerated.

He quotes from Lord Bacon's Maxims of the Law:

> It were infinite for the law to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause.

My conclusion from these authorities is that upon a proper construction of clause (G) the injuries which caused the death of the insured did not happen from the fit which he suffered. The fit was a remote cause; the proximate cause was the fire.

I do not rely on the decision of this court in *Canadian Casualty and Boiler Co.* v. *Boulter*(2), because of the stress placed in the judgments in that case on the word "immediate" which was used in the policy.

I do not read clause (G) as creating a new and distinct liability. The injuries with which it deals are the

> bodily injuries caused solely by external, violent and accidental means

to which the application of the entire contract is at its outset confined. The indemnity for such injuries when they happen (*inter alia*) from fits is by clause (G) reduced to one-tenth of the sum which would be payable under clause (A) if they happened from other causes. Clause (G) is a clause of limitation introduced by the company in its own favour and, like

(1) 7 Q.B.D. 216. (2) 39 Can. S.C.R. 558.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Anglin J.

a clause of exception, is to be given a strict construction.

Moreover, as is pointed out by Taft J., in *Manufacturers' Accident Indemnity Co.* v. *Dorgan*(1), at page 956:—

> Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted to resolve any doubt or ambiguity in favour of the insured and against the insurer. *Fitton* v. *Accidental Death Ins. Co.*(2).

In view of the great divergence of judicial opinion as to its proper construction it would savour of temerity to insist that clause (G) of the policies before us is wholly free from ambiguity. While of the opinion that, when construed according to well established legal principles, clause (G) does not cover the present case, I am not prepared to say of those who hold the contrary view (adapting the language in which Meredith J.A. refers to the Divisional Court) that "it is easily demonstrated that (they) err and how." I appreciate the force of the argument in favour of the defendant company's contention. But, if I should be wrong in the view which I have taken as to its proper construction, I agree with Hodgins J.A., that the ambiguity and uncertainty of the clause, which the defendants invoke, should be resolved in favour of the assured. *In re Bradley and Essex and Suffolk Accident Indemnity Society*(3), at pages 422, 430; *In re Etherington*(4), at pages 596, 600.

With all proper respect for the learned judges who think otherwise, I am, for these reasons, of the opin-

(1) 58 Fed. R. 945.
(2) 17 C.B.N.S. 122.
(3) [1912] 1 K.B. 415.
(4) [1909] 1 K.B. 591.

1914

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Anglin J.

ion that the correct conclusion was reached in the Divisional Court and that its judgment should be restored. The appellant should have her costs in the Appellate Division and her costs of the appeal to this court. The cross-appeal should be dismissed with costs.

BRODEUR J.—I am in favour of dismissing this appeal for the reasons given by Sir Louis Davies.

Appeal dismissed with costs.

Solicitor for the appellant: *R. V. Sinclair.*
Solicitors for the respondents: *Perkins, Fraser & McCormack.*

1913

*Nov. 20.
*Dec. 23.

CHARLES DONALDSON AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

EMMA DESCHÈNES, PERSONALLY AND ÈS QUALITÉ (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Employer's liability—Ship labourer—Disregard of rules —"Accident in course of employment"—Action—Claim by dependents—Findings of jury—Evidence—Art. 1054 *C.C.*

A labourer employed on board a ship went ashore for purposes of his own while the ship was in port and, on returning to his work, he attempted to descend from the upper deck by the hatchway, which was prohibited by rules laid down for the men engaged in stowing cargo. In doing so he fell into the hold, his body struck his foreman (who was there in the discharge of his duties) and caused injuries which resulted in the death of the foreman. There was evidence to shew that the rules, which required labourers to use the companion-way, instead of the hatchway by which the labourer had attempted to descend had been habitually disregarded. The jury found that the defendants were at fault "in not having taken the necessary precautions to enforce their rules," judgment went for the plaintiff, and this judgment was affirmed by the Court of Review.

Held, that there was evidence to support the finding of the jury and, consequently, their verdict should not be disturbed on appeal.

Quære, per Fitzpatrick C.J.—Whether or not the course of judicial decisions in the Province of Quebec has adopted the principle that, in a case like the present, an employer is subject to liability derived from the law alone, and departed from the rule of the Roman Civil Law that there is no liability without fault.

Per Brodeur J.—The exception, in article 1054 C.C., relieving parents, tutors, curators, schoolmasters and artisans from liability, in cases where it is established that they could not prevent the act which caused injury, does not apply to employers.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1913

DONALDSON v. DESCHÊNES.

APPEAL from the judgment of the Superior Court, sitting in review, affirming the judgment of Mr. Justice Archibald in the Superior Court for the District of Montreal by which, upon the findings of the jury, judgment was entered in favour of the plaintiff, personally and as tutrix to her minor children, for the sum of $5,000 with costs.

The circumstances of the case are shortly stated in the head-note and the questions raised on the appeal are mentioned in the judgments now reported.

Lafleur K.C. and *Aylmer* for the appellants.

Pariseault and *Rhéaume* for the respondent.

THE CHIEF JUSTICE.—This is an action brought by the widow and minor children of the late Cyrille Fournier to recover damages caused by his death when in the employment of the defendants on board the SS. "Kastala" in the harbour of Montreal.

Some objections were taken to the form of the proceedings which were, in my opinion, satisfactorily disposed of in the provincial courts. (*Ruest* v. *Grand Trunk Railway Co.*(1).) They are pressed here merely as affecting costs.

The accident to the deceased was the result of the negligence of a fellow-servant whilst acting in contravention of the rules laid down for his guidance by the owners of the ship.

The main defence is that all reasonable precautions were taken by the defendants to protect their employees against the negligence complained of, and, if

(1) 4 Q.L.R. 181.

1913

DONALDSON v. DESCHÊNES.

The Chief Justice.

the instructions, which were undoubtedly given, had been followed in this instance the accident to the deceased, admittedly, could not have happened. It is also urged that the deceased was himself a person in authority, charged as such with the duty of enforcing the rules, and that his failure in that regard was the cause of the accident.

The reply is that, in view of the transient nature of the employment and frequent changes in the "personnel," greater vigilance should have been exercised by the general foreman, Sullivan, and the general superintendent, Duncan, who alone had power to hire and discharge the men and to enforce the rules prohibiting the use of the means adopted by Thibert to descend from the upper to the main deck, which was the cause of the accident.

It appears on the evidence that the accident happened when Thibert was returning to his work on the main deck, and that he would not be subject to the control of the deceased until he reached that place.

The point raised is certainly not free from difficulty, and, were it not for the findings of the jury, the question might be before us for solution as to the extent to which the French law of Quebec has departed from the classic rule governing civil responsibility since the days of Rome that there is no liability without fault, to adopt the principle that the employer, in a case like this, is subject to a liability derived from the law alone.

I would be disposed to hold, if I were trying the case, that proper rules and regulations were made by the owners of the "Kastala" to provide for the safety of their men, and a reasonable attempt was made to enforce them, but there is evidence both ways and that

1913.

DONALDSON v. DESCHÊNES.

The Chief Justice.

issue was fairly enough put to the jury of merchants and traders who found unanimously that the necessary precautions to enforce the rules and regulations were not taken by those in authority. It was for the jury to say whether and how far the evidence was to be believed. (Gérard, Torts ou Délits Civils, page 201). I am, therefore, to confirm, but solely and exclusively on the ground that the injury to the deceased was found by the jury, on sufficient evidence, to have been caused by the fault of Thibert who was, at the time, under the control of the legal owners of the ship, at the loading of which both the deceased and Thibert were employed.

The appeal should be dismissed with costs.

IDINGTON J.—There is evidence upon which the jury could properly reach the conclusion they did in answering the main question settled and submitted for their consideration. I see no reason for granting a new trial.

If there has been error or oversight in relation to some of the numerous defendants being in fact and law answerable for the damages, that is a mere detail which can only affect the question of costs, for it is admitted a sufficient number of those named as defendants are of such financial substance as to answer the judgment herein.

The question of such costs also must be comparatively unimportant for they all seem to have joined in the defences set up as if they were equally liable with others.

Being a mere matter of costs, we should not, if we observe precedents of this court, interfere.

The appeal should be dismissed with costs.

1913

DONALDSON v. DESCHÊNES.

Anglin J.

DUFF J. agreed that the appeal should be dismissed with costs.

ANGLIN J.—Thibert, whose fall caused the death of the plaintiff's husband, was, at the time, an employee of the defendants, or some of them. He had been absent from the vessel on which he was engaged for purposes of his own. When the fall happened, he was returning to his work by a route forbidden by a rule of his employers. Although on the vessel and under pay, and, therefore, under the defendants' control within the purview of the first paragraph of article 1054 of the Civil Code, he had not reached the place where the work for which he was engaged was to be done. It may be that, at the critical moment, he would have been "in the course of his employment," within the meaning of that phrase as defined in certain authorities, but I should doubt whether he was "in the performance of the work for which he was employed" within the purview of the concluding paragraph of article 1054 of the Civil Code. That question, however, I find it unnecessary to determine.

Thibert's fall was caused by his own fault in using a prohibited means of descending from the upper to the main deck. The question presented for determination is whether the defendants have "failed to establish that they were unable to prevent the act which caused the damage.' (Art. 1054 C.C., para. 6.) The finding of the jury that the defendants were negligent in "not having taken the necessary precautions to enforce their rules," read in the light of the charge, in effect means that by taking proper care the defendants could have "prevented the act which caused the damage": viz., Thibert's attempt to descend by this

dangerous route. There was evidence to warrant such a finding — evidence that the men were in the habit of using the route which Thibert took. He himself says that he descended as he was accustomed to descend. The son of the deceased, Fournier, says that there were two methods of going down, and that the men went down as Thibert did as often as by the other route. Another witness, Marrier, says that they often went down as Thibert did. Albert Gagnon, J. B. Lefebvre and George Sarrazin also say that some of the men went down by the forbidden route. This practice was or should have been known to the persons in charge on behalf of the defendants if there was proper supervision. There was evidence, therefore, to justify an inference that they had not taken effective means to check it. It follows that the finding that the defendants had failed to enforce their rules is sufficiently supported.

The jury negatived the responsibility of the deceased, Fournier, for Thibert's wrongful act. While I entertain some doubt as to the correctness of this finding, I am not so clearly satisfied that it is erroneous that I would feel justified in setting it aside — especially in view of its confirmation by the Court of Review.

BRODEUR J.—Il s'agit d'un accident du travail qui, ayant eu lieu le 5 juin, 1907, ne tombe pas, par conséquent, sous les dispositions de la loi de 1909, mais est régi entièrement par le code civil.

Le verdict du jury a été qu'il y avait eu faute de la part des défendeurs, appelants, en ce qu'ils n'avaient pas pris les mesures nécessaires pour mettre leurs réglements à exécution. Ce verdict a été accepté par

1913

DONALDSON v. DESCHÊNES.

Brodeur J.

le juge instructeur et la cour de revision a unanimement confirmé le jugement de la cour supérieure. Il n'y a donc pas de difficulté quant à la question de fait.

D'ailleurs, en examinant toute la preuve, je suis arrivé à la conclusion que le jury pouvait raisonnablement rendre ce verdict (art. 501 C.P.C.) ; et, par conséquent, il n'y aurait pas lieu de ce chef d'ordonner un nouveau procès.

M. Lafleur, dans sa plaidoirie, a assimilé la responsabilité du maître a celle du père et il a allégué que si le maître peut prouver qu'il n'a pas pu empêcher le fait qui a causé le dommage alors il n'est pas tenu de payer l'indemnité.

L'article 1054 du code civil établit au contraire que la responsabilité du maître ne peut pas être restreinte de cette manière et qu'elle est, par conséquent, plus étendue que celle du père.

Voici l'article:—

> Elle (la personne capable de discerner le bien du mal) est responsable non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé par la faute de ceux dont elle a le contrôle, et par les choses qu'elle a sous sa garde;
>
> Le père, et après son décès, la mère, sont responsables du dommage causé par leurs enfants mineurs;
>
> Les tuteurs sont également responsable pour leurs pupilles;
>
> Les curateurs ou autres ayant légalement la garde des insensés, pour le dommage causé par ces derniers;
>
> L'instituteur et l'artisan, pour le dommage causé par ses élèves ou apprentis, pendant qu'ils sont sous sa surveillance;
>
> La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage;
>
> Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés ?

Comme on le voit à la lecture de cet article, les pères, les tuteurs, les instituteurs, les curateurs, les

artisans peuvent bien se libérer en établissant l'impossibilité où ils ont été d'empêcher le fait dommageable. Mais les maîtres et les commettants ne sauraient se soustraire à la responsabilité de leurs domestiques ou de leurs ouvriers en se retranchant derrière cette même impossibilité.

Pothier, où nous avons puisé les principes de notre article 1054 sur cette matière a, dans son Traité des Obligations, au no. 121, fait la distinction entre la responsabilité du maître et celle des autres; et il disait:

> On rende aussi les maîtres responsables du tort causé par les délits et les quasi-délits de leurs serviteurs ou ouvriers qu'ils emploient à quelque service. *Ils le sont même dans le cas auquel il n'aurait pas été en leur pouvoir d' empêcher le delit* ou quasi-délit, lorsque les délits ou quasi-délits sont commis par les dits serviteurs ou ouvriers dans l'exercice des fonctions auxquelles ils sont employés par leurs maîtres, quoiqu'en l'absence de leurs maîtres; *ce qui a été établi pour rendre les maîtres attentifs à ne se servir que de bons domestiques.*

Le code Napoléon (art. 1384) déclarait en termes assez a peu précis que la responsabilité des pères et mères, des instituteurs et des artisans cesse quand ils "prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité," et il gardait le silence à l'égard des maîtres et commettants.

Malgré ce silence de la loi française une divergence d'opinion s'est établie entre les auteurs; les uns disant que la responsabilité cesse à l'égard des maîtres comme à l'égard des pères, s'ils prouvent qu'ils n'ont pu empêcher le fait qui y donne lieu; d'autres, au contraire, disent que les maîtres ne peuvent jamais argumenter de l'impossibilité où ils prétendraient avoir été d'empêcher le dommage causé par leurs ouvriers dans les fonctions auxquelles ils les ont employés.

1913

DONALDSON v. DESCHÊNES.

Brodeur J.

Notre code, dans l'article 1054, s'est évidemment rangé à cette dernière opinion. Il ne doit donc pas y avoir de doute dans notre loi que cette exemption de responsabilité quant aux pères, instituteurs et artisans ne peut être invoquée par les maîtres.

Mais on dit dans la cause actuelle; Le maître n'est pas responsable de l'accident parce que Thibert, l'ouvrier qui en a été la cause, n'était pas "dans l'exécution des fonctions" auxquelles il était employé.

Il est en preuve que cet ouvrier qui était occupé au chargement d'un navire avait profité d'une suspension des travaux pour quelques instants afin d'aller prendre quelques verres de boisson dans un restaurant voisin. Quand il est revenu pour reprendre son ouvrage, au lieu de passer par un escalier qui communiquait d'un pont à l'autre du navire, il est descendu par l'écoutille et ayant perdu prise il est tombé sur Fournier qui était dans le fonds de cale. Fournier est mort des suites de cette chute de Thibert et sa femme et ses enfants poursuivent ses maîtres en dommages.

Les dommages causés par les préposés peuvent donner lieu à la responsabilité du maître non seulement dans le cas où ces préposés exécutent ce qui leur a été commandé mais aussi dans le cas où ils ont agi par imprudence ou maladresse. On a pensé d'abord que la responsabilité du maître était la sanction du mauvais choix qu'il avait fait en prenant l'auteur du dommage à son service, mais la jurisprudence fonde la responsabilité également sur le fait que le maître doit diriger ses employés, leur donner des ordres et des instructions sur la manière de remplir leurs fonctions (Dalloz, 1887-1-225).

Ainsi, par example, une société financière a été tenu responsable d'un faux commis par son employé

parce qu'il n'aurait pu commettre l'acte préjudiciable qu'à cause de l'imprudence ou du défaut de surveillance de la société. (Dalloz, 1887-1-37.)

Le serviteur dans la maison de son maître, étant reputé agir dans les fonctions auxquelles il est employé, le maître est responsable des dommages résultant de tous faits commis chez lui par ce serviteur sans qu'il puisse être admis à prouver qu'il les avait défendus, ni qu'il n'a pas été en son pouvoir de les empêcher. Cour de Cass.; Dalloz, 1860-1-518; Sachet, vol. 1er, no. 347; Pand. Fr. 1908-1-414; Dalloz, 1902-1-273; Dalloz 1902-2-404.

Le méme principe a été admis en Angleterre dans des circonstances analogues à celles que nous relevons dans cette cause-ci. *Robertson* v. *Allan Bros. and Co.*, en 1908(1), où un employé du bateau était allé à terre pour ses propres affaires, il remontait à bord du vaisseau sur une planche, contrairement aux ordres qu'il avait et, en glissant de cette planche sur le pont, il est tombé dans l'écoutille; il a été décidé que cette homme était dans "l'exécution de ses fonctions."

Nous savons cependant que, sur ces questions de responsabilité, la loi anglaise est bien plus favorable au maître que notre code civil.

Les derniers décisions francaises sont à l'effet que le maître est responsable du fait de son serviteur quand l'acte générateur de la faute a été commis par le serviteur, soit dans l'exercice, soit à l'occasion de l'exercice, de ces fonctions. Dalloz, 1894-2-296; 1897-2-172; 1898-2-511; 1899-2-104.

(1) 98 L.T. 821.

1913

DONALDSON v. DESCHÊNES.

Brodeur J.

Thibert était donc dans le cas actual dans l'exécution de ses fonctions et il a engagé par sa faute la responsabilité de ses maîtres.

Les appelants prétendent que l'action contre eux devrait être renvoyée parce que les intimés ont déjà poursuivi d'autres personnes pour le même accident et ils invoquent l'autorité de l'article 1056 qui déclare qu'il,

> ne peut être porté qu'une seule et même action pour tous ceux qui ont droit à l'indemnité.

Cette prétention ne saurait être maintenue. L'article 1056 détermine que si une personne décède à la suite d'un accident sans avoir été indemnisé son conjoint et ses enfants ont un droit de poursuite.

En principe général les créanciers d'une obligation peuvent exercer leurs droit seuls ou en même temps que leurs co-créanciers. L'article 1056 est une exception à cette règle générale et il exige que dans le cas de poursuites résultant d'un accident qui a causé la mort la mère et les enfants doivent s'unir ensemble pour instituer leur action afin que le tribunal puisse partager entre eux l'indemnité. Mais cet article ne veut pas dire que si ces représentants du défunt ont institué une première action contre des personnes qui n'étaient pas responsables de l'accident et qu'ils reprennent alors une poursuite contre les véritables auteurs de la faute, ces derniers pourraient se retrancher derrière cette première poursuite pour éviter leur responsabilité.

Cette prétention des appelants est donc absolument mal fondé.

1913

DONALDSON
v.
DESCHÈNES.

Brodeur J.

Pour toutes ces raisons je suis d'opinion de confirmer le jugement *a quo* avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *McLennan, Howard & Aylmer.*

Solicitor for respondent: *Théodule Rhéame.*

1914

*Feb. 17.
*March 2.

THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF SYDNEY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

"Militia Act"—R.S.C. [1896] *c.* 41—*"Senior officer * * * present at any locality"—Military district—Right of action—4 Edw. VII. c.* 23, *s.* 86—*Statute—Retrospective effect.*

By sec. 16 of the "Militia Act" (R.S.C. [1896] ch. 41) Canada is divided into military districts of which the Province of Nova Scotia is one. By sec. 34 "the senior officer present at any locality" may, on requisition from three justices of the peace, call out the troops in aid of the civil power wherever a riot or disturbance of the peace has occurred or is anticipated.

Held, Brodeur J. dissenting, that the "senior officer present at any locality" is not necessarily the senior officer of a corps stationed at the place where the riot occurs or is likely to occur. The justices, in their discretion, may requisition the senior officer of any available force.

By sec. 34, sub-sec. 6, of the above Act the officer commanding the troops so called out may, in his own name, take action against the municipality in which the riot occurred to recover the amount of the expenses thereby incurred which are to be paid to His Majesty when recovered. By 4 Edw. VII. ch. 23, sec. 86, this right of action was vested in His Majesty.

Held, that the latter being a procedure Act is retrospective and an action was properly brought in the name of the Attorney-General of Canada to recover the expenses of calling out the troops on the occasion of an industrial strike in the City of Sydney, part of which expenses were incurred before, and part after, the last mentioned Act came into force.

Judgment appealed from (46 N.S. Rep. 527), reversed, Brodeur J. dissenting.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

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

The two questions of law raised on this appeal are stated in the above head-note. The material sections of the "Militia Act" will be found in the opinion of Mr. Justice Idington.

Newcombe K.C. for the appellant.

Finlay Macdonald for the respondent.

THE CHIEF JUSTICE.—This is an action to recover the sum of $5,309.09 advanced by the Crown out of the Consolidated Revenue Fund of Canada to defray the expenditure incurred in connection with the pay and allowances of the militia force called out to aid the civil power to suppress a riot or disturbance within the municipality of the City of Sydney.

There is no dispute as to the facts. They are all found in favour of the Crown.

It appears that in July, 1904, there were riots and civil disturbances in Sydney, and the local authorities, unable to cope with them, found it necessary to summon a large military force to their assistance. Requisitions were accordingly made upon three separate military officers. Colonel Irving, the officer commanding at Halifax, District No. 9, which comprises the Province of Nova Scotia, was the only one who brought his forces to Sydney and performed the services required.

The trial judge maintained the action except as to one item of $20 for legal expenses. On appeal, this

(1) 46 N.S. Rep. 527.

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

The Chief Justice.

judgment was reversed on the sole ground that Colonel Irving was not

the senior officer of the active militia present at any locality

within the meaning of section 34 of the "Militia Act." Mr. Justice Ritchie, who delivered the judgment of the court, substitutes for this expression by interpretation, the words

the senior officer at or nearest the place where the riot has occurred or is anticipated.

And upon the assumption that there was an officer at Sydney or nearer to Sydney than Halifax, the claim is disallowed.

It appears to me obvious that, speaking generally, the statute contemplates real and effective proceedings to put down disturbances by aid of the militia power when the forces under the control of the local civil authorities are insufficient, and the section in question provides that the initial step must be taken by the civil authorities. It is for those authorities to judge of the magnitude of the disturbance, the necessity for aid and, in the first instance, the strength of the force required to quell it. The section properly provides, therefore, that the requisitions must be made by those who are immediately associated with the locality where the trouble has arisen and in which the services of the militia are required. They are in a moment of urgency authorized to impose a heavy tax upon the ratepayers; hence the words used in that section authorize the senior officer to act "when thereunto required in writing" by the chairman.

These authorities, charged with the duty of maintaining order in *the* localities where the disturbances have arisen apply to the senior officer of the active militia at "*any* locality." Here there are no qualify-

ing words as in the case of the civil authorities for the obvious reason that there may not be in the locality in which the riot occurs any active militia, or there may be serious reasons why in a local disturbance the local militia should not be called upon to interfere. Hence, the necessity for leaving a wide discretion with the local civil authorities.

There must have been in this case a serious and wide-spread disturbance, because the magistrates considered it necessary to summon assistance from three different quarters and the senior officer of the active militia who was in command, as I have already said, over the whole district, answered that summons and directed his subordinates to await his further orders.

I do not wish to be understood as saying that the municipal authorities might not have limited their requisition to the officer commanding the militia force at Baddeck or in Sydney. My point is that the statute confers a power upon the local authorities responsible for the maintenance of the peace which they exercise at their discretion in view of the necessities of the situation and they may requisition any officer in the province, and if the outbreak is sufficiently serious, they might go to headquarters and put the general officer commanding in a position to call out the whole militia force of the country.

The word "locality" as used in the section is perhaps somewhat indefinite, but it must be interpreted in such a way as not to unduly limit and possibly destroy the discretion which is undoubtedly conferred upon the civil authorities, and they having, in the exercise of their undoubted discretion, called upon the senior officer of the active militia for the district which included the scene of the disturbance, it was for

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

The Chief Justice.

him to determine how that requisition was to be met. This is made abundantly clear by reference to section 78 of the Act, which gives the officer commanding any military district authority, upon any sudden emergency, to call out the whole or any part of the militia within his command.

The "Interpretation Act," section 31, paragraph (*e*), provides that

> if a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

The active militia may be called out for service either within or without the municipality in which it is raised (sec. 34, sub-sec. 1).

The respondents contend that the action should have been brought in the name of the commanding officer of the corps because the militia were called out under the provisions of chapter 41, section 34, R.S.C. 1886, sub-sec. 5, which provides that the pay and allowances are to be recovered by the commanding officer. There are many answers to this objection in the circumstances of this case, but the most effective is given by Mr. Justice Anglin.

It appears by the particulars that the disbursements were all made by the Government during the period from August 6th, 1904, to February, 1905, and this action was brought iu 1910. At that time, the statute of 1904 (4 Edw. VII., ch. 23) was in force and sections 86 and 87 provide that such sums, as are in question here, may be recovered as a debt due to the Crown by the municipality. This is a mere question of procedure. In *Gardner* v. *Lucas* (1), Lord Blackburn said at page 603:—

(1) 3 App. Cas. 582.

For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

I entertain no doubt that the City of Sydney is a separate and distinct municipality from the County of Cape Breton and, as such, obliged to pay for the services of the militia duly requisitioned (sec. 3, ch. 70, R.S.N.S. 1900).

The appeal should be allowed with costs.

IDINGTON J.—The claim made herein is to recover from respondent, which is a municipality, payment for services rendered by the active militia called out in aid of the civil power under section 34 of the "Militia Act."

I am unable to construe that section as the Supreme Court of Nova Scotia has in support of its judgment allowing the appeal from the judgment of the learned trial judge.

With great respect it seems to me rather narrow ground to proceed upon the possible meaning to be found in the words of part of one sub-section out of half a dozen such sub-sections and especially so when those words are at best of dubious import.

I think we must look at the scope of the whole of this section and see if there has been a substantial compliance with its meaning and whether or not the action taken has been an illegal or legal proceeding.

For if illegal then if those men so engaged or any one of them in suppressing a riot or disturbance had happened to take human life, a charge of man-

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Idington J.

slaughter or worse might have lain against those responsible for such result.

Such like considerations may well arrest our attention in determining whether or not this calling out of the active militia fell within the meaning of what the statute prescribes. For if by the reasonable interpretation of this section the legality of the action of Lt.-Col. Irving and the magistrates making the requisition upon him cannot be maintained assuredly no action will lie for the recovery of the payments made.

And on the other hand if what was done can be justified under and by virtue of the statute as legally done, it seems to me the recovery sought must be allowed.

It is admitted that Lt.-Col. Irving was, during the time in question, District Officer commanding No. 9 Military District within which the City of Sydney lies.

There were other officers each commanding a regiment in the district, upon each of whom a requisition was made by the magistrate at the same time as the requisition made upon Lt.-Col. Irving. These other commanding officers were, I take it, under the command of Lt.-Col. Irving.

The first sub-section of section 34 provides that:—

> The active militia, or any corps thereof, shall be liable to be called out * * * in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or * * * whether such riot, disturbance or other emergency occurs, or is so anticipated within or without the municipality in which such corps is raised or organized.

Sub-section 2 declares that:—

> The senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers neces-

sary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, etc., * * * when thereunto required in writing by

the several judicial personages defined, etc.

Sub-section 3 provides that every such requisition shall express on its face the actual facts or the anticipation thereof

requiring such service of the active militia in aid of the civil power for the suppression thereof.

Sub-section 4 provides that:—

Every officer and man of such active militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer, etc., etc.

Then sub-section 5 provides that:—

When the active militia, or any corps thereof, is so called out in aid of the civil power, the municipality in which their services are required shall pay them, etc., etc., etc.

Sub-section 6 provides for Government advancing expenses, etc.

I have only quoted the parts of the language used that are material to test the correctness of the judgment here in question which seems to put the entire application of the section upon the meaning of the words quoted from the second sub-section. Such an interpretation would, if followed to its logical consequences be apt to reduce the whole section to a most impotent absurdity.

If the only person who may be requisitioned is as suggested, the senior officer nearest to the scene of the disturbance, then the captain of a company might be the only one answerable to such requisition, and his company not even all within reach of his summons and all the rest of the active militia be miles away.

Counsel for respondent when asked how more re-

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Idington J.

mote forces were to be brought in if needed suggested that the local officer could call for them. By what authority he was unable to tell us. It is quite clear he would have no such authority. And no one else would until duly and properly requisitioned by the civil authority.

According to the construction adopted by the court below in reversing the learned trial judge, the civil authority could not direct any one but the senior officer nearest the scene of disturbance.

The language I have quoted is express in imposing the duty not only upon a single corps, but upon the "active militia" and to my mind demonstrates that the contention made by respondent is untenable and unworkable.

All that the language of section 2 on which stress is laid to maintain this contention indicates is that magistrates and officers should each act in a reasonable and due orderly manner.

The locality is not defined, but the closing language of the first sub-section clearly shews that the corps need not be within the municipality.

And the word "locality" must be given a reasonable and common sense construction.

The magistrates of the county of whom one may be mayor or other head of the municipality concerned are alone entrusted with the power, and they are neither confined to their own county nor to a single corps. They would certainly be expected from the language used to exercise common sense. But they are entrusted with a high duty carrying with it great power and responsibility and I do not think we can supervise their action much less reduce them to the impotent state contended for.

Indeed, we have no such evidence before us as would warrant us in criticising their conduct in the premises. I presume it was what respectable men thought was reasonable and necessary to meet the emergency presented to them.

Counsel for respondent, as he was entitled to do, raised the question of the right of the Attorney-General to sue instead of the commanding officer suing as was provided by the Act as it stood at the time in question.

In view of the amendment making provision for the Attorney-General suing I do not think the objection is now tenable.

Indeed, I cannot get rid of the impression that the money being ultimately payable to the Crown it was always competent for the Attorney-General to have sued so far as the facts established that the Crown was ultimately entitled to recover.

The case of *Crewe-Read* v. *Cape Breton*(1) only decides that the officer suing by virtue of the statute, having died, his administratrix could revive and continue the action he had begun.

Nor can I find that the action should have been brought against the county.

And if the company most directly interested in the protection of the militia are, as the factum alleges, free from taxation, I suspect that must be a situation created by respondent and not by the county.

The protection of property outside the city was no doubt because that was connected with the city and something the county derived no benefit from.

The appeal should be allowed with costs.

(1) 14 Can. S.C.R. 8.

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Duff J.

DUFF J.—The action out of which this appeal arises was brought by the Attorney-General of the Dominion to recover a sum of $5,309.09 advanced by the Dominion Government to pay the expenses of certain militia forces requisitioned in aid of the civil power under the provision of sec. 34, ch. 41, of the Revised Statutes of 1886. I think the only points that require discussion are two: first, it is said that the magistrate who professed to act under the authority of section 34 had no authority to requisition the troops that were requisitioned; and, secondly, that if they had such authority that the Attorney-General has no status to sue for the advances made. As touching the first point the facts appear to be that the magistrate requisitioned Col. McRae, of Baddeck, and Col. Irving, who was district officer commanding at Halifax for the district of Nova Scotia; troops were sent by Col. Irving from Halifax, but the troops at Baddeck, although mobilized, were not sent forward. The argument appears to be that the power of requisitioning troops given by sec. 34 applies only to troops in the locality in which the disturbance occurs or in some adjacent locality. The Supreme Court of Nova Scotia held that locality in the second sub-section of section 34 means the locality nearest the seat of disturbance. The effect of this construction would be that the requisition to Col. Irving at all events was beyond the power of the magistrates.

I think with great respect that it is impossible to support this view of the statute. The language of the introductory clause of section 34 is general, and whether some limitation may or may not be justified by the context or the subject-matter of the section I think it is impossible to read it in the restricted sense in which it was read in the court below. The effect of

that construction would seriously limit the operation of these provisions. It would make it impossible for the magistrates to call in more than a strictly limited number (generally not more than one) of bodies of troops, no matter how inadequate such forces might be, no matter how clearly undesirable the employment of those particular forces, or any of them might be in the particular circumstances. The argument that the provisions construed as the Government contends are liable to abuse is one that no doubt deserves consideration, but, on the other hand, Parliament may have well felt that it was better to rely upon the good sense of the magistrates and the military authorities than to impose restrictions which, in easily conceivable cases, might entirely neutralize these provisions.

The facts bearing upon the second point are these. The "Militia Act" to which I have already referred was superseded, in 1904, by a statute which was chapter 23 of the statutes of that year. That Act came into force on the 1st of November. Of the advances sued for a considerable proportion were made prior to that date. As to these advances it is contended that chapter 41 of the Revised Statutes, 1886, applies and if so the proper person to sue for them is the commanding officer and not the Attorney-General. I think this contention must be rejected for the reason advanced by Mr. Newcombe, viz., that the commanding officer, in suing for the recovery of advances under sub-section 6 of section 34 of the earlier Act, sued as trustee for the Crown, and that, consequently, the provision of the later Act, section 87, which authorizes an action on behalf of and in the name of the Crown is strictly a provision relating to procedure only.

This is a sufficient answer to the objection, but there

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Duff J.

is another answer which would be equally effective. There appears to be nothing in the practice of the Supreme Court of Nova Scotia to prevent the commanding officer now being added as a party (*The "Duke of Buccleuch"*(1)), and the suggestion that his claim would be barred to the Statute of Limitations, falls to the ground when one remembers that the right of action asserted by him is not on his own behalf, but on the behalf of the Consolidated Revenue Fund. In the circumstances it would not be proper to impose any terms as to costs as a condition of such amendment.

The appeal should be allowed with costs here and below; there should be judgment for the Attorney-General with costs of the action.

ANGLIN J.—The court *en banc,* reversing the trial judge, dismissed this action on the ground that the officers on whom the requisitions calling out the militia were made were not then present at the locality of the riot or disturbance, actual or anticipated. With respect, I think the court has placed a wrong construction on the words "present at any locality" in sub-section 2 of section 34 of chapter 41 of the R.S.C. 1886. This adjectival phrase qualifies either "the senior officer" or "the active militia" — I think the latter — but it is not very material which. The "locality" referred to is not that where the riot or disturbance occurs — there might be no active militia whatever there; the available force might be quite inadequate — but that where the officer requisitioned or the body of active militia which he commanded is

(1) [1892] P. 201.

stationed. The phrase "at any locality" was used advisedly. The words which immediately follow,

shall call out the same or such portion thereof as he considers necessary,

obviously refer to the body of active militia under the command of the "senior officer" requisitioned. The contrast between the words "present at any locality" and the words,

the municipality or county in which such riot, or disturbance or other emergency occurs or is anticipated,

found in the same section, I think removes any possible doubt that the application and meaning which I give to the words "any locality" is what Parliament intended they should have. It follows that the requisitions addressed to Colonel Irving and Colonel McRae were within the authority conferred by section 34 of chapter 41.

The respondent further insists that the right of action was, by the statute in force when most of the payments were made, given exclusively to the commanding officer, who was required to sue in his own name, although payment had already been made out of the Consolidated Revenue Fund, R.S.C., 1886, ch. 41, sec. 34, sub-secs. 5 and 6. But by an amendment of 1904 the right to sue for the recovery of money so expended was given to His Majesty (4 Edw. VII., ch. 23, sec. 86). That right is exercisable by the Attorney-General. No new right of action was created by this amendment; no new liability was imposed. Under the former statute when the money had been paid out of the Consolidated Revenue Fund the commanding officer who sued was bound to pay the

1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Anglin J.

amount recovered over to His Majesty. The statute of 1904 merely effects a change in the procedure to be followed in the recovery of the money. It was in force when the action was brought and as a statute regulating procedure applied to it. I think the right of the Attorney-General to maintain this action is clear.

As to the small item of expenditure incurred in protecting the source of supply of the waterworks of the Dominion Steel Company ($36) there is a little more difficulty. The source of supply of these waterworks is outside the town limit; but the works of the steel company are within the City of Sydney, and the danger to the water supply arose from rioting and disturbance within the city. It was to prevent injury likely to arise out of that rioting and disturbance that the services of the militia were required. I do not think that it is beyond the scope of the statute that the municipal corporation of the City of Sydney should be required to pay for the services rendered under such circumstances at the source of the water supply.

I would allow this appeal with costs in this court and in the court *en banc,* and would restore the judgment of the trial judge.

BRODEUR J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Ritchie.

Appeal allowed with costs.

Solicitor for the appellant: *R. T. MacIlreith.*
Solicitor for the respondent: *Finlay Macdonald.*

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

AND

FRANK McDONALD (PLAINTIFF) .... RESPONDENT.

1913

*Nov. 10
*Dec. 23

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

Appeal — Jurisdiction—"Matter in controversy"—Annuity—Quebec "Workmen's Compensation Act," R.S.Q., 1909, arts. 7321 et seq. —9 Edw. VII., c. 66—"Supreme Court Act," R.S.C., 1906, c. 139, s. 46(c)—Construction of statute.

Plaintiff's action, under the Quebec "Workman's Compensation Act," claimed $450 for loss of earnings, for six months, during incapacity occasioned by personal injuries, and also an annuity of $337 *per annum*. The plaintiff recovered judgment for the specific amount claimed and he was also awarded an annuity of $247.50, which might be subject to revision, under the statute. The capitalized value of the annuity would, probably, amount to a sum exceeding $2,000, the appealable limitation fixed by section 46(c) of the "Supreme Court Act," R.S.C., 1906, ch. 139.

Held, Davies J. dissenting, that, in the circumstances of the case, it did not appear that the *demande* amounted to the sum or value or two thousand dollars, within the meaning of section 46(c) of the "Supreme Court Act," and, consequently, the court had no jurisdiction to entertain the appeal. *Talbot* v. *Guilmartin* (30 Can. S.C.R. 482); *La Cie. d'Aqueduc de la Jeune Lorette* v. *Verrett* (42 Can. S.C.R. 156); *Lapointe* v. *The Montreal Police Benevolent and Pension Society* (35 Can. S.C.R. 5), and *Macdonald* v. *Galivan* (28 Can. S.C.R. 258), referred to.

MOTION to quash an appeal, for want of jurisdiction, from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Fortin J., in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

the Superior Court for the District of Montreal, by which the plaintiff's action was maintained with costs.

The circumstances of the case are stated in the head-note and the questions in issue on the appeal are discussed in the judgments now reported.

Vipond for the respondent, supported the motion.

Holden K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash for want of jurisdiction. The question raised is not free from difficulty, but, after careful consideration of the Act and of the jurisprudence of this court, I have come to the conclusion that the motion must be granted.

The dispute between the parties to this litigation is with respect to the right of the plaintiff to compensation for injuries measured by the terms of the "Workmen's Compensation Act" of the Province of Quebec, and the question is: Does the thing in controversy amount to the sum of $2,000 ? (See section 46(*c*), "Supreme Court Act.")

The compensation payable to an injured workman, under the Act, takes the form, in the case of permanent incapacity, of an annual "rent" or pension which continues during his life; but, as its amount is subject to revision (see section 26 of the Act), it cannot be said to be a life rent within the ordinary meaning of that term (Planiol, vol. 1, nos. 2251 and 2783). The quantum of the rent is determined by the extent to which the earning power of the plaintiff has been reduced as the result of the injury received. That is the

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

The Chief Justice.

basis of the compensation, so that, if his earning power improves at any time within four years after judgment rendered (sec. 26), the amount of compensation awarded is liable to be reduced on cause shewn, and, if that earning power is restored, the right to compensation ceases altogether. There is this other element of contingency to be considered — the uncertainty of human life — and, in the present case, on the medical evidence, I gather that the expectation of life is very short.

It is true that the Act (9 Edw. VII., ch. 66) provides, by section 2 (*c*), that the capital of the "rent" shall not, except in the case mentioned in article 5, exceed $2,000. This does not mean that the employer is entitled, on payment of that sum, to escape his liability. The purpose of the statute, following the principle of the French Act, is to introduce periodical payments in lieu of a capital payment so as to protect the workman and the employer. The combined effect of sections 2(*c*) and 9 is to enable the workman to demand, as soon as his permanent incapacity to work is ascertained, that the "rent" payable to him shall be capitalized and that the capital which will produce this "rent" — reduced to $2,000 if it exceeds that sum — shall be paid not to himself, but to an insurance company. It is to be observed also that there is grave doubt as to whether it can be said that the permanent incapacity to work can be ascertained until the four years period, during which the amount of the pension is subject to revision, has expired. In any event, it is only when this option is exercised that any "capital of the rent" comes into existence. That being the measure and the nature of the plaintiff's right, is it possible for us to say that

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

The Chief Justice.

there is in controversy between the parties a thing which has a value realizable in money to the extent of $2,000? I fail entirely to see how a right, the existence of which is dependent upon so many contingencies and which, under the terms of the statute is intended to provide the workman with a pension payable quarterly *only so long as his physical condition as affected by the injury is such as to justify its payment,* can be said to have any commercial value at all. It is not a thing which is *in commercio,* more particularly in view of those provisions of the statute which make the pension inalienable, not seizable (sec. 12), and subject to revision by the court as above stated.

The practice of this court in cases arising in Quebec seems to be against our jurisdiction. In *Toussignant* v. *County of Nicolet*(1), Taschereau J., speaking for the court, said:—

> It is settled law that neither the probative force of the judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount.

In *Talbot* v. *Guilmartin*(2), the relief asked for included a condemnation to pay $18,000, money alleged to have come into the hands of the appellant, and, notwithstanding, the court refused to entertain the appeal. The last case is *La Compagnie d'Aqueduc de la Jeune Lorette* v. *Verrett*(3), in which it was held that this court was without jurisdiction. In that case the plaintiff asked for a declaration that certain rights and privileges to construct an aqueduct were exclusive. The value of those rights was shewn, on affidavit, to far exceed the appealable amount. On

(1) 32 Can. S.C.R. 353. (2) 30 Can. S.C.R. 482.
(3) 42 Can. S.C.R. 156.

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

The Chief Justice.

the whole, therefore, I am of opinion that we are without jurisdiction because, as the Chief Justice said, in *Macdonald* v. *Galivan*(1), "there is no direct claim for a definite sum of $2,000," or as the Chief Justice said, in *Lapointe* v. *The Montreal Police Benevolent and Pension Society*(2), the "value of the demand is a contingent one depending upon his life."

It may be that I have been influenced in reaching this conclusion by the fact that the Quebec "Workmen's Compensation Act" specially limits appeals (see section 22), and to allow an appeal here in a case like this would be contrary to the spirit of the Act. In any event, in case of doubt, the question should be resolved against jurisdiction. *Interest reipublicæ ut sit finis litium.*

DAVIES J. (dissenting).—Our jurisdiction to hear this appeal is challenged by a motion to quash on the ground that the "matter in controversy" does not "amount to the sum or value of $2,000" within section 46 of the "Supreme Court Act."

The action was one brought by a workman against his employer under the "Workmen's Compensation Act" of Quebec, R.S.Q., 1909, art. 7321 *et seq.*

The claim of the plaintiff was to recover $450 for one-half year's earnings during incapacity to earn wages before action and also for a life rent or indemnity of $337 per annum.

The judgment awarded the plaintiff a life rent of $247.50 per annum to commence on the 24th December, 1911.

The capitalized value of this life rent or annuity at

(1) 28 Can. S.C.R. 258. (2) 35 Can. S.C.R. 5.

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Davies J.

3% would amount to $8.266; at 4% to $6,175; at 5% to $4,940; and at 6% to $4,116.66; and if such capitalized value can be taken to be directly involved in this case as a matter in controversy between the parties no doubt could exist as to our jurisdiction.

While in the ordinary case of a life rent or annuity its value would be simple of calculation, in cases such as this its continuance would be subject to so many contingencies that its value would be difficult, if not impossible, for an appeal court to determine. That value would depend largely upon the condition and state of health in which the injuries of the annuitant arising from the accident left him. The ordinary annuity tables, owing to the contingencies arising from the condition and state of health of the workman, might be quite inapplicable and the difficulties of placing an estimate upon its value almost insuperable.

The evidence in the record of the case we have now before us affords an excellent illustration of these difficulties; and if we were driven to estimate the value of the life-rent from this evidence we might well conclude that the case is not within our jurisdiction.

The two medical men examined as experts differed on some material points. Dr. De Martigny's opinion was that as the result of the accident two surgical operations were necessary, one to cut off one of the workman's legs very high up near the thigh and the other to cut off one of his arms. Dr. Archibald did not concur in this view so far as the arm was concerned.

For us, as an appeal court, to attempt to determine the contingencies of life or death which might follow one or both of these operations so as to estimate the

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Davies J.

value of the life-rent and determine whether we have jurisdiction to hear the appeal is a course which, I feel certain, our "Supreme Court Act" never contemplated as one of our duties. *Lapointe* v. *Montreal Police Benefit Pension Society*(1). It seems to me, however, that the "Workmen's Compensation Act" relieves us of all these difficulties and establishes the value of the life-rent for us. Article 7329 of the Revised Statutes of Quebec (1909) reads as follows:—

> As soon as the permanent incapacity to work is ascertained, or in case of death of the person injured within one month from the date of the agreement between the employer and the parties interested, or if there be no agreement, within one month from the date of the final judgment condemning him to pay the same, the employer shall pay the amount of the compensation to the person injured or his representatives, or, as the case may be, and at the option of the person injured or of his representatives, shall pay the capital of the rent to an insurance company designated for that purpose by order in council. 9 Edw. VII. ch. 66, sec. 9.

That section confers upon the injured workman, who has obtained judgment for a life-rent, the right to demand payment of

> *the capital of the rent* to an insurance company designated by order in council

and imposes upon the employer the obligation to make the payment of such capital when demanded.

That being so, it appears to me that the capitalized amount of the life-rent awarded the workman is a matter in controversy in this action directly flowing from the judgment awarding the life-rent itself; and it being declared by art. 7322, sub-sec. 2, that the capital shall not exceed $2,000, in cases such as this, that amount at least is in controversy.

The "Workmen's Compensation Act" of Quebec by

(1) 35 Can. S.C.R. 5.

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Davies J.

imposing the obligation upon the employer of paying over the capital representing the life-rent to a company as security, in part at least, for the payment of the life-rent to the workman has put a statutory value for that purpose upon the life-rent.

In my opinion such a correlative right and obligation arising directly from and being a direct consequence of the judgment awarding the life-rent gives us jurisdiction in cases where such capitalized value is not less than $2,000, which it obviously is not in this case.

The statute does not release the defendant from its obligation to pay the life-rent adjudged to the plaintiff, but capitalizes it at an arbitrary maximum limit of $2,000. It confers upon the plaintiff the right within one month from the date of the final judgment to compel

> payment of the capital of the life rent (not exceeding $2,000) to an insurance company.

In the case now before us that maximum limit would obviously be the sum which the plaintiff had a right to demand should be paid and which the defendants were bound to pay over. Unless, therefore, we are prepared to say that we could enter upon a consideration of the contingencies or possibilities under which that $2,000 might be reduced it seems to me the appeal is within our jurisdiction.

IDINGTON J. concurred in the opinion of the Chief Justice.

DUFF J.—The question to be determined on this application is whether or not we have jurisdiction to en-

tertain the appeal under section 46(*c*) of the "Supreme Court Act"; in other words, whether in the suit out of which this appeal arises

> the matter in controversy * * * amounts to the sum or value of $2,000.

The effect of the accident from which the respondent suffered was to produce "an absolute and permanent incapacity" within the meaning of article 7322 (*a*) of the Revised Statutes of Quebec, 1909, and the respondent, therefore, became entitled to a "rent" for life equal to 50% of his yearly wages, subject to any question which might arise under article 7322(2), R.S.Q., 1909, and to the contingency of "revision" under article 7346. The respondent, moreover, is entitled, at his option, under article 7329, R.S.Q., 1909, to require the appellants to pay the capital of the "rent" to an insurance company "designated for that purpose by order-in-council."

It seems to be manifestly impossible to say that the amount "demanded" by the respondent in his action was equal to the sum of $2,000. The respondent "demanded" a judgment entitling him to a life-annuity which, in the aggregate, might or might not amount to that sum. I think that is not sufficient to bring the case within the first alternative of sub-section (*c*) of section 46 of the "Supreme Court Act."

As to the second alternative ground of jurisdiction, under that sub-section, I am inclined to think that "the matter in controversy" can only "amount to * * * the value of $2,000," within the meaning of the words to be construed, when the plaintiff is claiming something other than the mere payment of money. That seems to be the more natural construction, and

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Duff J.

it was, moreover, the view which was taken by this court, apparently, in *Lapointe* v. *The Montreal Police Benevolent and Pension Society*(1). Assuming, however, that in this case "the matter in controversy" ought to be regarded as the right claimed by the plaintiff to be paid the statutory annuity subject to the statutory incidents and conditions (and that the case, consequently, is covered by the sub-section in question, if the value of that right can be said to amount to $2,000), I think the appellants still fail because there are no grounds before us justifying the conclusion that the right claimed and established has a value equal to that sum. Unfortunately the accident has left the respondent's expectation of life in a state of very grave uncertainty, and not only has no attempt been made to put a capital value upon the right established by the judgment he has recovered, but it would seem that any attempt to do so could hardly, in the circumstances, be expected to result in any conclusion sufficiently definite to serve as a guide for the purposes of this application.

Counsel for the appellants rested exclusively upon the provision of article 7322(2), arguing that this enactment was a statutory declaration as to the value of the annuity when the incapacity is permanent. I am afraid I cannot follow this contention. There is nothing whatever to indicate that, in fact, the legislature had in mind any such object in framing this provision; in any case, it would still be our duty to apply section 46(*c*) of the "Supreme Court Act" according to the proper construction of the words used by the Parliament of Canada, and we should be obliged to

(1) 35 Can. S.C.R. 5.

hold that our jurisdiction, under that provision, only arises when "the matter in controversy" is, in fact, shewn to amount to "the sum or value of $2,000." The requirement imposed by article 7329, R.S.Q., 1909, by which the employer comes under an obligation to pay the capital of the "rent" to an insurance company, does not help the appellants. It may be open to dispute whether, on the one hand, this article contemplates that the incidence of the obligation established by the judgment shall fall thenceforth upon the insurance company exclusively (the employer being relieved and the amount to be paid being determined by arrangement between the employer and the insurance company) or, on the other hand, the sum here required to be paid to the insurance company is merely intended to stand as security for the due performance by the employer of his obligation. Whichever view be taken of the effect of the article it can give no help to the appellants on this application. If the moneys paid are intended to stand as security only, then it seems plain that such an obligation to provide security, as a right incidental to the judgment, can afford no final criterion for determining the value of the matter in controversy in the proceedings leading up to the judgment. If, on the other hand, it is to be regarded as the purchase price of an annuity to be paid to the plaintiff by the insurance company, we have no means before us of ascertaining, with any degree of certainty, the amount of it; and until, at all events, the sum has been actually determined by payment, the attempt to ascertain the probable amount of it, in effect, resolves itself into an attempt to appraise the value of the plaintiff's right with all the attendant difficulties already indicated.

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Anglin J.

ANGLIN J.—Our jurisdiction in this appeal depends upon whether the matter in controversy, according to the plaintiff's claim based on the R.S.Q., 1909, arts. 7321 *et seq.*, amounts to the sum or value of $2,000 ("Supreme Court Act," sec. 46).

Except the decision in the case of *Lapointe* v. *Montreal Police Benefit Pension Society*(1), I know of no authority binding on this court which requires us to hold that where the plaintiff's right to an annuity or pension is the subject of litigation, the value of the matter in controversy is to be deemed limited to the amount of the first annual payment. There are dicta of some judges' susceptible of such an interpretation, to be found in cases in which the actual claim in the action was limited to a single instalment of a periodical payment. But these cases are so obviously distinguishable that reference to them is unnecessary. In such cases it is the settled jurisprudence of this court that jurisdiction will not be entertained, although the effect of the judgment in appeal may be to determine the rights of the parties in regard to payments which, in the aggregate, must amount to a sum greater than $2,000. Although it is on the authority of such cases that the *Lapointe*(1) decision is based, under the doctrine of *stare decisis* I bow to its authority, but, if free to do so, I would respectfully decline to follow it. An ordinary annuity or pension has a market value capable of ascertainment and that value is the amount in controversy where the judgment in the action determines directly the right to the entire annuity or pension and all future payments thereof are exigible by process issued under such judgment.

(1) 35 Can. S.C.R. 5.

The *Lapointe Case*(1), however, is not decisive of the question of jurisdiction now before us.

In the present case, as is pointed out by my Lord, the Chief Justice, we are not dealing with an ordinary annuity. The pension, or the "rent" as the statute terms it, awarded by the judgment is inalienable and its amount is subject to revision during the ensuing four years and to reduction if the plaintiff's earning capacity should increase. (Art. 7346.) The evidence of Dr. deMartigny discloses that the plaintiff may have to undergo one or perhaps two serious and perilous operations in the near future. It is not unreasonable to assume that in determining the amount of the compensation awarded this view of the situation was accepted. There is no evidence before us of the plaintiff's expectation of life. In the peculiar circumstances of this case it would probably be very difficult to obtain testimony, and it would seem to be extremely unlikely, that reliable actuarial evidence could be procured that the annuity or pension claimed by the plaintiff, if awarded as claimed, would have a value of not less than $2,000. Upon that aspect of the case, quite apart from the authority of the *Lapointe*(1) decision, I would not be prepared to affirm jurisdiction.

The matter in controversy, however, is to be regarded from the point of view of the defendants as well as from that of the plaintiff. It is true that in extent the plaintiff's right and the defendants' responsibility are correlative; but the real value of the matter in controversy may perhaps be better appreciated if regarded from the point of view of the liability

(1) 35 Can. S.C.R. 5.

1913

CANADIAN PACIFIC RWAY. CO. v. McDONALD.

Anglin J.

imposed upon the defendants, who are seeking to appeal. Under art. 7329 the defendants may, at the option of the plaintiff, be required to

> pay the capital of the rent to an insurance company designated for that purpose by order in council.

It is this feature of the present case which distinguishes it from *Lapointe* v. *Montreal Police Benefit and Pension Society* (1). By sub-section 2 of art. 7322 it is provided that:—

> The capital of the rents shall not, however, in any case except in the case mentioned in art. 7325, exceed $2,000.

The present case is not within art. 7325.

As a direct result of the judgment in many cases under the Act, the defendants may be required to pay to an insurance company a sum of $2,000.

It has been suggested that this sum is to be paid merely by way of security; that it remains the property of the defendants to be repaid to them when the rent ceases; and that payment of it does not relieve them from their liability to pay the rent itself. If that be the purpose and effect of the payment of the capital to an insurance company, there is, no doubt, much to be said in favour of the view that the capital so payable is not the real matter in controversy between the parties, but only something incidental to the claim and judgment, which does not confer jurisdiction. *Talbot* v. *Guilmartin* (2). As at present advised, I am, with respect, unable to take that view of the legislation. Nowhere in the Act is it stated that the capital of the rent to be paid to the insurance company, under art. 7329, is to stand merely as security. On the con-

(1) 35 Can. S.C.R. 5. (2) 30 Can. S.C.R. 482.

trary, by art. 7331 provision is made for determining the conditions upon which the Lieutenant-Governor in Council may authorize insurance companies *"to pay* the said rents in virtue of this sub-section." And, by article 7340, it is provided that the compensation shall be secured by a privilege upon the defendant's property

so long as the sum necessary to *procure* the required rent has not been paid to an insurance company.

In view of these provisions of the statute the purpose of the payment of the capital of the "rent" provided for by art. 7329 seems to me to be not the giving of security for the continued payment of the rent itself by the defendants, but the purchase or procuring for the plaintiff, from an authorized insurance company, of a pension or annuity equal in amount to the compensation to which the judgment entitles him. Subject to a possible right of refund *pro tanto* in the event of a revision of the compensation under art. 7346, the capital, when paid to the insurance company, would, in the view which I suggest, cease to be the property of the defendants and become the property of the insurance company, which would, thereafter, assume the sole liability for the rent. If this were not intended, but the real purpose were merely the giving of security for the future payment of the rent by the defendants, I find it difficult to understand why an insurance company should be selected as the depositary. If as a direct result of the judgment, therefore, the defendants would be liable, at the plaintiff's option, to pay a sum of $2,000, I would be prepared to hold that they might appeal to this court. From their point of view, in that case, their liability to pay a sum of $2,000 would

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Anglin J.

be a real matter in controversy in the action. But it is not, in the present case, necessary to determine what is the proper construction of the Quebec legislation, and as the question was not argued, it is not desirable to do so.

On the view of the statute to which I am at present inclined, the $2,000 is a maximum and it was not intended to require the defendant to pay that sum in every case regardless of the physical condition or the state of health of the plaintiff. In many cases in which an annuity larger than that awarded to the present plaintiff is given, the nature of the injuries sustained or the delicate health of the injured person would enable the defendant to procure an insurance company to undertake his obligation for a sum less than $2,000. No doubt it is the policy of the Government to authorize a sufficient number of insurance companies to deal in these "rents" to secure to defendants the benefit of real competition. To determine what capital sum a defendant would be required to pay under the statute, in order to procure for the plaintiff a "rent" from an insurance company, would necessitate the giving of evidence on which a finding of the plaintiff's expectation of life under all the circumstances of the case could properly be based, and actuarial testimony of the market value of his annuity based upon such expectation. The contingency of revision would also have to be taken into account. I cannot think that the "Supreme Court Act" contemplates our entering upon such an inquiry to determine jurisdiction. But if it does, we have not the necessary evidence in the present case. Upon the material before us it is not possible to say what is the market value of the plaintiff's annuity; it is not possible to

1913

CANADIAN PACIFIC RWAY. CO. v. MCDONALD.

Anglin J.

say what sum the defendants might be required to pay as capital of the rent to an insurance company under art. 7329. It is, therefore, not established that the matter in controversy amounts to the sum or value of $2,000.

For these reasons I concur in granting the motion to quash this appeal.

BRODEUR J.—I concur with the Chief Justice.

Appeal quashed with costs.

Solicitors for the appellants: *Meredith, Macpherson, Hague & Holden.*

Solicitors for the respondent: *Vipond & Vipond.*

1913

*Oct. 27, 28.

1914

*Feb. 3.

PETER CARLSON (DEFENDANT).....APPELLANT;

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Fisheries—Seizure of foreign ship—Fishing within territorial waters—Evidence—Jurisdiction of Canadian court—Concurrent findings of fact.

Where the evidence as to the place of the seizure of a vessel for unlawful fishing within Canadian waters is unsatisfactory, and leaves it doubtful whether or not the vessel seized was, at the time of seizure, within the three-mile limit of the Canadian coast, it would be unsafe and unjust to condemn her.

Per Fitzpatrick C.J. and Anglin J.—Where a charge of unlawful fishing within the territorial waters of Canada involves the condemnation of a foreign ship, the evidence must establish with accuracy and certainty the fact that the offence was committed within such territorial waters.

Per Duff J.—Where condemnation involves the forfeiture of a ship belonging to an alien friend, as well as the jurisdiction of the trial court to award the condemnation and of the legislature over the locus of the act complained of, the evidence must establish more than a probability barely sufficient to sustain a verdict in any ordinary civil action in which none of these exceptional elements are present.

The judgment appealed from was reversed, Idington and Brodeur JJ. dissenting on the ground that the concurrent findings of both courts below ought not to be disturbed on appeal.

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the judgment of Morrison J., at the trial, by which action, on the informa-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

tion of the Attorney-General for Canada, was maintained and the launch "Thelma" was condemned to forfeiture for unlawfully fishing within the three-mile limit off the coast of British Columbia.

The circumstances of the case are stated in the judgments now reported.

Lafleur K.C. and *R. M. MacDonald* for the appellant.

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

THE CHIEF JUSTICE.—I agree, for the reasons given by Mr. Justice Anglin, that this appeal should be allowed with costs.

DAVIES J.—This is an action brought in the name of the King, on the information of the Attorney-General, against the defendant as owner of the gasoline launch "Thelma" for the condemnation of the launch, a foreign vessel, her tackle and apparel, for fishing within the three-mile limit off the coast of British Columbia in contravention of the "Customs and Fisheries Act" of Canada.

It is unnecessary, in the view I take of the case, to deal with the question whether, even if within the limits, the launch when seized was engaged in fishing — the substantial question on which I rest my judgment and which gives rise to so much doubt, and difficulty is whether the "Thelma," when so seized, was or was not within the prohibited limits.

The weather on the day and at the time of the seizure was, by common consent, thick and foggy and the shore or land was not visible until the vessels were

1914

CARLSON v. THE KING.

Davies J.

brought in quite close to it, say about a quarter of a mile.

Fishery-officer Ledwell, who made the seizure, described the weather as

> very inclement, very dirty. You could not call it a fog, a heavy misty rain.

He also says that, when he boarded the "Thelma" and charged Captain Carlson with being within the three-mile limit, the latter replied that he was not aware of it. Mr. Ledwell frankly admits that land was not in sight and that you could not form a true estimate of the location of the "Thelma" by the courses and distances followed by the cruiser "Newington" from the time she left port till the seizure took place. What he and the captain of the "Newington" relied upon to fix the true location of the "Thelma," when seized, was the course and distance run towards the shore after the cruiser took the launch in tow and the time and speed of the vessel while so running. These, I agree, are the determining factors and the chief one is the time.

The location of the launch, when seized, was not buoyed for further testing and whether or not it was within the three-mile limits depends entirely upon the distance traversed by the cruiser "Newington" after taking the launch in tow and while she ran at full speed towards the shore.

The contention on the part of the Crown was that the steamer ran straight towards the shore from the time she took the launch in tow for a period of sixteen minutes, running at the speed of about eight miles an hour, and that when the captain stopped at the end of the sixteen minutes he sounded with the

lead and found he was in fifteen fathoms of water, and was then about a quarter of a mile from the shore.

Under the weather conditions there was no other means of judging how far the "Thelma" was from the shore when she was seized than the test made by running the cruiser at full speed towards the shore, determining at what speed she was running, and ascertaining, as nearly as possible, the time taken to make the run.

The whole question depends upon the correctness of this time. If, as the Crown contends, it was sixteen minutes only, and the rate the steamer was running at was eight miles an hour and there were no distances run towards the shore after the cruiser started with the launch in tow and before the log was thrown over and also after it was read and taken in before the fifteen fathoms were sounded when the vessel was judged to be within a quarter of a mile of the shore, then it would be tolerably certain that the Crown's contention was correct and the launch, at the time she was seized, was, at any rate, not more than about two and a quarter or two and a half miles, at the outside, from the shore.

But, if the time during which the cruiser ran at full speed, judged to be at the rate of eight miles an hour, was twenty minutes, and not sixteen, then, making reasonable allowance for the distance the cruiser ran with the launch in tow before the log was thrown over and also after it was taken in and the vessel slowed down and the fifteen fathoms sounding was made, at which moment Captain Halgreen judged himself to be a quarter of a mile from shore, I think the conclusion must be that, when seized, the "Thelma" was not within the three-mile limit.

1914

CARLSON v. THE KING.

Davies J.

In determining whether the cruiser ran with the "Thelma' 'in tow for sixteen minutes or twenty minutes at full speed towards the land we are not left altogether to the conflicting judgment or memories of the witnesses.

Captain Ledwell, the fishery-officer, who was, however, aboard the launch, and not in the cruiser "Newington," states that he took the time with his watch in hand and that they ran in sixteen minutes at the rate of eight miles an hour as he judges and, at the close of his examination, says:—

> I might say that, when we started to tow the boat in, I took my watch out like that; just as the "Newington" started her propeller, started to go ahead, I took my watch out and I held it in my hand until we got close in to shore then and the captain (Carlson) was standing alongside. I don't know whether he saw it or not, but I told him the time and distance.

Captain Carlson's account differs somewhat. He says that after the tow line was made fast to his launch the cruiser went ahead and got them under a little head-way and then went ahead "a few hundred yards any way," then stopped, and then got the log ready, started again and threw the log overboard. He says, at page 95, that he was at the wheel with Captain Ledwell holding his watch in his hand alongside of him, and he (Carlson) looking at the clock in the pilot-house from the second time they started. He goes on to say:—

> That was just exactly half-past eleven. And, when we were going in the neighbourhood of fourteen or fifteen minutes, well, I had pretty near fifteen minutes at the time, somebody asked Mr. Ledwell how long we had been going. He said, "fourteen minutes," and I looked at the pilot-house clock and I had pretty near fifteen minutes. Well, after then it seemed as though the speed of the "Newington" became slackened up, she commenced to go slower, and at the end of seventeen minutes she was going, I should judge, under half-speed, or

something like that, and I says to Mr. Ledwell, I says, "It ought to be three miles now; we have been going nearly twenty minutes." So he simply looked at his watch; he didn't say how many minutes it was, and he kind of smiled, and he went across the deck and he says, "Work under slow bell," and the like, and "We are inside the headland and it would not make any difference whether you are five miles off shore, as we measure a line from headland to headland, and you have got to be three miles outside that line." I said, "I never heard of that before," and he said, "That is the way we are taking measurements."

He then goes on to speak of the lowering of speed and the throwing out of the lead two or three times and then the turning of the ship towards the eastward parallel with the shore, and that, up to that time when the ship turned eastwards, they had been towing altogether twenty minutes.

Captain Halgreen professes to speak of the time run from a memorandum made at the time. At first I gathered that this memorandum was made by himself, but later on he explains that it was put down by the wheelsman who was in the wheelhouse while the captain was outside on the bridge in his oilskins telling him what to put down, and that the man made a mistake in his entry of the hour the steamer stopped which he, the captain, afterwards corrected.

Exhibit "E" reads as follows:—

Extract from daily journal, 1912, of "Newington."

Wednesday, 24.

Morning, thick fog and rain.

Left 7.7 a.m. and proceeded west under half speed; 9.46 spoke launch "Vera" of U.S.; sighted launch "Emma," U.S., and warned her to keep outside 3 mile limit. Sighted gasoline str. "Thelma" with her seine out, 10.41; was alongside of her from 10.55 to 11.26, then took her in tow towards shore, stopped 11.39 about ¼ of a mile from shore, at that time the log shewed 2 miles. Tsusiat Village 11.54, log 2¼ Natinat Village 12.04, Owen Point, 1.54 p.m., Gas Buoys 2.00. Dropped anchor in San Juan Hr. 2.31 p.m.

42

Distance, 44½ miles.

Coal consumed, 2 ton.

Coal on board, 28½ tons.

1914

CARLSON v. THE KING.

Davies J.

The original sheet was not produced. The copy produced was, as the captain explains, taken from the original sheet, as he says:—

> I wrote it down on account of it was so wet and the sheet I would write it on got so soiled I took it from that copy that day. You can see it was so dirty.

The captain put in the figures "42" below the figures "39" which had been entered by the man in the wheelhouse because the entry was wrong, but what time of the day he did this is not explained.

I dwell upon this as shewing that the captain was not relying upon any contemporaneous memorandum or entry made at the time, but upon a corrected entry made some time later in the day, no doubt honestly made, but, possibly, after conference with Captain Ledwell and others. He made the entry conform to what, in his honest belief, it should have been. Captain Halgreen states that he went by his judgment and the log; that, of course, he could not say how the engines were going; that he looked afterwards at the log and it read the ship had run just two miles; that he stopped the engines at the end of sixteen minutes, took soundings, found fifteen fathoms, and then judged himself to be within a quarter of a mile of the coast.

He says, at page 57:—

> When I stopped her I stopped her from full speed ahead to stop — see.

He says that when the lead was hove and shewed fifteen fathoms he turned the ship E.S.E. for a quarter of a mile. He does not say how far the ship ran after he gave the order to stop her before the soundings were successfully taken, remarking, however, that the quarter-mile run after he turned her was run while the ship was from full speed to stop,

and that "you can't stop a ship dead still like you stop a waggon."

It is quite plain, however, that, after the ship was stopped from "full speed ahead" to "stop," or as the chief engineer put it, to "half-speed," she continued running on her course towards the shore until the soundings had been successfully taken. James McKay, the seaman who took the soundings, explains that, at the time he took the fifteen-fathoms soundings, the vessel had stopped or slowed down, and that the shore was in sight then and, he judged, about a quarter of a mile away. Later he explains that you could not take soundings while the vessel was going full speed and that he had taken four soundings *before he got bottom*. How far the vessel ran towards the shore between the order which stopped her engines, or put her at half-speed, and the first successful soundings, after three unsuccessful attempts, is not stated, but it obviously must have been some considerable distance.

Apart, however, from the evidence of the chief engineer, to which I will refer later and which seems to have been entirely overlooked by the trial judge in his oral judgment, I confess that, while entertaining much doubt, I would not have felt justified in interfering with his finding, confirmed as it was on appeal, as to the launch having been captured within the three miles from the shore.

But, unless this evidence of the chief engineer is to be entirely disbelieved, and there has not been a word said to throw discredit upon this officer, I cannot see how we can affirm such a finding.

Chief Engineer Wilson was in the discharge of his duty in the boiler-room all the morning of the day of

1914

CARLSON v. THE KING.

Davies J.

the seizure, and up to 12 o'clock. It was his watch. It was his duty to make correct entries in his log kept there of the speed at which the engines were, from time to time, running, and of the moment when any changes were made in that speed, pursuant to orders from the captain. He swears he never left the engine-room at all during the whole of his watch and that he had made the entries in his log as produced by him. The custom was to make the entries on a slip kept for the purpose and copy them into the official log-book each evening. He says he did so with respect to these entries on the day in question. He knows, of course, nothing of what is taking place on deck, or can be seen from the deck, but whether his vessel is going at "full speed," or "half-speed" or "slow," or his engines are "stopped" altogether, it is his duty not only to know, but to record.

I make the following extract from his evidence. After asking permission to refer to his log and saying that

all the movements in the engine-room were placed on this paper by myself,

he says, in response to the question:—

Q. Give us your movements that morning?

A. Then I can give you the whole thing. We ran full speed until five minutes past ten o'clock. At 40 past 10, we stopped to speak to the launch "Emma."

Q. What does that mean?

A. I am referring to this because it will have some bearing upon the pressure of steam I was carrying at the time of the seizure. At 10.44 we were running at half-speed; at 11 we were running at full speed, and to orders. The orders came so quickly between 11 and five minutes past 11 it was almost impossible to give the variation of time, there were so many orders. At five minutes past 11, we were running at full speed and stopped at 11.20. At 11.25 we were running at full speed again, and at 11.45 at half-speed. We ran at half-speed until 1.45.

Later, replying to the vital question:—

Q. Then, tell us how your engines were from 11.25 to 11.45 ?

he answered:—

We were moving at full speed.
Q. And from 11.45 to 1.45 ?
A. Half speed.

In reply to Mr. Ritchie, he further said that he had more than 185 head of steam on between 11.25 and 11.45, and that his highest was 195.

Now, the entry in the captain's log is that at 11.26 he took the vessel in tow and stopped at $11.\frac{39}{42}$. But it is somewhat indefinite as to the precise moment he meant when he "took her in tow." The captain's starting time in taking her in tow is one minute later than the engineer's time when the engines were started at full speed, while the time when he says he "stopped" — 11.42 — is three minutes before the chief engineer says he stopped the engines at full speed. One or the other has made a grave mistake. The chief engineer is speaking of the actual movements of the engine and the screw and the moments of each and every change as recorded by him in his engine-room at the time. The captain speaks from a memorandum entered by the wheelsman and, some time afterwards, corrected by himself.

Full speed for twenty minutes, from 11.25 to 11.45, would mean, at the rate the officers estimated the steamer's speed, two and a half miles. Making reasonable allowance for the distance the cruiser with the launch in tow sailed before the patent log was thrown out and began to record, and also for the distance she sailed after the "stop" order was given, and while the three unsuccessful attempts in throwing the lead to

1914

CARLSON v. THE KING.

Davies J.

get bottom were being made, and the fourth successful one was made and announced, after which only the course of the vessel was changed, and adding to these distances the estimated distance of one-third of a mile from the shore, I would conclude that the "Thelma" was, at least, three miles from the shore when she was taken, or, at least, so very near to the three miles that it would be unsafe and unjust to condemn her.

For these reasons, I would allow the appeal and dismiss the information with costs.

IDINGTON J. (dissenting).—I think the officer directing the seizure in question was acting in good faith and took the proper attitude to be taken in all such cases; that, if there should be found a doubt as to the distance of the fishing-vessel from the shore, the owner thereof should get the benefit of the doubt.

All parties concerned knew what was involved in starting for the shore to measure the distance, and, if the appellant did not take more care than he seems to have done to guard against mistakes in doing so, it must be because he assumed due and proper methods were, before his eyes, being adopted.

Loose expressions are used which might, if standing alone, cast a doubt on the accuracy of the test applied, but the officer directing the proceedings, if in good faith, could hardly be mistaken with watch in hand, and experienced in the use of the appliances, in the result.

The questions involved are merely of fact, and I do not see how, if even I had great doubt, to reverse such findings.

The appeal should be dismissed with costs.

1914

CARLSON v. THE KING.

Duff J.

DUFF J.—In such a case as this, where condemnation involves the forfeiture of the property of an alien friend and the fundamental question, though a question of fact, is that upon the answer to which depends not only the conclusion as to the acts alleged to constitute the offence charged, but the jurisdiction of the court to award the condemnation and of the legislature over the locus of the defendant's acts, I think the judgment against the defendant ought to rest upon something more solid than a measure of probability barely sufficient to sustain a verdict in an ordinary civil action in which none of these exceptional elements of controversy are present. I think, with respect, that this principle has not been kept in view; and I am constrained to the conclusion, after an examination of the evidence, that the allegations of the Crown have not been satisfactorily established.

I agree with the judgment of my brother Davies.

ANGLIN J.—Although I entertained little doubt at the close of the argument that if I had been presiding at the trial of this action I should have felt obliged to hold that the Crown had not sufficiently established its case, I was not then satisfied that the conclusion of the trial judge, affirmed by the British Columbia Court of Appeal, should be reversed here. But, on further reflection and study of the evidence, I have become convinced that the judgment of condemnation should not be sustained.

The provincial courts held that the defendant had incurred the penalty of confiscation of his 15-ton gasoline fishing-boat, the "Thelma," his nets, etc., on the ground that, when the boat was arrested, he was illegally engaged in fishing within three miles of the

1914

CARLSON v. THE KING.

Anglin J.

Canadian shore. That the defendant was engaged in fishing, was, I think, a proper conclusion from the evidence under the authorities. The *"Frederick Gerring, Jr."* v. *The Queen*(1). But that the boat was, when seized, within the three-mile limit has not, in my opinion, been established with that accuracy "and complete certainty" which is properly required in cases where such a penalty as confiscation is the result of an adverse judgment. *The "Kitty D."* v. *The King*(2).

To discharge the burden of establishing the location of the defendant's boat at the time of the seizure, counsel for the Crown adduced evidence on three distinct lines. First, he sought to trace the route of the Government boat, the "Newington," which made the seizure, from her departure from the harbour of San Juan to the point of seizure; secondly, he endeavoured to prove the distance of the point of seizure from the coast by shewing the time taken to tow the "Thelma" in to a point which the Crown witnesses estimate to have been a quarter of a mile from the shore and the speed at which the run towards the shore was made; thirdly, he relied upon the record made by the patent log used on the "Newington" while towing the "Thelma" in.

At the outset of the trial, counsel for the Crown, in his examination of the first witness, fishery officer Ledwell, endeavoured to establish the course which the Government vessel had taken in reaching the point of seizure. He must have very soon realized that in that effort he would not succeed. But, as a result of his examination of this witness and of the cross-examination both of this witness and of the next witness,

(1) 27 Can. S.C.R. 271. (2) 22 Times L.R. 191.

Captain Halgreen of the "Newington," we have laid down upon a chart what purport to be approximately the courses taken by the "Newington" and the point of seizure. According to what is thus laid down the Government vessel would, at the time of the seizure, have been more than three miles distant from the shore. For the Crown it is now said that the laying down of these courses is quite unreliable. Although the trial judge states that Captain Halgreen figured them out deliberately, there is no doubt that both the witnesses spoke of them as being only approximate at best, and stated their inability to locate on the chart the precise position of the Government vessel either at the time when they sighted the "Thelma" or when they came up with her and arrested her. I would regard this evidence as of little value in itself and something to which no attention should be paid were it not for the fact that the point of seizure thus shewn on the chart agrees with what the defendant's witnesses maintain to have been the location of the point of seizure and also, approximately, with what the log of the engineer of the "Newington" and other evidence in the record indicate to have been the distance of that point from the shore as will be presently explained.

The weather at the time of the seizure and during the shoreward run which followed was foggy or misty. The "Thelma" was sighted when about half a mile from the "Newington." Fishery officer Ledwell says that on that morning

> you could not distinguish anything more than about half a mile.

Captain Halgreen says,

> Just about three-quarters of a mile, that is about all you could see ahead.

1914

CARLSON v. THE KING.

Anglin J.

Of course, neither the shore nor any landmark was visible from the place at which the seizure was made. There could be nothing in the nature of cross-bearings to assist in locating it. The spot was not buoyed as was done in the caes of the *"Kitty D."*(1). Perhaps it was not practicable to do so in this case. But that is not shewn: and, since the failure to buoy the spot precludes all possibility of subsequently ascertaining it, the necessity for absolute accuracy and precision in making the test to determine the distance by running in to the shore was all the greater.

When confronted with the difficulty that the point of seizure, as marked by him, is over 3½ miles from the shore, Captain Halgreen endeavoured to meet it by stating that the "Newington," when the "Thelma" was sighted, in order to come up with her had run in towards the shore about ¾ of a mile. He evidently forgot that both he and officer Ledwell had already said that when sighted the "Thelma" was only *half a mile off the "Newington's" starboard bow,* and that she had not moved while the "Newington" was bearing down on her. The course of the "Newington" until the "Thelma" was sighted had been about parallel to the shore-line. This discrepancy rather shakes one's faith either in the reliability of Captain Halgreen's estimates of distances, on which so much depends in this case, or in his trustworthiness as a witness. Then again, in the particulars delivered on behalf of the Crown the point of seizure is stated to have been

> about 2¼ miles off shore from the mouth of the Nattinat River and about seven miles in shore from the Swift Shore light ship.

The point of seizure, as marked by officer Ledwell on the chart, is 4½ miles from the mouth of the Nattinat.

(1) 22 Times L.R. 191.

At the trial Ledwell thought the Swift Shore light ship was about seven miles from the shore. He said he had often measured it. It is shewn by the chart, however, to be 8½ miles from the shore. Yet the Crown case largely depends on the testimony of these witnesses as to distances measured by the eye.

According to the log of the captain of the "Newington," after she came up to the "Thelma" both boats lay to for 31 minutes (10.55 to 11.26) before the "Newington" started to tow the "Thelma" in towards the shore. During the first part of this period the net or seine of the "Thelma" was at least partly out and the current would affect the boat more on that account. The oral testimony also establishes that the boats lay to for about 30 minutes while the crew of the "Newington" were making preparations for the towing. Captain Halgreen makes this period 36 minutes or possibly 41 minutes. While the tide was slack at this time, according to the evidence of Captain Churchill (which is uncontradicted), there was a current at the place of seizure of which the general tendency was towards the shore, and Captain Carlson says that about the time of the seizure the wind was also blowing towards the shore, though not strongly or steadily. This evidence is also uncontradicted, although both officer Ledwell and Captain Halgreen were called in rebuttal. The "Thelma" was drifting shoreward during all this time. The defendants claim that there should be an allowance of three-quarters of a mile for this drifting. In the calculations of the Crown no allowance whatever is made for it. Upon the whole evidence I should be disposed to think that an allow-

1914

CARLSON v. THE KING.

Anglin J.

ance for drifting, during this 31 minutes, of one-third of a mile would not be excessive.

The "Newington" started in towards the shore with her tow-line slack. She tightened it and ran, the defendants' witnesses say, for a few minutes, and then stopped to adjust the line — all this before the real start for the shore was made — before the 16 minutes run in at full speed of which the Crown witnesses speak, had begun, and, of course, also before the patent log had been put out. The defendants' witnesses estimate the distance covered during this preparatory movement variously — Captain Carlson at several hundred yards, Torrisdal at one-quarter of a mile, and Tideman at from 1,500 to 2,000 feet. The two latter witnesses probably include in their estimate the distance covered after the second or true start for the shore was made and before the patent log was thrown out. The Crown witnesses do not dispute that the "Newington" stopped to adjust the tow-line, but they maintain that no appreciable headway was made as a result of the first start. On the whole evidence the Crown cannot, I think, complain of an allowance being made for the distance covered in this way of about 120 yards, say one-fifteenth or .066 of a mile. Indeed, that is probably considerably underestimating it.

After the tow-line had been adjusted the "Newington" made her real start for the run towards shore. The Crown's evidence is that, after this second start, she ran in towards shore under full speed for 16 minutes and then stopped. There is some question, however, whether the 16 minutes was not counted from the moment when the patent log was thrown into the water, which was not until the vessel was well

1914

CARLSON v. THE KING.

Anglin J.

under way. It is noteworthy that on this crucial point as to the length of time occupied in the full speed run in, on which the oral evidence is conflicting, the wheel-house log of the "Newington" is unreliable. The original entry is not produced. In explanation Captain Halgreen says that it was wet and soiled. What is produced purports to be a copy of the log made by the captain from notes, he says at a later hour on the day of the seizure. It shews that the towing in began at 11.26 and ended at 11.39. The original entry made by the man in the wheel-house was 11.39. The captain in his evidence says that he did not write the notes himself because he was out on the bridge, that the man in the wheel-house made a mistake in putting down 11.39 instead of 11.42, which he (the captain) told him to enter. It is a little difficult to understand how such a mistake could be made. The captain adds that he himself afterwards corrected the entry by putting the 42 below the 39. He also states that the figures "11.26," as they now appear in the log, were written "11.36."

> This is a little mistake here, I think that is 36. It should be 26 though.

This evidence requires no comment. Asked by counsel for the Crown as to the rate of speed maintained during the run in at full speed, fishery officer Ledwell says "about 8 miles an hour, *I guess,*" and Captain Halgreen, "Well, I should judge about 8 miles an hour." Assistant-engineer Morrison, in answer to a question by counsel for the Crown, "Well, give us a minimum?" says,

> Well, I should say she ought to make 8 knots on that run.

According to the evidence of inspector Ledwell, during a run on the following day, while towing the

1914

CARLSON v. THE KING.

Anglin J.

"Thelma" to Victoria, they made a test to determine the rate of speed which the "Newington" would make with the "Thelma" in tow. But the head of steam during the test is not given nor is there any evidence that the conditions of tide, wind and current were the same. Captain Halgreen bases his estimate of the speed, while towing the "Thelma," on his experience in towing scows; Tideman, a seaman for twenty-nine years, and Torrisdal, who had been seventeen years fishing, think the "Newington" made 10 miles an hour while towing the "Thelma." The evidence of Wilson, the chief engineer of the "Newington," who was called as a Crown witness and gave his statement after making a careful scientific estimate, is that, allowing for a slightly reduced head of steam and for the drag of the tow, the "Newington" went towards the shore during the full speed run at the rate of 9 miles per hour. On all this evidence it would not seem to be unfair to fix the rate of speed at 8½ miles per hour. At 9 miles per hour the vessel would cover 2.4 miles in 16 minutes, at 8 miles per hour, 2.133 miles, and at 8½ miles per hour, 2. 266 miles. McKay, a Crown witness, says in his direct examination that the towing in of the "Thelma" lasted "about half an hour as near as I can say." The engine-room log, produced and vouched for by chief engineer Wilson, who made the entries himself, contains this item:—

> At 11.25 we were running full speed again, and at 11.45 half-speed.

and the word "Thelma" is written under the figures 11.25, which Wilson says means "we have taken the 'Thelma' in tow," as was reported to him by a man whom he had sent on deck to ascertain that fact, which indicates that he was aware of the necessity for ac-

curate and careful observation. He also says that from 11.25 to 11.45 the engines were running at full speed. This evidence is given in direct examination by counsel for the Crown. If the chief engineer's entry and testimony are reliable and if his estimate of the rate of speed should be taken, the "Newington" towed the "Thelma" three miles in towards the shore before she changed from full speed to half-speed. It should be observed, however, that according to the engine-room log there was no stop of 31 minutes (10.55 to 11.26) during which, according to the captain's log and the oral testimony, the "Newington" lay to beside the "Thelma." The engine-room log says "full speed, and to orders 11.05 stopped 11.20." But the defendant has a right to expect, where so much depends upon it, that the Crown case shall be borne out by the engine-room log as well as by the captain's log and shall not rest merely upon unrecorded statements of witnesses' recollection of events and periods of time as to which there is a conflict of evidence. Both logs are in this case unreliable. One of them confirms the defendant's version of the time occupied in the run in. Captain Carlson of the "Thelma" says his boat was towed in towards shore for 20 minutes; and he adds that he said so to fishery officer Ledwell at the time. Earlier in his evidence he had stated that the "Newington" had slackened speed, after 15 minutes and, at 17 minutes, was running at half-speed. Peter Tideman, cook on the "Thelma," says that he kept watch during the run in by the clock in the pilot-house; that they went at full speed for 16 minutes and then at slackened speed for between five and six minutes, at the expiration of which they could see the shore, and he adds that the 16 minutes at full speed elapsed after the

1914

CARLSON v. THE KING.

Anglin J.

patent log was thrown out. The log was not thrown out, he says, until four or five minutes after the "Newington" had started, when she was from 1,500 to 2,000 feet from her starting point. Torrisdal, a seaman, corroborating Captain Carlson, says that when the "Newington" stopped towing the "Thelma" in towards the shore, Captain Carlson remarked to inspector Ledwell, who was standing beside him, "We have been towing 20 minutes now." Upon all this evidence it is, I think, not possible to say that the time occupied in towing the "Thelma" in to shore at full speed was established with the precision and accuracy requisite in penal proceedings at the 16 minutes claimed by the Crown. There is the further uncertainty whether the 16 minutes, if accepted, should be computed from the moment when the "Newington" started shorewards the second time, or from the time when the patent log was thrown overboard. The Crown certainly cannot complain if the distance covered under full speed is calculated on the basis of a 16 minutes run at $8\frac{1}{2}$ miles per hour — 2.266 miles. Making a deduction for loss in getting up speed, and no addition for the interval which elapsed between the start and the throwing out of the patent log, if the 16 minutes should be computed from the latter moment, it would seem that the distance covered in the full speed run may be fairly fixed at 2.15 miles.

It is also reasonably clear that, after the run in at full speed, whether it occupied 16 minutes as sworn by Carlson and stated by Ledwell and Halgreen, or 20 minutes as shewn by the engineer's log, the "Newington" continued to move towards the shore for several minutes at slower speed. If she ran in for from four to six minutes at half speed,

1914

CARLSON v. THE KING.

Anglin J.

as Tideman says, she would cover in that time about one-third of a mile. He says she went "about close to half a mile." Officer Ledwell says that, after running under full speed for the 16 minutes, the "Newington" stopped and the lead was then cast. McKay, the man who cast the lead, called by the Crown, says he cast it four times before he got bottom and that on the fourth cast he got it at 15 fathoms. Of course, the vessel was moving in towards shore while these soundings were being taken, though at a reduced rate of speed. Up to the time of the soundings McKay says she had been going at full speed. Captain Halgreen says that in slowing down from "full speed" to "stop" the vessel would cover a quarter of a mile. McKay, who cast the lead, says that when he got 15 fathoms on the fourth sounding the "Newington" had stopped. Ledwell says that after the soundings were taken the "Newington" again started to go ahead and that he then told the captain to stop because he thought it dangerous to take the "Thelma" any further towards shore. This was clearly after the 16 minutes had elapsed. Ledwell and Tideman both say so, and Captain Halgreen also says the lead was cast after the 16 minutes had expired. Taking into account what McKay says as to the four soundings made after the full speed run had been completed and while the vessel was proceeding under slow speed, what Captain Carlson says on the same point, and what officer Ledwell says as to the start to go ahead towards the shore after the soundings had been made, a movement which continued until he called out to go in no further, I would be disposed to make an allowance of one-quarter of a mile for the distance thus covered at reduced speed after the 16 minutes, or

1914

CARLSON v. THE KING.

Anglin J.

whatever longer period the full speed run occupied, had expired.

How far was the "Newington" from shore when, in obedience to officer Ledwell's order, she ceased towing the "Thelma" in and turned east? This point was not buoyed and no cross-bearings were taken to fix it. Nor was the distance measured accurately as might have been done by sending a small boat in to the shore. No reason is given why these measures were not taken. No suggestion is made that it was not practicable to have thus ascertained with certainty and precision at what distance from the shore the towing in of the "Thelma" ceased. On this very important point the Crown case depends on eye measurements made in a fog by Captains Ledwell and Halgreen, assistant-engineer Morrison and sailors Kraemer and McKay, who all agree (*mirabile dictu*) in stating that the distance was "about a quarter of a mile" — modifying that statement, however, by such expressions as " as nearly as I can judge." Tideman says that at the end of the full speed run he could "see the high land" on the shore. Kraemer, a Crown witness, says that when the "Newington" "stopped," when they "read the log, the two miles" they "could just make out the shore line"; and he adds that they could only see a quarter of a mile that day. Now the evidence of other Crown witnesses is that they could see half a mile. They saw the "Thelma" at that distance. Captain Halgreen says he could see three-quarters of a mile ahead. This evidence casts grave doubt on the reliability of the estimate of a quarter of a mile as the distance from the shore — made by "optic observation," to quote officer Ledwell. Captain Halgreen says that, after running in, the "New-

ington" turned along the coast at 11.42 and ran easterly for 12 minutes during which, he maintains, she covered only one-quarter of a mile ! His story is that the "Newington" turned east immediately upon the expiry of the 16 minutes. He excludes from consideration the four or five minutes that Tideman and Carlson say the course shoreward continued at slow speed. He ignores, if he does not contradict, Ledwell's statement that after taking the soundings they again started towards the shore and turned east only when he, Ledwell, called out an order not to go further in. The log shews that the "Newington" stopped abreast of Tsusiat Village at 11.54. Twelve minutes — from 11.42, when the 16 minutes expired, to 11.54 — are, therefore, to be accounted for as well as the admitted registration of $2\frac{1}{4}$ miles on the patent log when it was taken in, the captain says abreast of Tsusiat Village. He maintains that during that 12 minutes his boat made this quarter of a mile, at a speed of $1\frac{1}{4}$ miles an hour, and suggests that the additional quarter of a mile shewn by the patent log was registered during this eastward run, although his own evidence shews that the patent log will probably not *register* when the speed is under $2\frac{1}{2}$ miles an hour. In explanation of thus moving along the coast only at the rate of $1\frac{1}{4}$ miles per hour Captain Halgreen says,

> this quarter of a mile run (was) while the ship was from "full speed" to "stop." You can't stop a ship dead like a waggon.

That is quite inconsistent with officer Ledwell's evidence, confirmed by Tideman, and it scarcely accords with Kraemer's evidence. The four soundings were taken after the "stop" order was given and while the speed was lessening. Captain Halgreen himself says that it was after the taking of these soundings that

1914

CARLSON v. THE KING.

Anglin J.

he turned the "Newington" east. To take these soundings must have required several minutes — no doubt the four or five minutes to which Tideman deposes — the three or four minutes of which Carlson speaks — during which the vessel made headway towards the shore. Then there was the third start of which Ledwell tells. All this occupied part of the 12 minutes period from 11.42 to 11.54 — probably nearly half of it — leaving about seven minutes for the quarter of a mile run down the shore to Tsusiat. Much the greater part, if not the whole of the last quarter of a mile of the 2¼ miles shewn by the patent log when it was taken in would appear to have been recorded before the "Newington" turned eastward.

Speaking of the position of the "Newington" when, after going this quarter of a mile, she had reached a point abreast of the village of Tsusiat, Captain Halgreen says:—

> That is the nearest we got to the coast * * * just about a quarter of a mile, I should judge, from shore.

How much farther out had the "Newington" been when she turned east? Pressed by Crown counsel on re-examination, Captain Halgreen says they were as close to the shore at the beginning of the quarter mile run to the east as they were at the end of it. He thus seeks to avoid the effect of the statement that "the nearest point we got to the coast" was at the end of that quarter of a mile. Captain Carlson estimates the distance from the shore when the towing in ceased at one-third of a mile. He says the shore line was visible only for a half mile, but the woods up high on the mountain in the rear could be seen a mile off. Torrisdal and

Tideman say that when the "Newington" stopped her shoreward course they were still three-quarters of a mile from the shore. Tideman had seen the high land at the end of the full speed run. It was at the end of the run of four or five minutes at reduced speed that these witnesses say the shore was still three-quarters of a mile off. It was then that the captain said they were close enough in. It was then they turned down the coast to the east. On all this evidence it can scarcely be said to have been satisfactorily established that the "Thelma" was towed on a course at right-angles to the coast to within a quarter of a mile from the shore. On the story of Kraemer that they could just make out the shore line, taken with Captain Halgreen's statement that they could see three-quarters of a mile and the statement of Halgreen and Ledwell that they saw the "Thelma" when half a mile away, and on Captain Halgreen's admission that they were nearest the shore after making the quarter of a mile easterly run, the defendants would seem to be entitled to claim that half a mile, or, at all events, the one-third of a mile which Captain Carlson estimates, should be fixed as the distance from the "Newington" to the shore when the run in at right-angles to the coast ended. But for the purpose of estimating the distance of the "Thelma" from the shore at the time of seizure I place this distance at the quarter of a mile claimed by the Crown.

To sum up the result of all the evidence in a manner of which I think the Crown cannot reasonably complain we have as the outcome of the time and speed test the following:—

1914

CARLSON v. THE KING.

Anglin J.

	Miles.
Drifting allowance while boats lay to for 31 minutes	.333
Preliminary movement adjusting the towing line, etc.	.066
Full speed run — 16 minutes at 8½ miles per hour, 2.266, less allowance for loss in getting up speed	2.150
Run at slow speed during soundings, etc.	.250
Distance from shore at stop	.250
Distance from shore of point of seizure	3.049

Indeed, the defendant may have reason to complain that none of these allowances is made on a sufficiently liberal scale. For instance, he may well claim that the distance from the shore when the "Newington" turned east should be placed at one-third of a mile at least; that engineer Wilson's estimate of the rate of speed during the tow should be taken; and that the allowance for distance covered in preliminary movements before the 16 minutes' run began should have been at least one-eighth of a mile instead of one-fifteenth.

The learned trial judge did not base his judgment on the time and speed test, but he held himself bound to accept as conclusive the record of the patent log. He could "see no evidence to offset it." As already stated, the patent log was put out only after the "Newington" had made her second start towards the shore. The allowances for drifting during the 31 minutes that the vessels lay to and for the distance covered as a result of the first start and during the adjusting movements must, of course, be made in considering the result of the patent log records as in the case of the time and speed test. To these must be added something for the distance covered from the moment of the second start until the log was thrown over. Crown counsel speaks of this as "a short distance on"; Captain Halgreen as an interval which "*might have* been the time of 45 seconds"; Torisdal

"about a quarter of a mile"; and Tideman four or five minutes — 1,500 to 2,000 feet. (These two latter witnesses may be including the distance covered as the result of the first start.) Tideman, however, adds:

> They did not throw out the log until after we got a good speed.

The learned trial judge says that he does not discredit the evidence of the defence witnesses as untruthful, but deems it unsatisfactory because they had not the necessary skill and information to give reliable testimony. The latter part of that observation is scarcely applicable on this point. Then Captain Halgreen says:—

> You cannot count on the patent log registering when the speed is under 2½ to 3 miles an hour. * * * At four miles it will register true, but under three miles I would not be very positive of it.

Kraemer, the man in charge of the patent log, says that

> when the vessel is going under five or six miles, you cannot say it is registering accurately.

The log evidently cannot be relied upon to register fairly either while the vessel is getting up speed in starting or while it is slowing down in stopping. It would seem to be proper, therefore, to make an allowance, either for distance covered during the interval between the second start and the moment when the log was cast over, or for distance covered before a registering speed was obtained, or partly for one and partly for the other; and one-tenth of a mile would seem to be reasonable.

The Crown evidence is that at the end of the 16 minutes full speed run the patent log registered two miles. The accuracy of this registration is challenged. The line of the log appears to have been long enough

1914

CARLSON v. THE KING.

Anglin J.

to bring the fan or rotator at times under the "Thelma" and at times alongside her. There is evidence that this would make the registration slower. But I shall assume that, while the vessel was running at full speed, the log recorded accurately. When it was taken in it registered 2¼ miles. Captain Halgreen says that this was after he had run one-quarter of a mile along the coast, but he also says that to run that quarter of a mile took twelve minutes — that is, at the rate of 1¼ miles an hour, and at that speed, according to his own evidence and that of Kraemer the log cannot be relied on and probably would not register at all. Kraemer says that the reading of 2¼ miles was "very shortly after the reading at two miles." Captain Carlson says that only ten seconds elapsed between the announcement of the reading of two miles and that of 2¼ miles. Kraemer says that the log was taken in after the "Newington" turned east, but he does not say that it was when she had stopped opposite Tsusiat. Upon all the evidence there is not the slightest doubt that after the order to slow down or stop had been given at the expiration of the 16 minutes, when the log was read and shewed two miles, the "Newington" continued to move shoreward slowing down. During this time the soundings were taken. During at least part of it the log was recording. This fact goes far to substantiate the defendant's claim that an addition must be made to the distance covered during the 16 minutes and recorded on the patent log at 2 miles, for the further run in at slow speed. The same allowance should be made as in the previous test, viz., one-quarter of a mile. On the patent log test, therefore, we have the following result:—

	Miles.
Allowance for 31 minutes drifting	.333
Preliminary movement	.066
While log not in water, or not registering	.100
Log record during full speed run	2.000
Run in at slow speed during sounding and start after before Ledwell called far enough in	.250
Distance from shore at stop, or turn	.250
	2.999

In regard to these allowances the defendant, as already pointed out, may well claim that some of them are not made on a sufficiently liberal scale.

I do not wish to be understood as expressing the opinion that the evidence clearly establishes that the "Thelma" when seized was outside the three mile limit. That is not proved, although the balance of probability seems to be in favour of that view. On the other hand, I think it is satisfactorily demonstrated that the evidence does not establish that the "Thelma" was clearly within the three mile limit when seized, certainly that it fails to do so with that precision and conclusiveness which are properly demanded in a penal proceeding such as this. It may be said that the various allowances which I suggest are mere guesses. As to the quantum of each allowance that is no doubt the case. But that some such allowances should be made seems to be quite clear and the Crown has left matters in such uncertainty that I do not think it possible to say that those which I suggest are excessive. For these reasons I think judgment of condemnation should not have been pronounced. I would allow this appeal with costs in this court and in the British Columbia Court of Appeal and would direct the entry of judgment dismissing the action with costs.

1914

CARLSON
v.
THE KING.

Brodeur J.

BRODEUR J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for British Columbia confirming the decision of the trial judge.

The questions at issue are questions of fact on which we have the unanimous findings of the courts below.

The contention of the respondent is that the appellant, who is a United States citizen, was fishing contrary to law within the three-mile limit of Vancouver Island.

The appellant claims that his vessel was outside of territorial waters. The evidence shews that, in order to ascertain which of those claims were right, the Canadian Government vessel towed the fishing launch straight to a point as close to the nearest shore as it could safely get, and measured the distance by a patent log.

The evidence is somewhat conflicting as to what then occurred. The learned trial judge's finding was that the "Thelma," the seized vessel, was within the three-mile limit at the time she was apprehended.

That finding having been concurred in unanimously by the Court of Appeal, I feel that, relying on the constant jurisprudence of this court, those decisions of two courts below on a question of fact should not be disturbed.

Appeal allowed with costs.

Solicitors for the appellant: *MacNeill, Bird, MacDonald & Darling.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*

ERNEST H. ROOTS AND DAVID W. BROWN (DEFENDANTS) ..... APPELLANTS;

AND

ARTHUR BASIL CAREY (PLAINTIFF) . RESPONDENT.

1913
*Nov. 6.

1914
*Feb. 3.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Vendor and purchaser—Agreement for sale of land—Option—Acceptance—Uncertainty as to terms—Condition precedent—Specific performance.

On 26th November, 1910, R. gave C. a memorandum respecting the sale of his land, as follows: "In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my quarter-section — N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January of each year till paid." On the 20th of January, 1911, a letter was written, by C.'s solicitor, to R., as follows: "Major Carey is prepared to make payment of one-third of purchase price, and we are anxious to close the matter out at once. We would suggest that, rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We would be pleased to prepare the necessary documents, and you can submit same to your solicitor at Medicine Hat."

Held, reversing the judgment appealed from (5 Alta. L.R. 125), Davies and Anglin JJ. dissenting, that the memorandum constituted an offer requiring acceptance; that the letter of the solicitor was not an unqualified acceptance of the terms of the contract such as was called for in the circumstances, and that C. was, therefore, not entitled to a decree for specific performance.

APPEAL from the judgment of the Supreme Court of Alberta(1), by which, Simmons J. dissenting, the judgment of Stuart J.(2) was affirmed.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 5 Alta. L.R. 125. (2) 2 West. W.R. 677.

1914

ROOTS v. CAREY.

The memorandum and extract from the solicitor's letter above quoted, constituted, in effect, the evidence in support of the plaintiff's claim for specific performance of an alleged agreement for the sale of the lands in question. The trial judge decided in favour of the plaintiff and ordered a decree as prayed for. This judgment was affirmed, Simmons J. dissenting, by the judgment now appealed from.

The questions in issue on the present appeal are discussed in the judgments now reported.

Travers Lewis K.C. for the appellant.

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—This is an action for specific performance of an alleged contract for sale. The question is: Was there a concluded agreement between the parties? It appears by the evidence, written and oral, that on the 26th of November, 1910, the appellant gave to the respondent a memorandum in writing, in the following terms:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey, the option of my quarter section — N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January of each year till paid.

This written instrument contains no date, nor does it say when the first cash instalment is to be paid, but the respondent admits, in his evidence, that the first payment was to be made on the 31st of January, 1911. I read the memorandum as an offer which, to become a contract, required to be accepted, and nothing appears to have been done by the respondent to manifest any intention to accept until the 20th of

January, 1911, when his solicitor wrote to the appellant to say:—

> Major Carey is prepared to make payment of one-third of purchase price, and we are anxious to close the matter out at once. We would suggest that, rather than give an agreement for sale, you execute a transfer of the land in favour of our client, and take a mortgage back for unpaid balance. We would be *obliged if you would let us hear from you at once.*

The suggested modification of the terms of the option required the assent of the appellant. No answer was given to this communication, although acknowledged to have been received within the time, and no tender of the cash payment was made until the 20th of March following.

I cannot find in the solicitor's letter evidence of such an unqualified acceptance of his offer as the appellant was entitled to in view of the speculative character of the market in which the transaction took place, and there is no justification of the respondent's failure to pay the first instalment when it fell due.

Briefly, my opinion is that, in the absence of unqualified notice of acceptance within the time (*en temps utile*), and in view of his neglect to pay or tender the money at the date fixed for the first payment, the relation of vendor and purchaser was never established between the parties and, as there was no concluded contract of sale, the foundation of an action for specific performance fails.

I would allow the appeal.

DAVIES J. (dissenting) agreed with Anglin J.

IDINGTON J.—The respondent claims to be entitled to specific performance of an alleged contract of sale

1914

ROOTS v. CAREY.

Idington J.

and purchase which rests upon the following memorandum written by him in his note-book and signed by the appellant Roots:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January each year till paid.
>
> E. H. ROOTS.

This remarkable document, it may be observed, can only be made operative and given some sensible meaning by virtue of the implications therein.

To begin with, it does not express that the option is to be one of pre-emption. That may be implied in the phrase "at the rate of $25 per acre." No time is expressed for its acceptance. That also must be supplied by implication. Is it to be taken as within a reasonable time? Or is it to be determined by acceptance on the part of the respondent on or before the 31st of January then next, or acceptance and payment of a cash instalment before that date?

It is clear from the evidence of the respondent that the transaction took place in a speculative market. And that being the case, if a reasonable time is taken as a test, I think that the respondent was too late on the 20th of March following with his then tender of the cash instalment and a binding agreement signed by himself accepting the proposal.

If it is, however, to be taken that an acceptance and payment of the cash instalment on or before the 31st of January are implied as conditions precedent, then, clearly, the respondent is out of court, for no money was offered till the 20th of March. Looking at the surrounding circumstances, I incline to the opinion that such payment on or before the 31st of Janu-

ary, or tender thereof and acceptance of the proposal, were implied.

The parties were entire strangers to each other, and the nominal payment of ten dollars on a transaction of such magnitude suggests, in such case, that it was within the reasonable expectation of the appellant (Roots) that he should not be long bound until something more was forthcoming than mere acceptance by one who might, for aught he knew, be a man of straw.

But, even if this be not quite clear, surely Roots was entitled, at least, to an absolute acceptance before he could be held bound by the establishment of the relation of vendor and purchaser between him and the respondent. Such relationship has always been held as necessary before the offer can be treated as a concluded dealing to which to apply the principle and authorities upon which courts have proceeded in holding that non-payment on the days named was not necessarily fatal.

If the 31st of January is to be taken as the time fixed for the cash payment, then it clearly would be implied that before any such principle can be resorted to enabling waiver or postponement of such fixed date, there must have been ere that an unconditional and absolute acceptance.

But it may be said that this phrase:—

> Balance to be paid ⅓ on the last day of January each year till paid

has no relation to the cash payment and that, for this, no time was fixed.

I, however, interpret this language so used, under the surrounding facts and circumstances, as clearly pointing to the cash payment of one-third on the 31st of January as being intended thereby.

1914

ROOTS v. CAREY.

Idington J.

And, although the interpretation of the writing cannot be affected by the respondent's opinion, it is satisfactory to find from his evidence that this interpretation does him no injustice. He says:—

Q. You were to pay the money by the 31st of January ?
A. Yes; but there was no discussion about that in that way. * *
Q. When was your money to be paid over ?
A. On the 31st of January.

It may also be fair to infer such was also the understanding of Roots.

In the case of *Morrell* v. *Studd & Millington* (1), at page 658, Astbury J. points out that when a written instrument contains no date parol evidence may be given to shew when it was written and from what date it was intended to operate.

In short, I conclude that, in any case, the appellant, Roots, was undoubtedly entitled to an absolute unconditional acceptance on or before the 31st of January, or to be thenceforward released from his offer.

All he got was the following letter:—

Calgary, Canada, Jan. 20, 1911.

R. Roots, Esq.,
Medicine Hat, Alta.

Re Major A. B. Carey and yourself — our file 9,588.

Dear Sir,—We are acting for Major A. B. Carey who secured an option from you on the north-east quarter of section twenty (20), Township twelve (12), Range five (5), West of the 4th Meridian.

According to the terms of option, Major Carey has to pay one-third of the purchase price on the last day of January each year till the purchase price is paid in full, the purchase price for the land being at the rate of $25 per acre.

Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take

(1) (1913) 2 Ch. 648.

a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.

Yours faithfully,

H.A.A./A.M.C. H. A. ALLISON.

This was received by Roots within the time, but never answered. Can it be said that this forms an acceptance of the offer ? Let us test it by seeing how Roots could have availed himself of it in any way.

Could he have acted upon this and succeeded in an action by him against the respondent for specific performance of the contract ?

It seems to me it would have been impossible for him to have succeeded in such an action; apart altogether from any question of the Statute of Frauds.

The letter is framed in such equivocal terms that it could not be said to evidence a contract, sought to be specifically performed, such as Lord Hardwicke said when remarking that

> every agreement of this kind ought to be certain, fair and just in all its parts. See Fry on Specific Performance (5 ed.), part iii., ch. 3, p. 165.

It may have been the purpose of the solicitor writing this letter, in the event of the non-acquiescence of Roots in all he suggested therein, to recede. It may have been that he intended the perfectly proper suggestion he made to be only tentative. How could any court reading the letter say otherwise ?

How could any court say that the respondent intended thereby, if and when he found this modification impossible, to submit to the obvious risks and embarrassments of carrying out this contract as set forth in the meagre terms of the option.

This letter was, evidently, an effort to extricate

1914

ROOTS v. CAREY.

Idington J.

the respondent from the consequences of his foolish form of contract.

It seems to me clear that no action for specific performance would lie in such a case; even if the requirements of the Statute of Frauds were waived and merely the question of a contract or no contract raised.

I have not only considered the cases cited to us, but also a great many more, in the hope of meeting something like this case. I have failed to find one where such an acceptance has been found effective on such a basis as rested upon herein.

Numerous cases can be found wherein mere notice of acceptance of an offer has been held sufficient.

But, in all these the terms of the contract, either expressly or impliedly, when read in light of the surrounding facts and circumstances, including in many cases the actual dealings of the parties, clearly pointed to notice of acceptance as all that was required to make effective the establishment of the relation of vendor and purchaser as between the parties.

This peculiarly ambiguous form of option now in question does not lend itself to such a method of dealing.

I think it called for an express and absolutely unconditional acceptance of the proposal to make it effective.

And it is to be observed that the solicitors of the respondent in this case, when it came to a question of closing the matter, adopted, by tendering an agreement executed by the respondent, this very method.

The tender thus made was, I must hold, too late.

It is not necessary to decide whether or not the acceptance must, in such a case as this, comply with the requirements of the Statute of Frauds and bind the

acceptor in that sense. I incline to think the acceptance in such a case as this should so comply. All I am, however, holding is that a contract is needed and here there was none.

I have purposely abstained from heretofore entering upon the conduct of the appellants in going through the form of Roots selling to Brown.

It seems to me that this cannot have anything to do with the disposal of the merits of the case.

I can conceive of such conduct having influenced one in the position of the respondent, and thus become an element to consider.

But the respondent frankly says, in regard thereto, as follows:—

Q. When did you discover that the defendant Brown had intervened ?

A. It was after the last day of January, but I cannot give you the date without reference to correspondence.

Certainly he was not influenced, within the time limit in question herein by such transactions as the appellant entered into.

It appears that the respondent had, on 3rd December, after getting this option on the 26th of November, registered a caveat to protect it. And, on the 26th of January, Brown's solicitor mailed to the respondent's solicitors a notice calling upon them to proceed to enforce same.

So far from that being an excuse for not acting more promptly, it seems to me it ought to have operated, if properly heeded, as an incentive to take steps to make the acceptance of the option by respondent fall within the time which I hold he was limited to.

The conveyance to Brown was subject to the rights of the respondent. A tender of acceptance of the

1914

ROOTS v. CAREY.

Idington J.

option and of the cash payment ought (as best answer to Brown's solicitor) to have been made to Roots and, possibly, as a precaution, also to Brown as his assignee. There was ample time (if mail, as is to be presumed, in due working order) to have done something on or before the 31st of January, but nothing was done. And there is no evidence that the respondent's solicitors knew of the transaction between the appellants. For aught that appears, the claim by Brown might have rested on an independent title altogether.

We may surmise they searched the registry, but, if so, they acted rather as if abandoning any claim for their client than otherwise. In this whole phase of the matter we are left entirely to conjecture.

I submit, therefore, we are bound to look to the actual knowledge of the respondent and the time thereof relative to any contention on his behalf founded upon the conduct, or misconduct, if you will, of the appellants, as dispensing with anything implied in the contract. That, I repeat, was after the respondent's rights had ceased. I am unable to see what right any one can rest upon the misconduct of another unless by way of clear proof that it has misled him.

I may respectfully observe that the judgment providing for interest or possession seems to savour of making a contract and not that exercise of discretion the court has in such cases.

I think the appeal should be allowed with costs.

DUFF J.—I have come to the conclusion that the rights of the respondent lapsed on the 31st of January, 1911, for non-compliance with the conditions of the memorandum signed by the appellant in November, 1910. From the beginning the respondent has put

forward and acted upon the view that this memorandum constituted an offer by the appellant which was to be open for acceptance until the end of January, 1911; and the basis of his case is that this offer was accepted by a letter addressed to the appellant on the 20th of January. As his case was presented both in the courts below and here it must fail, if that letter was not an unqualified acceptance of the appellant's offer. The memorandum of November is in the following terms:—

> Exhibit 1.—In consideration of a payment of $10 I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last days of January each year till paid.
>
> E. H. ROOTS.

Construing this memorandum as the respondent construes it, as expressing an offer to enter into a contract of sale and purchase on the terms stated, it seems to me that the letter of the 20th of January was not an acceptance of that offer. I take it to be indisputable that an acceptance, in order to be effective, must be an unconditional acceptance in the sense that the person to whom the offer had been made declares his intention presently to enter into a contract with the offeror in the terms of the offer.

Now, the last paragraph of the letter in question is in the following terms:—

> We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.
>
> Yours faithfully,
>
> H.A.A./A.M.C. H. A. ALLISON.

1914

ROOTS v. CAREY.

Duff J.

This paragraph seems clearly enough to amount to a statement that the writer considers something more must be done before any of the purchase money is to be paid. It implies very plainly indeed that Roots is to be called upon to execute an agreement for sale. And there can be no manner of doubt that this was entirely in accordance with the expectation of Carey and with the advice which Mr. Allison, the writer, had given to Carey already. It is stated by Carey in his evidence in the most unmistakable way that he did not expect any part of the purchase money to be paid until some further document had been signed by Roots. The memorandum in his possession, he says, was not, as evidence of his interest, sufficiently complete for the purpose of enabling him to dispose of that interest with facility, and he was, of course, as he admits, buying the property only with the object of selling it again at a profit in the immediate future. Carey saw Mr. Allison the day after the memorandum was signed and the subsequent correspondence between them shews that Carey's views were understood by Allison at the time and shared by him. In a letter written on the 21st of January, Allison says:—

Exhibit 10. January 21, 1911.

Major A. C. Carey,
209 Lendrum St.,
Winnipeg, Man.

Dear Sir,—Referring to your letter of the 11th inst. and my reply thereto, I beg to say that I infer from your letter that you do not desire to pay for land in full, especially as option does not say anything in regard to interest, and that you only desire to pay one-third of the purchase price and enter into an agreement for sale, or accept title and give a mortgage for unpaid balance.

The subsequent proceedings shew that Mr. Allison fully realized the importance of getting from Roots

1914

ROOTS
v.
CAREY.

Duff J.

a document more precise and more serviceable for Carey's purposes than the one he already had.

To return to the letter of the 20th of January: The last paragraph being such as it was, let us read the preceding paragraph in connection with it.

> Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

The writer, in this paragraph, does not declare in terms that he accepts the offer or that he there and then binds himself to a contract in the terms of the offer. Then, is an acceptance of the offer necessarily implied in the statement that Carey is prepared to pay one-third of the purchase price, and that the solicitors are anxious to "close the matter out" at once? There seems to be no such implication. The letter is not accompanied by a cheque for the instalment of the purchase money which, assuming the offer accepted, would be payable on the 31st of January, and the letter does not appear to have reached its destination until the 24th of January. In the circumstances "we are anxious to close the matter out at once," especially when taken with the paragraph to which I have just referred, would seem calculated to convey an intimation that, in the view of the respondent's solicitors, the payment of one-third of the purchase money to which the letter refers was a part only of some operation described as "closing out the matter," which operation would involve the execution of some additional document. In a word, I do not think this letter does express unequivocally an intention to assume *simpliciter* the obligations involved in the acceptance of the offer, viz., to pay the residue of the purchase money according to the terms stated; and, looking at all the circumstances, I think

1914

ROOTS v. CAREY.

Duff J.

the proper inference is that it was not intended to do so.

On this ground alone, I think the appeal ought to be allowed.

There is, however, another possible construction of the memorandum of November on which, perhaps, something ought to be said. It seems capable of being read as intended to embody a present agreement in consideration of the payment of ten dollars on the part of Roots to convey to Carey the lands mentioned, on the payment of the purchase price according to the terms stated. According to this view, the document would express the terms of a concluded bargain under which Carey had assumed no obligation for the future. On this construction of the document, punctual performance by Carey of the conditions as to payment according to the letter of the agreement would be an essential condition of his right to demand a conveyance; and as the payment due on the 31st of January was not made, it would be incumbent upon the respondent to establish facts precluding the appellant from insisting upon the strict performance of the condition. The learned trial judge appears to have held that, inasmuch as Roots had, in December, conveyed the land to the defendant Brown, he had thereby disabled himself from carrying out the contract and that this would be sufficient to excuse the respondent from the strict performance of the condition. It may very well be that on discovery of the conveyance to Brown, the respondent could have treated the execution of the conveyance as a breach of the contract embodied in the memorandum of November and have sued for damages; but the respondent comes into court declaring that he has a subsisting and binding agreement of sale

and purchase; and non-performance of one of the essential conditions of his rights under that contract must be fatal to him unless he can establish some valid ground of dispensation. The fact that the appellant has made default in the performance of his obligations even though it should be of such a character as to entitle the respondent to treat the agreement as rescinded, does not afford such a ground unless the respondent can also shew that he was thereby prevented from performing the condition in respect of which he is in default himself. The respondent has made no attempt to shew that. We do not know even that he was aware of the fact of the conveyance having been made before the 31st of January. If he did, as Chief Justice Harvey appears to assume, receive notice of the conveyance, there was nothing to prevent him paying the money to Brown, as he clearly would have been entitled to do. *Ex parte Rabbidge*(1), at p. 370; *Re Taylor*(2), at page 573. If he was not aware of it, then there is no explanation of his failure to pay Roots which would have been perfectly safe, of course, in absence of any intimation from Brown that he had become the owner of the property. In my opinion, the truth is, as I have already intimated, that, on the 31st of January, when the first instalment of the purchase money became due, the respondent had no intention of taking up the option unless he obtained some further instrument which would afford entirely satisfactory evidence of a concluded agreement of sale and purchase, having regard to the object he had in view, viz., a re-sale of the property at the first favourable opportunity.

(1) 8 Ch. D. 367.

(2) (1910) 1 K.B. 562.

1914

ROOTS v. CAREY.

Idington J.

It ought further to be observed that the respondent does not by his pleadings allege that he was prevented from performing his condition by the act of the appellant or that the appellant's conduct was such as to preclude him from alleging non-performance of the condition. He alleges a contract concluded by the acceptance (so called) of the 20th of January. The paragraphs of the statement of claim bearing upon this point are paragraphs 4, 5, and 6, as follows:—

4. Prior to the 31st of January, A.D. 1911, the plaintiff duly accepted the said option or agreement.

5. The said defendant Roots refused to carry out the terms of the said option or agreement, and, by transfer bearing date the 3rd day of December, A.D. 1910, transferred said land to the said defendant Brown, which said transfer was registered in said land titles office on the 17th day of December, at 12.40 p.m., as 1,659 AF., and the defendant Brown thereby became and still is the registered owner of said land.

6. On the 21st day of March, A.D. 1911, the plaintiff tendered the defendant Roots an agreement for sale and purchase in duplicate, covering the said lands and embodying all the terms of said option or agreement, both copies of which said agreement for sale and purchase were duly executed by the plaintiff, and, at the same time, tendered to the said defendant Roots the sum of $1,347.19 and demanded execution of said agreement for sale and purchase, and the said defendant Roots thereupon refused to execute said agreement and to accept the said sum of $1,347.19.

No amendment was asked for at the trial and I am unable to find, from a careful perusal of the record, that it was suggested at the trial that any act done by the appellant had prevented the performance of the condition by the respondent. It is important to note this for this reason. In the court of appeal, the learned Chief Justice appears to have considered he was justified in inferring that the notice sent by Brown to the respondent was the cause of the failure on the part of the respondent to pay the purchase money. I have already said that, in my opinion, such

1914

ROOTS v. CAREY.

Idington J.

is not the proper inference from all the evidence. What I now desire to emphasize is that no such inference ought to be drawn unless it were clear that all the material evidence was before us, as the point was neither pleaded nor was the evidence directed to it at the trial.

In these circumstances I think the appeal should be allowed and the respondent's action dismissed with costs.

ANGLIN J. (dissenting).—I regard the plaintiff's solicitor's letter of the 20th of January, 1911, as an unconditional acceptance of the option given to the plaintiff by the defendant. The mere suggestion that the transaction should be carried out by the exchange of a deed and mortgage did not make the acceptance conditional. The contention that it did is purely an afterthought.

It was not so regarded at the time. As the defendant, Roots, himself admitted on his examination for discovery, he proceeded, on a statement of Brown, to whom he had resold the land before the 20th of January, that the option given Carey was no good, and he adds that his sole ground for repudiating his contract with Carey was that he was obtaining $1,000 more for the land from Brown.

Payment of the money due on the 31st of January, 1911, was not a condition of a valid acceptance under the terms of the option. From the time of the receipt by the defendant of the letter of the 20th of January, the relation of vendor and purchaser subsisted between the parties.

Time was not expressly made of the essence of the agreement so constituted. But if, for any reason, it

1914

ROOTS v. CAREY.

Anglin J.

should be deemed to be so, I am of the opinion that the defendant waived tender of the instalment due on the 31st of January. He handed over to Brown the plaintiff's letter of the 20th of January telling him that it was his business to attend to it. Brown, on the 26th of January, caused a notice to be sent by mail to Carey requiring him to take proceedings within sixty days to establish his right to maintain a caveat which he had lodged. The Chief Justice, sitting in full court, expressed the view that Brown's notice reached the plaintiff's solicitors on or about the 28th of January. That notice informed the plaintiff that Roots had transferred his interest in the land to Brown and that the plaintiff's rights under his own option were contested. It was tantamount to a repudiation of Roots's contract with the plaintiff and, under the circumstances, may well be regarded as the act of Roots himself. I think the plaintiff's right of action accrued immediately upon this notice being given and that he was not obliged to make tender before bringing it. Tender was in fact made on the 20th of March. The reason for the delay is not explained though it is more than suggested that an explanation might have been given by the plaintiff's solicitor, who was, unfortunately, ill and not available as a witness.

In my opinion there was a binding contract, and no good reason has been shewn why it should not be carried out.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Mahaffy & Blackstock.*
Solicitors for the respondent: *Clarke, McCarthy, Carson & Macleod.*

THE ROYAL GUARDIANS (DEFENDANTS) ..... APPELLANTS;

AND

MARY OLIVE CLARKE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1913
*Nov. 14.
1914
*Feb. 3.

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

Benevolent society—Life insurance—Contract—Payment of assessments—Extension of time—Rules and regulations—Place of payment—Demand—Default—Suspension—Authority to waive conditions — Conduct of officials — Estoppel — Company law—Arts. 1152, 1164, *C.C.*

By the constitution and by-laws of a mutual benevolent society death indemnities were assured to members who, in order to maintain good standing and entitle their beneficiaries to the indemnity, were, thereby, required to make prompt payments of monthly assessments within thirty days from the dates when they became payable. In the subordinate lodge of which C. was a member it had for some time been the practice of its financier to receive such payments fifteen days later than the thirty days so limited and, if then paid, members were not reported as having been in default and, *ipso facto*, under suspension according to the regulations provided by the constitution and by-laws incorporated in the certificate whereby the indemnity was secured. For several years the financier of the subordinate lodge had habitually received these payments from C. at his residence, on or about the last day of this extended term. Seven days after the expiration of the thirty days for payment of the last assessment, and while it was still unpaid, C. died and, on the following day, the overdue assessment was paid to the local financier and a receipt therefor granted by him. The Grand Treasurer of the Society refused to accept this payment on the ground that C. was then under suspension and was not a member in good standing at the time of his death.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

ROYAL GUARDIANS v. CLARKE.

Held, affirming the judgment appealed from (Q.R. 21 K.B. 541), Duff J. dissenting, that by the course of conduct in the subordinate lodge, of which the Grand Lodge was aware, the condition as to prompt payment had been waived, that C. remained in good standing until the time of his death and that the death indemnity was exigible by the beneficiaries. *Wing* v. *Harvey* (5 DeG. M. & G. 265; 43 Eng. R. 872); *Tattersall* v. *People's Life Ins. Co.* (9 Ont. L.R. 611); *Buckbee* v. *United States Annuity and Trust Co.* (18 Barb. 541); *Insurance Co.* v. *Wolfe* (95 U.S.R. 326); and *Redmond* v. *Canadian Mutual Aid Association* (18 Ont. App. R. 335), referred to.

Per Fitzpatrick C.J. and Brodeur J.—As no place of payment had been indicated, according to the law of the Province of Quebec (art. 1152 C.C.), assessments were payable at the domicile of the assured; consequently, owing to the practice which had prevailed as to the receipt of payment at C.'s domicile and because no demand for payment had been made at such domicile, there had been no default on the part of C. and he had not become suspended at the time of his death.

Per Duff J., dissenting.—Neither the Grand Lodge nor the subordinate lodge or their officials had power to waive the conditions as to payment prescribed by the constitution and by-laws and the certificate of membership of C.; these instruments constituted the contract of insurance and sufficiently designated the office of the financier of the subordinate lodge as the place where payment of the assessments was to be made; even if article 1152 C.C. applies, no notification was given or proof made conformably to article 1164 C.C., and consequently, failure to make payment of the assessment due within the thirty grace days, at the office of the subordinate lodge, worked a default and, *ipso facto*, the suspension of membership, and, therefore, C. was not in good standing at the time of his death so as to entitle the beneficiaries to the indemnity according to the regulations of the society.

Held, further, *per* Duff J.—As the member must be presumed to know the limitations of the authority of the Grand Lodge, the subordinate lodges, and the officials of each of them, as determined by the constitution and by-laws, the ostensible authority of officials cannot, for any relevant purpose, be of wider scope than the actual authority which is defined specifically and exhaustively by the constitution.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of

(1) Q.R. 21 K.B. 541.

Dunlop J., in the Superior Court, District of Montreal, by which the plaintiffs' action was maintained with costs.

The action was brought by the beneficiaries named in a beneficiary certificate issued by the defendants, a mutual benevolent society, the late Joseph P. Clarke, deceased, a member of a subordinate lodge, constituted by the Grand Lodge of the defendants, which was formerly known as "The Ancient Order of United Workmen of Quebec and the Maritime Provinces," the certificate in question, together with the Constitution and by-laws of the society, being, in effect, a contract of life insurance securing to the beneficiary an indemnity of $2,000 payable upon the death of the member provided he was in good standing in the order at the time of his death.

The circumstances of the case and the questions in issue on the present appeal are stated in the judgments now reported.

T. P. Butler K.C. and *E. Lafleur K.C.* for the appellants.

R. C. McMichael K.C. and *R. O. McMurtry* for the respondents.

THE CHIEF JUSTICE.—The contract here is to be found in the certificate and the application for membership and both make it a condition that, if the assessments are not paid the policy lapses; the payment of the premium is made a condition precedent to the continuance of the liability, or, in other words, to be entitled to the benefits on the policy a member must be in good standing at the time of his death.

1914

ROYAL GUARDIANS v. CLARKE.

The Chief Justice.

Clarke, the beneficiary, died on the 7th of September, 1908, and the question is: What was his position at that time with respect to the society? It is admitted that the assessments for August, 1908, were not paid, and it was argued on behalf of the society, that, in consequence, he was not in good standing, and his heirs are not entitled to collect the benefits sued for. This is a good defence, unless, as found in the courts below, Clarke was not in default, because it was usual and customary for the financier of the various lodges to receive from their members payment of their monthly dues and assessments after the expiration of the days of grace prescribed by the certificate. There are concurrent findings to that effect in both courts below and those findings are fully borne out by the evidence. Leroux, the financier, testifies that the larger proportion of the members' assessments were paid after the expiration of the thirty days and within the first fifteen days of the following month. It is admitted that the settled practice was not to send in the financier's report, as required by the conditions of the certificate, at the end of the month for which the assessments were due, but fifteen days later, and it is explained that this practice arose out of the fact that the members were usually in arrears in the payment of their assessments. Mr. Patterson, who describes himself as the "General Manager of the Society," admits the existence of this practice and will not deny that it is attributable to the cause assigned by the financier, *i.e.*, to the prevailing custom of extending the days of grace within which members might pay their assessments. Patterson's letter to the financier, written after he heard of Clarke's death, is not to be explained

1914

ROYAL GUARDIANS v. CLARKE.

The Chief Justice.

on any other assumption. Clarke died within the extended period of grace.

There is this additional fact to be considered: there is no provision in the contract with respect to the place of payment of those assessments, in which case they should be collected from the beneficiary at his domicile under the law of Quebec where the contract was made and the society carried on its operations under a charter or licence obtained in the province. (Art. 1152 C.C.) It was proved beyond all doubt that the practice was to collect the assessments from the members, in which case the insured had the right to rely on that practice. It is also clear, on the evidence, that Patterson, the "Grand Recorder," received those assessments as they were paid, after the expiration of the delay with, I am satisfied, knowledge of all the circumstances. I do not think the Society can now be heard to deny that the financier, the agent, whose special duty was to collect the assessments, had the authority to extend the delay: *Nicholson* v. *Piper* (1). In the course of business, as carried on with the knowledge of those in authority, Leroux had the power to do what he did. I am of opinion that, in this case, the Society must be held to have adopted his act: *Wing* v. *Harvey* (2). It is the law that when the practice of collecting the assessments in insurance matters is well established, the beneficiary is entitled to rely upon it, and there can be no default or forfeiture if a demand is not made on him. Planiol, vol. 2, No. 2159, says:—

La résiliation ou la suppression de l'assurance n'ont lieu qu'au cas où la prime arriérée était portable, c'est à dire qu'elle devait être payée par l'assuré au domicile de l'assureur ou de ses agents. D'ordinaire les compagnies stipulent que les primes seront portables, mais

(1) 23 Times L.R. 620, at p. 621.

(2) 5 DeG. M. & G. 265; 43 Eng. Rep. 872.

1914

ROYAL GUARDIANS v. CLARKE.

The Chief Justice.

comme elles ont l'habitude de faire encaisser les primes à domicile par leurs agents, pour être plus sûres de leurs rentrées, la jurisprudence décide que cette circonstance change la nature de la prime qui, de portable qu'elle était d'après la police, devient quérable (très nombreux arrêts depuis plus de cinquante ans: Cass. 21 août, 1854; D., 54.1.366; S.V., 54.1.359; Cass. 31 janvier, 1872; D., 73.1.86; S.V., 75.1.113). Cette jurisprudence a été pendant longtemps très énergiquement combattue par les compagnies; elle n'est plus discutée aujourd'hui. Vide Laurent, vol. 16, No. 182, page 245; Fuzier-Herman, vo. "Assurance," nos. 697 *et seq.*

The appeal should be dismissed with costs.

IDINGTON J.—The appellants are a fraternal society carrying on a life insurance business. They were, as many of these societies, constituted by a constitution which vested the supreme authority in a Grand Lodge which was enabled thereby to charter subordinate lodges with definite powers.

The members of these subordinate lodges managed the details of their business by acting within the powers so granted. These members were in this instance enabled to obtain life insurance by different plans, of which the one now in question provided for monthly payments of a fixed sum according to the age of the members; to be advanced, however, at the end of each successive period of five years during the life of the member.

The payments were made to the officer of the local lodge called its "financier." No place of payment was fixed though, according to the practice in many instances, they were made at the lodge-room.

The monthly payments are spoken of as assessments and as having been levied. This seems to me rather an inapt way of expressing the substance of the transaction.

I rather think there are insurance societies or com-

panies which proceed upon the basis of making good the losses sustained by a varying payment commensurate with the loss to be made up, and in such cases these terms might be apt ones to use.

But when the monthly payment was fixed and to be progressively increased by a mere mathematical rule, as here, other considerations are applicable to such a system than those carried on upon the basis I have just suggested as possible.

The Grand Lodge officers, each month, published in a paper called "The Protector," mailed to each member, a list of these monthly dues, by way of reminding the members of their respective amounts of dues.

These monthly dues became payable on the first of each month and, according to the term of the constitution, should have been paid within thirty days thereafter.

The Grand Recorder of the Grand Lodge was, to use his own language,

> practically you might say the manager of the institution in the Province of Quebec and the Maritime Provinces.

This Grand Recorder tells us a practice grew up of his sending out, about the twentieth or twenty-fourth of the month, to each of the financiers of the local lodges a form on which was entered the list of the members in each lodge with the amount payable by each for that month.

On this form the financier was expected to fill in the respective amounts paid him by each member, and such facts as the suspension or death or withdrawal of any member, and when so completed, to return it with the money collected to the Grand Recorder.

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

The system was simple and, if acted upon promptly, brought under the eyes of this manager of the institution exactly how each member stood.

In the local lodge now in question there were some thirty to forty members, no doubt slightly varying from time to time.

The number ran up into the hundreds in some of the local lodges.

But, in any case, there does not seem to have been any large amount of clerical work involved in completing the return after the payments were made. So far as I can see there was nothing involved in all this but a few hours' labour next day after the end of the month, yet, for some reason or other, as much as fifteen days was allowed for it, at other times ten days, and at the time of the trial of this case, eight days was fixed for such returns. At the time we are concerned with, it was fifteen days.

I will advert to the bearing of all this presently.

The late Mr. Clarke had entered "Columbus Lodge, No. 26," on the 15th of December, 1896, and continued as a member till death, save one or two suspensions which are now out of the case or at least are not made part of the defence herein — and the alleged suspension of September, 1908.

He died, suddenly, on the 7th of that month and a friend paid, next day, the sum due by him for the month of August to a person acting for the financier in his absence. The appellant, the Grand Lodge, refused to accept this money from the financier, or recognize payment, claiming that the insurance had ceased under and by virtue of the terms of article 98 of the Constitution, which was as follows:—

98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the financier of his lodge by each member of the Order on the first day of each month unless he be notified to the contrary and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

The learned trial judge and the court of appeal have held that by virtue of a long course of dealing adopted by the parties this cannot furnish a bar to recovery.

It has been argued, with great force, before us that the language of this rule is so explicit and the limitation of the authority of the financier of the Columbus Lodge, No. 26, so clear that neither could this term of the constitution be varied nor the authority of the financier be so extended as to justify its variation.

I may observe that this Constitution, of which we have heard so much, seems to me nothing more nor less than a contract which the association and those applying for membership therein each undertook to observe.

And I would further observe that the association, acting by and through its duly constituted officers, may by its course of conduct in its relations with its members as their insurer or with other persons in any of its dealings with them vary the terms of any contract not requiring by law to be written or may vary the mode of carrying same out; so long as not departing from the ordinary lines of conduct necessary to the success of its business as an insurer or not in absolute violation of the organic terms of the instrument under which it is operating.

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

Let us, therefore, see just what this article 98 says and implies.

It expressly provides for the possible case of a "special notice" and the case of a member being "notified to the contrary" of the general rule that payments were to be made as specified in the rate table.

Surely if anything ever can be implied, it is implied in this very article, that the Grand Recorder may so notify and that if he did, even if in excess of authority I submit, those insuring and relying upon his express notice are entitled to have his notification observed.

Nay, more, I submit it is implied thereby that in some such cases it is to be presupposed that he had authority for so acting.

I am not concerned with reconciling all the terms of this instrument. I am only concerned to know that it clearly never was intended that the hands of all the officers acting under it were so tied that they could not, for what seemed to them good and sufficient reasons, change the terms of the time of payment.

Once we thus, by the manifest implication that some of the administrative officers had such powers, get rid of the need of all or a majority even of the members of the association sanctioning such proposals we have the very ordinary case of the conduct of the executive alone to consider.

That an executive so empowered can bind by their conduct those it represents in carrying out its contracts and its contractual relations with others, does not seem to me to need argument. Now let us see how little there was to do or be left undone herein as between appellants and those it insured.

The two last lines sound very formidable to one

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

who does not stop to consider. They admittedly mean that a man may become *ipso facto* suspended at midnight, and next morning pay a trifling sum and be *ipso facto* restored.

This is not the case of requiring to consult any one or ask his leave or be examined by a medical man or, in short, anything but the awakened will of him most concerned. It is not the case which article 107 is evidently aimed at.

Its whole purpose is evidently to hold the lash over the laggard — nothing more — unless he actually wishes to withdraw. To say that the waiver of such a term of this contract is something beyond the competence of the executive, seems to me idle.

The grave question is whether or not the executive did in fact waive it and to the extent claimed and in such deliberate fashion by their long course of conduct as to preclude them from setting up herein the contrary.

Although Patterson, the Grand Recorder, was acting with and under the directions of an executive committee, we must not lose sight of the fact that he was "practically the manager of the institution."

He, on the morning of Clarke's death being announced, telephoned to one Gilbert, acting for Leroux, the financier of Columbus Lodge, No. 26, to know if Clarke had paid his dues of last month, and followed this up by the following letter:—

J. Leroux, Esq.,
Financier, Columbus Lodge, No. 26.

Dear Sir and Bro.—Be good enough to give the date of last payment made by the late Bro. J. P. Clarke and amount of same. Please be particular to give this exact as you may be called upon to attest

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

same under oath. I beg to warn you not to accept any money on his behalf for assessments. Kindly reply at once.

Yours fraternally,

(Signed) A. T. PATTERSON,
Grand Recorder.

It is not often honest men furnish such cogent evidence against themselves as this conduct of Grand Recorder Patterson does, in my judgment, against him relative to the knowledge of the course of dealing now in question, when read in light of all the previous history and surrounding facts and circumstances.

Why this feverish haste and urgency a week or more after the books had been forever closed if he honestly believed this clause of the constitution had been observed — and did not know that it had been more honoured in the breach than in the observance ?

As the evidence he gave is full of that sort of equivocation, and apparently mental reservation, regarding which we need the eyes and ears of the learned trial judge to guide us in appeal, I accept that which his report indicates as being conclusive so far as it goes.

I shall, therefore, not deal at length with the details of the evidence bearing upon the question of the knowledge of the executive, by and through Patterson, of almost all, and in substance all, that Leroux, the financier, tells us. And assuming the Grand Recorder knew or had good reason to know the substance of what Leroux tells we need not doubt the conclusion to be reached.

I must observe, however, that it seems impossible to me for any man of the alert mind of Mr. Patterson, as shewn in the course of his evidence, not to have appreciated the full meaning of the financial secretaries' need for more time to make their returns on any other

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

hypothesis than that the moneys had not always come in just as quickly as the threatening rule required.

I have outlined the nature of these returns and the little to be done if money all in and ready to complete the business. Why was fifteen days needed ? There is no explanation. Why was the period varied from time to time ? Who took the side of the laggards in all the discussions leading to these changes ? Who was afraid to cut them off ? Who was to profit by their business ? Who was to lose if they were cut off ?

Is it not plain as if written that, while keeping in the constitution a plea for urgency, the executive was anxious to do business ? Is it not equally plain that all this course of dealing was saying to the members, though the letter says thirty days we mean you have forty-five days if you cannot pay ?

In doing so they were but conforming by acts and conduct to the actual language of the policy in the case of *Tattersall* v. *The People's Life Insurance Co.* (1), which I suppose is a usual provision.

Even fraternal societies have to observe the trend of competitive exigencies in the insurance business and act accordingly.

I think appellants' conduct in this instance, and so many others in the same matter of time, was tantamount to extending the time of payment and should be treated accordingly.

The remarkably clean slate that the reports for months produced do shew, regarding the lapses of the kind now in question, though shewing others more serious in import certainly, did not pass unnoticed

(1) 9 Ont. L.R. 611.

1914

ROYAL GUARDIANS v. CLARKE.

Idington J.

unless it was just what this manager from his knowledge of the situation expected.

When we consider the frame of the Grand Recorder's approved form which has a column for "suspended, etc.," under heading "membership deceased" and another column for "arrears," and find, in practice, that it was under this latter and not under the former that such defaults as in question were put when the report was made to conform to what the Grand Recorder approved in this very instance, surely we must conclude there was a distinction in his mind between actual suspension and merely being in arrears with a "susp" added.

However that may be, it seems suggestive.

As to the local law requiring the demand of payment from the debtor I do not say more than that such doubt as created thereby lent aid to this way of looking at the business in hand.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I shall first state what appear to me to be the relevant facts, that is to say, the facts upon which, as it seems to me, the rights of the parties to this litigation must be determined. Other facts upon which the respondent largely rests her case, but which seem to me, for reasons I shall state, to be beside the point, may be considered later. On the 15th day of December, 1896, the deceased, Joseph P. Clarke, became a member of the Columbus Lodge of the Ancient Order of the United Workmen of Quebec and the Maritime Provinces and received a beneficiary certificate, the material provisions of which are as follows:

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC AND THE MARITIME PROVINCES, DOMINION OF CANADA.

This Certificate cannot be assigned or hypothecated.

This Certificate issued by the authority of the Grand Lodge of the Ancient Order of United Workmen of Quebec and the Maritime Provinces, witnesseth that Brother Joseph P. Clarke, a Workman Degree member of Columbus Lodge, No. 26, of said Order, located at Montreal, in this jurisdiction, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen of the Jurisdiction of Quebec and the Maritime Provinces and to designate the beneficiary to whom the sum of TWO THOUSAND DOLLARS, without use or interest of the Beneficiary Fund of the Order at his death, be paid.

This Certificate is issued upon the express condition that said Joseph P. Clarke shall in every particular while a member of said order comply with all the laws, rules and requirements thereof.

* * * * * *

ENDORSEMENT.—"ASSESSMENT SYSTEM."

Besides the terms and conditions appearing in the body hereof, this Certificate is issued upon the following further terms and conditions which are to be read as forming a part of this contract, viz.:—

(1) That the member to whom this Beneficiary Certificate is granted is bound not only by the Constitution, Laws and Amendments of the Order now in operation, but also by any Amendments that may subsequently be made thereto.

(2) That only persons entitled under such Constitution, Laws and Amendments to become beneficiaries can be named as such by the member to whom this Certificate is granted.

(3) *That this Grand Lodge shall not be liable to pay any sum under this Contract,* if * * * *he is not a Member of this Order in good standing.*

(Sig. of Member)..... Attest..... Recorder ..... Lodge, No. .....

The Ancient Order of United Workmen appears to have been organized, in 1868, in Pennsylvania. The Order comprised a Supreme Lodge by which Grand Lodges of inferior jurisdiction were established, the Grand Lodge of Quebec and the Maritime Provinces being first constituted in 1894. In 1898, this Grand Lodge was registered under the Benevolent Associations Act of the Province of Quebec and, thereby, be-

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

came a body corporate. In September, 1907, the Grand Lodge for Quebec and the Maritime Provinces seceded from the parent order and became an entirely independent body. In 1908, the name was changed by the authority of an order of the Lieutenant-Governor in Council of Quebec to "The Royal Guardians" and in May, 1910, after the commencement of this action, the Royal Guardians were incorporated by an Act of the Parliament of Canada. The constitution of the order and the laws governing the Grand Lodge and the members of the order subject to its jurisdiction, as adopted in 1906, are in evidence and (with certain changes not material to any question on this appeal made necessary in consequence of the secession from the jurisdiction of the Supreme Lodge of the parent order) are admitted to have been the constitution governing the Grand Lodge in 1908, when Clarke died, and the suspension was alleged to have arisen which is the principal subject in controversy before us. The constitution provides, article 2:—

> 2. The following Constitution, as hereinafter set forth, subject to such changes as may be ordained by the Supreme Lodge, shall govern this Grand Lodge and the subordinate lodges and members of the Order in this jurisdiction, and no amendment or alteration shall be made in the said Constitution by this Grand Lodge except at a stated or special meeting of Grand Lodge, nor unless notice of such amendment shall have been given to the Grand Recorder sixty days prior to session of Grand Lodge and a copy thereof sent by him to each subordinate lodge thirty days previous to such meeting, and that a two-thirds majority of votes of the members of G. L. present at such meeting of Grand Lodge shall be cast in favour of such amendment or alteration.

By article 4, the Grand Lodge was to consist of certain officers and representatives from subordinate lodges within the jurisdiction.

By article 78:—

The following rules (arts. 78-118) are prescribed for the government of this Grand Lodge Beneficiary Jurisdiction in the collection, management and disbursement of the Beneficiary Fund.

By article 79: The Grand Lodge guarantees payment of the amount mentioned in the beneficiary certificate to the members named, provided:—

That said member shall fully comply with each and all requirements of the hereinafter specified conditions, with the Constitution, and the general laws governing the Order and shall at his death be a member of the Order in good standing.

The provisions as to the manner of assessment, the period of grace allowed for the payment of the sums levied and as to suspension for non-payment and reinstatement are set out in articles 96-110 inclusive. The parts of these provisions which are immediately material are these. Article 97 provides that (in certain circumstances mentioned in the article indicating that the beneficiary fund of the Grand Lodge needs replenishment in order to provide funds for the payment of benefits),

it shall be the duty of the Grand Recorder to call upon the subordinate lodges to forward the beneficiary funds in their respective treasuries and at the time of making such call to make an assessment upon each member of the Order who shall have received the Workmen Degree prior to the date of the last assessment.

Sections 98, 99 and 100 (pp. 51 and 52) are as follows:—

98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month unless he be notified to the contrary, and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his Beneficiary Certificate shall thereby lapse and become void.

99. Every call made upon subordinate lodges to forward Bene-

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

ficiary Funds shall be made upon the first day of the month that is not Sunday or a legal holiday, shall contain a list of deaths officially reported to the Grand Recorder prior to the last day of the preceding month, and not included in the preceding call, and all necessary instructions relative to forwarding the funds called for. The notice of such call is given by the Grand Recorder having it printed in the official organ of Grand Lodge, or by mailing a special notice to the Recorder of each Lodge.

100. Any member not receiving the said official organ or official notice before the fifteenth day of any month shall write the Financier of his Lodge to ascertain whether an assessment has been made and shall also by registered letter, give notice to the Grand Recorder of the non-receipt of such official organ or notice: otherwise default to pay an assessment within the required delay shall not be excused on any plea of want of notice.

The two remaining sections which are material are sections 106 and 107 which are in these terms:—

106. The Grand Recorder is hereby instructed, so soon as he receives the Subordinate Lodge's report to give notice to any member reported as having failed to pay to the Financier of the Lodge of which he is a member, on or before the expiration of thirty days after an assessment has been made for the Beneficiary or other Funds, and who, if under the Level Rate Plan, for a period of three years has not sufficient money to his credit in his reserve to cover the amount of such assessment, that his interest and benefit, and those of all claiming through him, from and after said date, and such member shall not be reinstated except as hereinafter provided. Such notice to be delivered or sent by mail (registered) to the last address of such member known in the Grand Recorder's office.

The above notice by the Grand Recorder is, however, only a matter of courtesy, and failure to give or to receive the same cannot be pleaded by a defaulting member, as in any way avoiding the suspension caused by his default.

Payment to the Financier of his Subordinate Lodge within thirty days from date of such suspension shall be for the purposes of this clause considered as payment to the Grand Lodge.

107. Any suspended member who has forfeited all his rights by reason of non-payment of assessments for the Beneficiary or other Funds, may be reinstated, if he be living, at any time within a period of three months from the date of such suspension, upon the following conditions, and none other, that is to say: He shall pay all assessments that have been made during that time, including the one or more for the non-payment of which he had become suspended, together with his dues to date, and if thirty days have passed since such non-payment, he shall at the same time furnish a certificate, by

a duly qualified medical practitioner, that he is in good health. The Financier shall report the same to the Lodge at its next stated meeting and the fact of the reinstatement shall be entered on the minutes; such report, however, is not to be a condition precedent to the reinstatement. But it is hereby expressly declared that the death of a member while so suspended, and during the said three months, shall debar him from being restored into good standing or from being reinstated, by payment of any assessments, either of the one or more for the non-payment of which he became suspended, or those that shall have been made against him during the said period; it being an absolute condition that all membership rights are forfeited by such non-payment, and the Beneficiary cannot claim any rights in case the member should die before complying with all the above conditions and before being reinstated as provided in this constitution and payment or tender by his personal representative or representatives during said period, shall in no case be held to restore the said member into good standing in the Order.

On the 1st of August, 1908, a call was made upon the subordinate lodges under the provisions of article 97, and, at the same time, an assessment was made and notice of it was given in the official organ of the Grand Lodge. The assessment and the notice are as follows:

Official Notice of the Beneficiary Fund Assessment, No. 8, for August, 1908.

Office of the Grand Recorder,
Fraternal Chambers, A.O.U.W. Building,
Cor. Sherbrook St. and Park Ave.
Montreal, Que., August 1st, 1908.

To the Members of the Ancient Order of United Workmen,
Jurisdiction Grand Lodge of Quebec and the Maritime Provinces.

You are hereby notified of the following deaths, necessitating the levy of one assessment:—

* * * * * *

In order to provide for payment of death losses, Assessment No. 8 is hereby levied upon each Workman Degree member who has taken the degree prior to the 1st of August, 1908, according to Tables of Rates in adjoining column.

The said assessment is now due, and must be paid to the Financier of your Lodge on or before the 31st instant. Failing to comply within the above stated dates, you will forfeit all your rights, benefits and privileges, by becoming suspended.

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

Should you change your address notify your Financier, also the publisher of "The Protector," giving name and number of your Lodge.

* * * * * *

A. T. PATTERSON,
Grand Recorder.

Note (section 97, Grand Lodge Constitution, amended 1907).—Unless otherwise announced by the Grand Recorder, either by the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month, and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

Clarke died on the 7th of September, 1908, without having paid this assessment. After his death the amount was paid by some friends to the financier of his lodge, who accepted it but the responsible officers of the Grand Lodge taking the position that Clarke had incurred suspension by reason of the non-payment of his assessment on the 31st of August, refused to recognize this payment and declined to pay the benefits to which the respondents would have been entitled had Clarke been a member of the order in good standing.

The rights of the beneficiaries under Clarke's certificate rest upon the condition, which is an essential condition of them, that he shall have been a member of the order in good standing at the time of his death and that the beneficiary named shall be entitled to demand payment under the provisions of the constitution and laws of the order in force at the time of his death. Articles 97, 98, 100, 106 and 107, above quoted, provide in the most explicit terms that the failure to pay an assessment at the expiration of thirty days after it is made (and, by article 98, an assessment is deemed to have been made on the first of each month unless notice to the contrary is given) shall *ipso facto*

involve the suspension of the delinquent member with the consequence of the lapsing of all rights under that member's beneficiary certificate; and section 107, moreover, contains a specific declaration to the effect that on the death of a member while under suspension the provisions of the constitution as to reinstatement cease to have any application and all potential rights under the beneficiary certificate irrevocably disappear.

I have been forced to the conclusion, very much indeed to my regret, that there is nothing in the circumstances of this case affording any way of escape from the operation of these provisions which I think have the construction and effect contended for by the appellants and that the claim of the respondent fails. The grounds upon which the respondent rests her case are two: 1st, it is contended that, giving the articles referred to the legal effect assigned to them by the law of Quebec, the assessment was payable at the domicile of the member, that, consequently, it was the duty of the creditor to make demand at the member's domicile and that its failure to do so had the effect, in law, of excusing non-payment. The second contention, I am obliged to say, I have some difficulty in stating with precision; the general effect of it is that the Grand Lodge is precluded, because of certain alleged practices connected with the collection and receipt of assessments, from setting up the articles of the constitution upon which it relies.

First, then, of the legal effect of these articles as touching the place where the payment of the assessments is exigible.

A question suggests itself *in limine* which it may be worth while to indicate although in my view it is

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

unnecessary to pass any opinion upon it; and it is this: Is the legal effect of Clarke's contract necessarily ruled by the law of Quebec?

The Grand Lodge of Quebec and the Maritime Provinces was when first constituted an unincorporated association having members and subordinate lodges in the Maritime Provinces as well as in Quebec. The Grand Lodge was affiliated with other lodges all under the jurisdiction of the Supreme Lodge of the order which had been organized in Pennsylvania.

The contract governing the rights of the members of the order in Quebec and the Maritime Provinces was expressed in the constitution of the Grand Lodge, subject, however, to the provisions of the constitution of the Supreme Lodge in case of conflict. It might, I think, be suggested with some shew of plausibility, that, in the matter — the vital matter — of the payment of assessments, the constitution itself affords conclusive internal evidence of an intention that the obligations of the members, whether in Quebec or in the three Maritime Provinces, should be governed by a single law and, moreover, having regard to the origin of the order and of the constitutional provisions upon this subject and to the actual circumstances of this particular Grand Lodge itself, that these provisions contemplate in this respect the application of the common law rule according to which, reasonably, the debtor seeks his creditor rather than the rule of the French law.

In this matter of the law to be applied, the principle of the law of Quebec seems to be the same as the principle of the law of England, viz., that the actual or presumed intention of the parties as ascertained

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

from the instrument and the circumstances must, in the last resort, govern.

I pass over this question because, according to the law of Quebec, I think the respondent's contention on this point fails.

The relevant provisions of the Civil Code do not seem to leave the rule of law in doubt.

Articles 1152 and 1164 are as follows:—

1152. Payment must be made in the place expressly or impliedly indicated by the obligation.

If no place be so indicated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of contracting the obligation.

In all other cases payment must be made at the domicile of the debtor; subject, nevertheless, to the rules provided under the titles relating to particular contracts.

1164. If, by the terms of the obligation or by law, payment is to be made at the domicile of the debtor, a notification in writing by him to the creditor that he is ready to make payment has the same effect as an actual tender, provided that in any action afterwards brought the debtor make proof that he had the money or thing due ready for the payment at the time and place when and where the same was payable.

The provisions of this constitution, above quoted, when read with the other provisions relating to the making and collection of assessments seem to imply that the member shall seek out the financier *and not* the financier the member.

In articles 165, 166 and 167, which define the duties of the officers of the subordinate lodges, there is no provision for the taking of active steps by any of these officers for the purpose of collecting assessments. One sees further that no provision is made for the payment of these officers. The lodges are organized with a view to economical administration and the constitution seems to contemplate that the offices shall be honorary and filled by persons who in the ordinary course are largely occupied with their own vocations.

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

That seems hardly consistent with the notion that the assessments are intended to be in point of law payable at the domicile of the member.

But the arguments advanced involve the proposition that the making of the demand at the domicile is a condition which must be complied with to put the member in default. Assuming for the moment that this view is consistent with article 1164, above quoted, is seems clear enough that you cannot give effect to this view without doing violence to the intentions of the framers of this instrument as expressed in sections 97, 98, 99, 100, 102, and 106. Article 98, for example, says that an assessment is due and payable on the 1st of each month by each member unless he is notified to the contrary and any member making default for thirty days shall suffer the consequences therein mentioned. According to the argument of the respondent default would never take place until demand at the domicile of the member, from which time only the period of thirty days would begin to run. That would necessitate a demand at the domicile of each member on a given day for which no sort of provision is made and which cannot be supposed to have been in the contemplation of the constitution; or demands on successive days with the effect of giving different delays to different members in violation of the principle of equality which obviously pervades the constitution. The other articles are open to similar observations. The application of the rule suggested would throw the whole scheme into confusion. I think the proper conclusion is that, upon this point, the rule to be applied is that above indicated.

But, assuming the effect of article 1152 C.C. is to make the assessment payable at the member's domi-

cile, the failure to demand payment there is not in itself sufficient to excuse the failure to pay. Article 1164 C.C. seems conclusive upon that point; and the evidence, unfortunately, does not bring the appellants within the protection of that article.

I come now to the second ground which is that, for certain reasons, the appellants are precluded from alleging Clarke's non-performance of the conditions of his contract.

Before stating the facts upon which the respondents rely in support of this contention it would be convenient first to refer to section 115 of the Constitution. That section is as follows:—

> It shall be the duty of each Subordinate Lodge to make a monthly report to Grand Lodge, which report shall be closed on the last day of each month, signed by the Financier and Recorder, and at once sent to the Grand Recorder.
>
> This report shall be in the form provided by Grand Lodge, and contain the information thereby demanded.
>
> Should said report fail to reach the Grand Recorder on the fifteenth day of any month, it shall be his duty to call upon the Recorder of each delinquent Lodge, by telegram or otherwise, to forward said report forthwith. In months in which no assessment is called, a report shall be made as if there were an assessment, except that the blank for current assessments shall not be filled.

This section was construed, not unnaturally — I think, indeed, it is probably the proper construction of it — as giving to the officials of the subordinate lodge a delay of fifteen days to make up and forward the report referred to. The forms provided for by the Grand Lodge referred to in the section, called for a statement of the assessments paid for the month to which the report related, by the members of the lodge, and of the names of the members suspended for non-payment. By section 166(*c*), it was the duty of the financier of the subordinate lodge to notify the Grand Recorder

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

of all members who stand suspended on the last day of each month. The practice was to treat the report provided for by section 115 in which this information ought to be contained, as being a sufficient notification under section 116 (*c*). According to the strict letter of these provisions, therefore, members failing to pay an assessment due, on the first of a given month, within the thirty days of grace allowed by the rules should be marked suspended in the report under section 115. On the other hand, the effect of this would obviously be in some cases to give rise to what would very naturally appear to the officials of such an organization as this as quite useless trouble, not only to the officials themselves, but to the members, and at the same time involve the members in some, it is true, very slight expense. I am dwelling on this because it seems to be necessary to consider the practicable working of section 115 and section 166 (*c*) from the point of view of the member and the official of the subordinate lodge in order to appreciate the contention I am about to consider.

The constitution requires this report to be made up as of the last day of each month. But consider the case of a member having failed to pay during the given month his assessment for that month, but paying it a day or two after the end of the month to the financier. What is the position of that member ? During the period which elapsed after the expiration of thirty days from the first day of the month when his assessment became due and the day on which the assessment was paid to the financier the member was, according to the provisions of sections 98 and 107, suspended. If he died during that period (on this point section 107 is most explicit) no rights could arise

under his beneficiary certificate. But, if living, on payment at any time within thirty days after the date on which the suspension accrued he became by virtue of the payment *ipso facto* restored to his status as a member. That is the construction and effect attributed to section 107 by the Grand Lodge, and that, in my view, is the proper construction of that section. The requirement that the member who has become suspended

> shall pay all assessments that have been made during that time

has been construed and, in my judgment, rightly construed, as requiring the payment of such assessments in accordance with the provisions of the constitution, viz., within the period of grace allowed; and it follows that where the member pays prior to the expiration of the thirty days following the accrual of the suspension he is obliged to pay the assessment in respect of which he has made default and that assessment only, in order to obtain re-instatement. Section 107 requires that where the conditions of re-instatement have been satisfied, which in the case we are considering are limited to the payment of the overdue assessment, the fact of the re-instatement is to be reported to the next meeting of the lodge, but this declaration is added,

> such report, however, is not to be a condition precedent to the re-instatement.

Such then being the position of a member who, having failed to pay his assessment within the month for which it is levied, pays it within the first few days of the next month and, thereby, recovers his status as a member of the order in good standing and becomes re-invested with the rights under his beneficiary certificate which had suffered a temporary lapse during

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

the period of suspension, one understands how the inutility of reporting such a member as suspended would impress itself upon the financier and recorder of his lodge. The reporting him as suspended would necessitate a formal notice by the Grand Recorder under section 106 and the entry of the suspension in the records of the Grand Lodge, the payment of a small fine by the defaulting member, and would involve, it may be, some discredit for the lodge itself.

The result was that a practice appears to have grown up, certainly in Columbus Lodge, and probably this practice was general, of not reporting as suspended members who paid their assessments at any time before the report was sent forward under section 115; and this practice, while irregular and involving a violation of section 115, could not, in itself, prejudicially affect the rights of the Grand Lodge, *vis-à-vis* the holders of beneficiary certificates, provided the provisions of section 107 were observed and no assessment was received on behalf of a defaulting member who had died while under suspension.

It is this practice which is in the main relied upon as constituting the foundation of the respondents' contention that the appellants are precluded from setting up Clarke's default

The contention is put in two ways: First, it is said that the provisions of the constitution quoted above became superseded by a practice or custom which extended the period of grace from thirty days to the date not later than the fifteenth of the month following the making of the assessment when it became necessary for the officers of the subordinate lodge to forward their report in time to reach the Grand Recorder by the fifteenth of that month. Secondly, it is

said that, in effect, by this practice members were treated as being in good standing so long as their assessments were paid in time to be forwarded with the monthly report, and that the practice was known and acquiesced in by the Grand Lodge and that this acquiescence precludes the Grand Lodge from asserting that Clarke was not in good standing at the time of his death.

Before analysing this contention I should summarize the features of the evidence bearing upon it which must be kept in view. There is no evidence that, except in Clarke's case, an assessment was ever accepted by any financier of a subordinate lodge on behalf of a member who had died while under suspension. Leroux, the financier of Columbus Lodge, says that he had never done so. And the effect of the evidence seems to be that if such a thing had occurred it had not come to the knowledge of the officials of the Grand Lodge. Then it is not denied that in each month in which an assessment was levied a notice was sent through the official organ of the Grand Lodge, the newspaper "Protector," in the form of a notice for August quoted above in full — a notice specially emphasizing the consequences of failing to pay within the month, and quoting verbatim the section 97 in which these consequences are declared. This notice was mailed to every member as required by the rules, and by the great majority of members, no doubt, was received. In the case of Columbus Lodge, it appears to have been a common thing for members to delay the payment of their assessments until after the expiration of the month, but it was by no means universal. Columbus Lodge seems to have been in a state of

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

disorganization for a number of years; Leroux states that for four years there had not been a meeting of the Lodge. As to the other lodges there is really no evidence to justify the inference that there was any general practice of delaying the payment of assessments beyond the time allowed by the rules. Patterson, the Grand Recorder, says that he had his suspicions that assessments were received after expiration of the days of grace, and forwarded without any report of the default. But he denies any knowledge of such cases and, according to his statement, at all events, his evident belief that such cases did exist was simply an inference founded upon the probabilities, and the fact that the reports were sometimes delayed beyond the fifteenth. Brady, the Grand Master Workman, denied any knowledge of any such practice, although he too had his suspicions.

There is, however, no evidence and there appear to be no facts upon which an inference could properly be based that delinquent members who allowed themselves the indulgence of falling into default were under any delusion as to the provisions of the constitution applicable to such a case, or as to the nature of the risk they were running. Larkin, who was called as a witness on behalf of the respondents, and says he considered himself in good standing if he paid before the forwarding of the monthly report, admits that he was acquainted with the provisions of the constitution, requiring payment before the thirtieth of the month. The members who indulged in this practice seem to have been aware of the importance of concealing the facts from the officials of the Grand Lodge. In Columbus Lodge the pass books of the members in which the financier receipted the payment of the assessments did

not shew the date of payment, but only the month to which the assessment was attributed. In lodges in which the practice was to give the date of payment the receipts in such cases were antedated. The friends who paid Clarke's assessment were evidently impressed with the necessity of doing so at the earliest moment; obviously they did not entertain the idea that Clarke was legally entitled to postpone payment until the report was forwarded. It is nowhere suggested that any act of the Grand Lodge or of any of its officials or any of its records or any communication made or published under its authority had justified or created in any way a belief amongst the members that sections 98 and 107 were no longer in force or that the provisions of the constitution were in any respect other than those which are now produced in this litigation. On the contrary the monthly notice, as I have already mentioned, pointedly called the attention of members to the terms of section 98 and the effect of non-compliance with them.

Now, it is a term of every beneficiary certificate that the member shall observe the conditions of the by-laws and constitution and amendments thereof.

Among these are, of course, the rules prescribed (articles 78-116) for the collection, management and disbursement of the beneficiary fund and in particular, the rules governing rights of the Grand Lodge in the levying of assessments and the consequences of non-payment.

While each member is bound by these rules himself he is entitled to have them observed by others, that is to say, by the members in their dealings with the

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

Grand Lodge and by the Grand Lodge in dealings with members.

Article 2. "The constitution" * * * shall govern this Grand Lodge and "the subordinate lodges and all members of the Order"; and the rules just referred to "are prescribed" in the words of article 79 "for the government of this Grand Lodge beneficiary jurisdiction." These rules, in a word, constitute, in effect, a single contract to which the Grand Lodge and all beneficiary members are for the time being parties. It follows, of course, that they cannot be altered except in accordance with some provision of the constitution, *i.e.*, the contract itself or by the consent of all parties.

The constitution makes provision for amendment by the Grand Lodge by a two-thirds vote after certain notices have been given. The Grand Master Workman has power to grant dispensations *not inconsistent with the Constitution* and the Grand Lodge may adopt standing regulations *not inconsistent with the constitution* for the purpose of carrying the same into effect.

But it is clear enough that the Grand Lodge would have no authority, except by means of an amendment of the Constitution, to change the provisions of articles 97, 98, 100, 106 and 107, already quoted providing *ipso facto* suspension of members who fail to pay their assessments within the thirty days of grace provided for. An express resolution to that effect would, in itself, be inoperative.

And still less would the Grand Lodge have power to provide for the exemption of particular members or particular lodges from these provisions for giving, for example, to the members of some lodges forty-five days of grace instead of thirty days, the period allowed

the other members. Equality is the fundamental principle of every such constitution as this.

There could, therefore, be no such thing as an amendment of these rules by the operation of "custom." It is conceivable that a practice might become established by the acquiescence of every member of the order the validity of which everybody would be estopped from disputing; but that would be a very difficult case to maintain where new members are constantly being added. No such case is suggested here.

Almost as difficult would it be to make out that the Grand Lodge is by reason of some practice precluded from setting up the provisions of these rules, for example, sections 98 and 107.

Any such contention when analysed must come to this — that the Grand Lodge in permitting the practice relied upon had led the members to believe that these provisions would not be enforced and that the courts would compel the Grand Lodge to give effect to this expectation in favour of members acting upon it in good faith. In the case of the specific provisions now under consideration the contention being that in permitting the particular practice already described, the Grand Lodge encouraged the members of Columbus Lodge to act upon the assumption that these sections in so far as they provide for suspension on non-payment within the prescribed delay, would not be enforced provided the monthly assessments were paid in time to be forwarded to the Grand Lodge on the 15th of the month following that in which they became due. But the Grand Lodge having no authority to exempt lodges or members by express declaration from compliance with these provisions of the con-

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

stitution, it seems obvious that it could not so do by mere acquiescence in a course of conduct. Such a course of conduct, so long as there should be members entitled to insist upon the provisions of the constitution being observed, could not prevent the Grand Lodge insisting upon compliance with the provisions of the constitution.

Then a decisive answer to this argument on behalf of the respondent appears to be this, viz., that no member or person seeking to enforce rights under a beneficiary certificate can be heard to say that he did not know the provisions of the constitution which are made part of his contract. I exclude, of course, cases in which a member has been misinformed as, for example, of some amendment of the constitution through some communication made by some official or agency under the proper authority of the Grand Lodge or by means of some error in the record of the Grand Lodge itself. Knowing the rules as to the payment of assessments and the consequences of non-payment as prescribed by the rules, and knowing that the Grand Lodge has no authority to exempt lodges and members from the observance of these rules or from the consequences of non-observance, it must be taken that when he, alone or in concert with others, departs from them he does so at the risk of having to suffer the consequences pointed out by the constitution.

Coming to the case at bar, in addition to the knowledge of the rules which must be imputed to Clarke there are the circumstances mentioned above — the monthly notice, in view of the terms of which it is impossible to suppose that there could have been anything like a general belief in the order that the provi-

sions of sections 98 and 107 would not be enforced, the fact that there is no evidence of a single instance in which a defaulting member, dying while in default within the meaning of sections 98 and 107, was recognized as having died in good standing, the fact that the conclusive proof that no such case had occurred in the history of Columbus Lodge, at all events since the year 1903, that the practice, even such as it was, was obviously a clandestine practice — it seems impossible to conclude as a fact that members generally were really misled into a belief that they could fall into a default without suffering the consequences pointed out in sections 98 and 107. What they did understand doubtless was this: That they would not be reported to the Grand Recorder as being in default, or as being suspended, if they paid their assessments in time to enable their financier to forward them with his monthly report; and that they would not suffer the inconveniences, whatever they might be, arising from being reported as defaulters. But there is no solid basis disclosed by the evidence upon which one can fairly found the conclusion that the members of Columbus Lodge, and still less the members of the order generally, did not understand that in failing to pay within the prescribed thirty days they were making default within the provisions of the constitution which remained in full force. Again even assuming that there may have been members who in fact were ignorant of the constitution who never read the notices they received who having before their minds a sort of impression that in order to avoid obvious and immediate inconvenience an assessment must be paid by the fifteenth of each month at the latest and without thinking of ulterior and more serious conse-

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

quences paid only at the last moment — Is there anything in the circumstances of this case which can fairly be said, on legal principles, to cast upon the Grand Lodge the responsibility for such ignorance and neglect? The answer, it seems to me, must be in the negative if only for the simple reason that the whole pith of the complaint against the Grand Lodge rests upon the members' supposed ignorance of the provisions of the constitution. Take away this supposition of ignorance and there is nothing left. The Grand Lodge cannot be responsible for that, as I have already said, for the reason that a person who enters into a contract such as that expressed in these beneficiary certificates, and constitutional rules and by-laws, cannot excuse himself from non-performance of conditions on the ground that he does not know the provisions of his contract. It is his duty to know them. He must be held to know them. It is impossible to work out such a system as this upon any other principle. Then again, assuming ignorance in fact, on what ground is the Grand Lodge to be held responsible for it? There is nothing in the circumstances of this case to shew that the officials of the Grand Lodge had reason to suspect any general ignorance of the provisions in question. As I have already said, the evidence shews, on the contrary, that there was no such ignorance. Everything that could reasonably be suggested was being done by the Grand Lodge to induce members to pay promptly by keeping before their eyes the consequences of default; and the officials had, apparently, every reason to believe, what I think was the fact, that these provisions were generally understood. Default, where there was default, they doubtless attributed to reasons other than ignorance.

Clarke's case unfortunately illustrates my meaning. He was a persistent defaulter, being recorded again and again as suspended, making default no doubt with a full knowledge of the consequences. Indeed, there seems to be grave reason to doubt whether, strictly speaking, he was a member in good standing during the month of August. I mention this, of course, not for the purpose of insisting upon a point that the appellants have quite properly refused to take, but for the purpose of pointing out the difficulty of inferring that Clarke's default was due to a lack of appreciation of the consequences of default. Leroux's evidence, moreover, shews that, notwithstanding a reprimand administered to Columbus Lodge for the looseness of its methods, no change has since taken place, and, notwithstanding the position the Grand Lodge has taken in this litigation, the former practice is apparently continued.

Then the respondent says that the practice of the financier in sending for her husband's assessment on the fifteenth of every month established a course of business by which the Grand Lodge is bound. Now, first, it is perfectly clear that neither the financier nor Columbus Lodge had any authority to exempt Clarke from the operation of sections 98 and 107, yet the contention must come to this, if it is to have any force, that the financier by his conduct had relieved Clarke from the operation of those provisions of the constitution. The contention appears to assume that the financier having no actual authority, had ostensible authority to bind the Grand Lodge by such a course of conduct. The argument seems to be that the Grand Lodge must have had notice through the financier of what was going on and receiving the as-

1914

ROYAL GUARDIANS v. CLARKE.

Duff J.

sessment, with notice of the facts, ratified the acts of the financier. The contention, unfortunately, is compounded of fallacies, even leaving aside the fatal objections that the Grand Lodge itself had no authority under the constitution to exempt Clarke from these provisions except by amending the constitution.

Clarke must be taken to have known the limits of the financier's authority, and the limits of the constitutional power of the Grand Lodge itself, with respect to these provisions of the constitution. Again, as Clarke was entitled to pay the financier when he did pay and to be treated thereafter as a member in good standing notwithstanding any pre-existing suspension, the acceptance of the assessment ratified nothing. The receipt by the financier must be presumed to be a rightful one, not a receipt in violation of the constitution. And, still again, the reasonable explanation of the financier's conduct, considered as a matter of fact, in sending his messenger to collect Clarke's assessment, is that he did it out of kindness for Clarke who, unfortunately, seems to have had a very hard struggle to keep up his payments. It is not good policy to interpret such kindly acts of indulgence as establishing a course of business, in breach of the duty of the agents doing them, unless it is quite clear that such is the proper construction of them. It has been pointed out again and again that such extreme interpretations have a tendency to compel people to stand on their strict rights for their own protection rather than follow the more natural human kindly way, and for that reason they should be avoided except where there are really solid grounds for them. In this case the evidence utterly fails to begin to make a

case shewing that Clarke was misled by the kindness of the financier.

What I have already said will make it clear that, apart from numerous other grounds of distinction which become obvious when one keeps the facts of this case in view, the cases cited, of which *Wing* v. *Harvey* (1) is perhaps the type, can have no bearing upon any question before us on this appeal, for this short reason: That, as the member is conclusively presumed to know the limits of the authority of the Grand Lodge, the subordinate lodges and the officials of each (which are defined specifically and exhaustively by the constitution and by-laws), the ostensible authority of the officials cannot for any relevant purpose be of wider scope than the actual authority.

ANGLIN J.—I concur in the dismissal of this appeal. The evidence establishes that the financier of Columbus Lodge, to which the deceased Clarke belonged, was in the habit of collecting assessments from members, including Clarke, at their residences after the period of thirty days during which, under the by-laws of the society, they might pay without incurring suspension, had expired, *i.e.*, he collected up to the 15th day of the month following that on the first of which the assessment became due. It was then that the financier was required to make his return to the Grand Lodge. His custom was, to return, on the 15th day of the following month, the moneys so collected after the expiry of the month in which they were payable as assessments paid in the ordinary course and not as moneys received from suspended

(1) 5 DeG. M. & G. 265; 43 Eng. Rep. 872.

1914

ROYAL GUARDIANS v. CLARKE.

Anglin J.

members. This practice had continued for at least five years before Clarke's death. It appears to have prevailed also in other lodges. The learned trial judge drew the inference from the evidence that the Grand Lodge officials were aware of what was going on. That inference has been accepted by the Court of Appeal and I am not prepared to hold that it is erroneous.

Upon this state of facts it has been held by the provincial courts that the provision for forfeiture for non-payment of the assessments during the month in which they were levied was waived and that the time for payment was extended at least until the 15th day of the following month prior to which payment might be made without suspension being incurred.

The deceased died on the 7th of September leaving his August assessment unpaid. It was paid on the following day. I accept the conclusion reached in the provincial courts that the practice above stated, known to the officials of the Grand Lodge and not repudiated by them, constituted a waiver of the provision for forfeiture which the defendants invoke. The assessment was not in default and Clarke had not incurred suspension at the time of his death. At least the defendants are estopped from contending that he had. To the authorities cited in the judgments of Mr. Justice Dunlop and Mr. Justice Cross I would merely add a reference to *Buckbee* v. *The United States Insurance and Trust Co.*(1); *Insurance Co.* v. *Wolff* (2), at page 333; and *Redmond* v. *Canadian Mutual Aid Association*(3), at pages 341-342. The course of

(1) 18 Barb. 541, at p. 544. (2) 95 U.S.R. 326.
(3) 18 Ont. App. R. 335.

dealing by the society with Clarke was such, in my opinion, as to induce his failure to make payment within the thirty days prescribed by the by-laws and it would operate as a fraud upon his representatives if the Society were now

allowed to disavow its conduct and enforce the condition.

Neither can I see any distinction in principle, such as has been suggested, between mutual-benefit insurance societies and joint-stock insurance companies in regard to the effect of the conduct of high officials in creating a waiver or estoppel. In the management of its business these officials in the case of mutual-benefit societies represent the members of the society, who are its owners and presumably have entrusted the management of its affairs to such officials because they repose confidence in them, quite as much as the directors and high office holders in the joint-stock company represent its owners, the shareholders. Shareholders and participating policy-holders in the latter are quite as much interested in the strict observance of provisions respecting forfeitures and lapses as the members of the former. The shareholders and participating policy-holders in the joint-stock company reap the benefit of forfeitures and lapses in the form of profits. Members of the mutual-benefit society reap a like advantage in reduction of assessments either in number or amount. In either case the management of the business is entrusted to officials who are its representatives and agents. With them the insured must deal. I cannot see that it makes any difference whether the conditions of the risk are expressed in the contract of insurance itself or are contained in a constitution or by-laws incorporated with

1914

ROYAL GUARDIANS v. CLARKE.

Anglin J.

the contract. Conduct of officials which will render it inequitable for the insurer to set up a condition entailing forfeiture in the one case will be equally effective in the other.

Another answer made by the plaintiffs to the claim of forfeiture is that, according to the civil law of the Province of Quebec, where the contract in question was made and the insured lived, in the absence of a contrary stipulation — the policy contained none — the creditor must seek his debtor. The financier of Columbus Lodge had by his practice recognized this rule as applicable to the insurance contract sued upon. His custom was to go himself or to send some person to collect the assessments from the assured. He had not demanded the August assessment. Therefore, it is contended, the assured was not in default when he died. I do not wish to be understood as rejecting this answer of the respondents. Finding the ground first stated sufficient for the disposition of the appeal, it is unnecessary for me to deal with this further contention.

BRODEUR J.—I agree that this appeal should be dismissed for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellants: *T. P. Butler.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

MAGLOIRE LAPOINTE (PLAINTIFF) . . APPELLANT; 1913 *Nov. 18.

AND

CHRISTOPHE MESSIER (DEFENDANT) . . . . . RESPONDENT. 1914 *Feb. 3.

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

Municipal corporation—Member of council—Interest in municipal contract—Public policy—Legal maxim—Money received under prohibited contract—Recovery of funds—Right of action—Statute —(Que.) 58 V., c. 42, ss. 1, 2, 11—Arts. 989, 1047 C.C.

A contractor with a municipality applied to the mayor thereof for financial assistance in carrying out works he had agreed to construct and obtained the necessary financial aid from him upon an understanding that the mayor should receive a bonus in consideration of the financial assistance to be rendered. On the completion of the works, but prior to the dates when the corporation was obliged to make payment, a promissory note was obtained from the municipality which was indorsed by the contractor, delivered to the mayor as collateral security for the amount owing to him, and, by the latter, was discounted at a bank. The mayor retained the proceeds of the note for the purpose of satisfying the amount of the bonus promised to him and some other charges which he claimed in connection with his services in financing the contractor. In an action by the contractor to recover the funds,

Held, that the arrangement so made had the effect of giving the mayor an interest in the contract incompatible with his duty as a member of the municipal council, contrary to public policy and in violation of the provisions of sections 1 and 2 of the Quebec statute, 58 Vict. ch. 42, and that he was not entitled to retain the moneys.

Held, also, that, in the circumstances of the case, the plaintiff's right of action was not affected by the illicit nature of the agreement and that he was entitled to recover the amount so retained in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

LAPOINTE v. MESSIER.

an action for money had and received to his use by the defendant, or under the provisions of section 11 of the Quebec statute, 58 Vict. ch. 42.

Judgment appealed from reversed. *Consumers Cordage Co.* v. *Connolly* (31 Can. S.C.R. 244) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, by which the judgment of Bruneau J., in the Superior Court for the District of Montreal was varied.

In the circumstances stated in the head-note, the plaintiff brought this action to recover from the defendant the sum of $11,136.24 with interest from 17th September, 1908. With his plea the defendant tendered the sum of $5,122.25 as the whole amount of the balance due by him to the plaintiff, after deduction of the amount of the bonus and other charges mentioned in the head-note. In the Superior Court Mr. Justice Bruneau declared that the amount so tendered was insufficient and entered judgment in favour of the plaintiff for $10,519.25 with costs. By the judgment appealed from the Court of King's Bench reduced the amount of the Superior Court judgment by the sum of $3,000, the amount of the bonus claimed by the defendant.

The questions in issue on the present appeal are stated in the judgments now reported.

Sir Auguste Angers K.C. and *A. E. deLorimier K.C.* for the appellant.

R. C. Smith K.C. and *R. Monty K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of King's Bench of Quebec,

varying a judgment of the Superior Court which had maintained the plaintiff's action.

That action was brought to recover from the defendant a sum of money alleged to be illegally retained by him out of a larger sum received from the plaintiff. The facts are susceptible of simple statement and the differences in the versions given by the parties of the circumstances out of which this suit arose are perhaps more apparent than real. Where they differ, the trial judge says that he accepts in preference the plaintiff's story.

The undisputed facts are: In the year 1907, the defendant was mayor of the municipality of the Village of DeLorimier, and in the month of September of that year the plaintiff was awarded a contract for the building of sewers in some of the main streets of the village. The terms of the contract are fully set out in notarial deeds executed on the 26th of the same month.

At that time the parties were apparently strangers to one another. On or about the 26th of October following, the plaintiff applied to the defendant for financial assistance to enable him to carry on his work, and it is admitted that without that assistance the contract could probably not have been executed. There is some dispute as to what occurred at the time and the trial judge apparently believes the plaintiff, but, so far as the issue to be determined on this appeal is concerned, it is not material to say more than this. The parties after some negotiations agreed that the defendant would assist the plaintiff to obtain the advances he required in consideration of the payment of a bonus of $3,000 for which a promissory note was then given. The contract was proceeded with vigorously,

1914

LAPOINTE v. MESSIER.

The Chief Justice.

the defendant made the necessary advances amounting in all to $12,201.30 and the work was completed in the summer of 1908, the defendant being still in office as mayor of the municipality. Notwithstanding the provision in the agreement that the contract price was to be paid in five equal annual instalments, the first falling due one year after the works were completed and accepted, on the 15th August, 1908, a promisssory note, payable at six months, was given for the total value of the work done. The corporation gave the note to the contractor on his undertaking to renew at maturity, but he indorsed it over at once to Messier, the mayor. No importance seems to have been attached below to this serious departure from a term evidently inserted in the agreement for the protection of the municipality. It was quite in the interest of the mayor, creditor of the contractor, that the contract price should be paid at once, and evidently his interest prevailed against that of the ratepayers which he was supposed to protect.

There is some dispute as to what occurred at the time the note was given to the mayor. The plaintiff says that it was given as *collateral security* for his then existing indebtedness, the defendant is assumed below to have said that it was in *payment* of that indebtedness. What he really says is at page 26 of the case. The trial judge believes the plaintiff.

Be this as it may, the defendant refused at the time, under one pretext or another, to account to the plaintiff for the note against which he, the defendant, had obtained an advance of $17,797.95 from the bank, *i.e.*, to the extent of his own claim for advances, commission and interest. There is some dispute here as to whether the note was discounted or merely given

to the bank as collateral security for an advance then made. The defendant says in his examination on discovery:—

1. R. Monsieur Lapointe aurait voulu avoir la différence et je lui ai dit:—Si je ne peux pas l'escompter je ne pourrai pas vous donner la différence maintenant.

* * * * * *

20. Q. Vous ne lui avez pas crédité ce billet à son compte ?

R. Je l'ai crédité le montant de $17,597.95 par le billet de la Corporation, du moment que je l'eus escompté.

* * * * * *

40. R. Je ne pouvais pas lui créditer si je ne l'avais pas en mains.

Again, I do not think, in my view of the case, that the difference is important; the result was that the plaintiff took out of the advances made by the bank on the note of the municipality the amount of his claim against the plaintiff including the bonus of $3,000 which is in dispute here.

On these facts two questions arise: Was the promissory note for $3,000 given for an illegal consideration, and if so, is the defendant entitled to retain that sum out of the proceeds of the note given by the municipality in payment of the work done under contract ?

I am quite satisfied that although there was no concert between the parties at the time the contract was awarded, the plaintiff's subsequent undertaking to pay a bonus of $3,000 for the advances which the defendant undertook to make was, in the circumstances, within the mischief of the Act hereafter cited and come within the words of the enactment, because it gave the mayor an interest in the contract which made him liable to the penalty prescribed by 58 Vict. ch. 42, sec. 2, which reads:—

1914

LAPOINTE v. MESSIER.

The Chief Justice.

Any member of a municipal council who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a partner, or knowingly during the existence of his mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

What is an interest sufficient to disqualify? See cases collected in 19 Halsbury, Laws of England, No. 627, p. 304, also *Miles* v. *McIlwraith*(1); *Mayor of Salford* v. *Lever*(2); *Norton* v. *Taylor*(3); *In re Campbell*(4); *Burgess* v. *Clark*(5); *Hunnings* v. *Williamson*(6).

I have looked at the case of *Le Feuvre* v. *Lankester* (7), much relied upon at the argument and, if still binding as an authority, it can be distinguished from this case. There the defendant sold the contractor certain ironwork which was used in carrying out the contract. No attempt was made to shew fraud or any interest which would affect the price of the goods or the manner in which they were to be paid for. Here the bonus of $3,000 was to be paid at the expiration of the contract out of the profits, which the contractor expected to make, and the defendant admits that if the contract was unprofitable, he stood a chance to lose not only his bonus, but also his advances. So that, if we take the view which is most favourable to the defendant, there is no doubt that by reason of that agreement he had a pecuniary interest in the result of

(1) [1883] 8 App. Cas. 120.
(2) [1891] 1 Q.B. 168.
(3) 75 L.J.P.C. 79.
(4) (1911) 2 K.B. 992, at p. 997.
(5) 14 Q.B.D. 735.
(6) 11 Q.B.D. 533.
(7) 3 E. & B. 530.

the contract and he was, therefore, in a position where he had necessarily to choose between that interest and his duty towards the municipality. I entirely agree with what is said by Arnold, Law of Municipal Corporations, pp. 26, 27. The members of a council should have no interest to bias their judgments in deciding what is for the public good. Members of a town council should be advised to keep themselves absolutely free from the possibility of any imputation in this respect.

This case affords a striking illustration of the necessity of strictly interpreting the section above quoted. As evidence, I refer again to the way the interests of the municipality were, to say the least, put in jeopardy by the payment of the contract price before the time fixed to ascertain if the work had been satisfactorily executed.

As to the second question — the right to recover — it has been argued that the old Roman maxim *nemo auditur propriam turpitudinem allegans* applies, and much reliance is placed, and very properly so, upon the opinion of Pothier, Obligations, No. 45. But it must not be overlooked that the legislature had the opinion of Pothier brought to its notice when the Civil Code was enacted and that opinion was deliberately departed from. If the undertaking to pay a bonus gave the mayor an interest in the contract, then the statute makes that undertaking unlawful and the payment was without consideration. The right, therefore, to recover exists. There was no debt and the defendant received a sum that was not due him. (See arts. 1047-1048 and 1140 C.C.) Neither was there a natural obligation. (16 Laurent 164; Marcadé 4, p. 399.)

1914

LAPOINTE v. MESSIER.

The Chief Justice.

It is quite evident here that the defendant took an unfair advantage of the financial necessities of the plaintiff, and the latter cannot be said to have been a party to the illicit agreement. His promise to pay the bonus was not made to give the defendant an interest in the contract, although that was the effect of it, and as Planiol puts it, vol. 2, No. 846:—

> Il semble que cette action (en répétition) devrait toujours être accordée, car si l'obligation illicite or immorale est condamnée par le droit, il importe que le créancier ne soit jamais autorisé a conserver ce qu'il a reçu, quand le débiteur s'est volontairement acquitté; lui laisser l'argent en privant le débiteur de son action en répétition, ce serait *donner effet à un acte illicite*, contrairement à l'article 1131 qui dit que ces obligations n'en doivent produire aucun.

It would be a curious result, if, under the statute, a briber could withhold from the bribee, in a case like this, the money paid when an innocent party would be obliged to suffer his loss.

It is said in the respondent's factum that *Consumers Cordage Co.* v. *Connolly*(1), decided in this court, is based upon modern French jurisprudence, but that is not the case. As far back as 1839, the French courts began to restrict the application of the Roman maxims *nemo auditur,* etc., and *quod nullum est nullum producit effectum.* (S.V. 33, 1, 668; S.V. 44, 1, 584; S.V. 90, 2, 97; Meynial's note and Marcadé, vol. 4, at page 399), and to-day it is universally admitted that they do not apply where the obligation is based on an illicit, as distinguished from an immoral, cause. (Vide Fuzier-Herman, vo. "Paiement," No. 451. All the cases on this subject are collected in "La Revue Trimestrielle," 1913, at page 553 *et seq.*)

The appeal should be allowed with costs.

(1) 31 Can. S.C.R. 244.

1914

LAPOINTE v. MESSIER.

Idington J.

IDINGTON J.—Whilst respondent was mayor of De-Lorimier, a municipal corporation, appellant tendered for the work of constructing some sewers and his tender was accepted and contract let accordingly.

It seems the appellant, who was not a man of much financial substance, then applied to respondent to finance him through the execution of these works.

There were proposals and counter proposals between these men, which ended by appellant giving respondent his promissory note for three thousand dollars, which is the note referred to in the following receipt given by respondent:—

Montréal, 26 Oct., 1907.

Reçu ce jour de M. M. Lapointe un billet à trois mois pour valeur reçu il est entendu que le dit billet sera renouvable jusqu'à la fin des travaux comprenant les canaux des rues Chabot, Simard et Gilford.

Ce billet est renouvable sans intérêt.

C. MESSIER.

Seeing that the total amount earned under said contract and owing by the corporation in respect of these works when finished was the sum of twenty-two thousand seven hundred and twenty dollars and fifty cents ($22,720.50), for which the corporation gave its promissory note, on the 18th of July, 1908, and that the entire advances of the respondent to the appellant between the dates of his getting the remarkable document above quoted and the acquisition of this promissory note of the corporation was never more than nine thousand four hundred and fifty-nine dollars and twenty cents ($9,459.20), one is surprised at the audacity which can claim that the transaction truly represents interest or compensation of that sort for making such advances and means nothing else.

The appellant says that the respondent proferred a

1914

LAPOINTE v. MESSIER.

Idington J.

partnership in the contract on the basis of sharing equally in the profits, that he (appellant) did not assent, but, after several interviews that the respondent preferred it should be put in the shape of giving him the promise above set forth of three thousand dollars, and that when he discounted the corporation's note or renewal thereof (broken into four notes spread over a term of years) and wanted him to settle up, he claimed two thousand dollars in addition to this three thousand dollars, besides an item of three hundred and ninety-six dollars and sixty-five cents, for interest, which together would so closely represent the half of the actual profits admittedly made on this small contract, that I think it quite clear the respondent never let the proposal of partnership out of his mind. In truth, I infer, he was determined on the double advantage of securing at least three thousand dollars and, if the results should so turn out that he would find half the profits to be still better, to claim that as he did, in the mode he did.

The item of three hundred and ninety-six dollars and sixty-five cents ($396.65) for interest, the respondent says was interest computed up to the 22nd of May, 1908, at 7% or 8% on the actual advances made up to that date, and, in the witness box claimed he ought to get interest on later advances, but indicates that was overlooked by reason of the disputes that followed.

If all this does not indicate that he had in mind the idea that he intended to be and was interested in the profits, I am puzzled to know what his process of reasoning was.

It is quite clear he claimed he intended he should

get five thousand dollars over and above the usual bank interest.

If it could not be called anything else, it certainly was a lavish commission coming to him out of a transaction in which the corporation of which he was mayor was concerned, and, I think, unless the statute prohibiting such officers from taking commission or other interests on its contracts is to be frittered away or repealed by judicial interpretation and construction, it is a violation thereof.

There are, besides the plain import of the transaction, several things in the respondents' evidence, such as his attempt to represent there were two contracts, when clearly only one, between the appellant and the corporation, and the erasure in the respondent's books, which, when taken with his evidence, shew or tend to shew a possibly false and fraudulent purpose on the part of the respondent and colour the whole story as against him.

The section 1, of 58 Vict., ch. 42 (Que.), relied upon is as follows:—

1. Any member of a municipal council who knowingly, during the existence of his mandate, *has* or *had*, directly or indirectly, *by himself or his partner any share or interest in any contract or employment* with, by or on behalf of the council, or who knowingly during the existence of his mandate, *has or had through himself or his partner or partners*, any commission or interest, directly or indirectly, or who *derives any interest in or from any contract with the corporation or council* of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

Section 2 puts the matter thus:—

2. Any member of a municipal council who knowingly, during the existence of his mandate, has or had, directly or indirectly, *through a partner or partners*, or *through the agency of any other*

1914

LAPOINTE v. MESSIER.

Idington J.

person, any interest, commission or percentage (in a contract), with the municipal council of which he is a member, or knowingly, during the existence of his mandate, has or had derived any pecuniary remuneration from any contract for work performed, or to be performed, shall upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

I have quoted these sections to shew how clear the purpose of the legislature was to prevent any member of the council from entering into any transaction which should place his personal interest in conflict with his duty to the corporation.

From the moment the respondent accepted the document I have quoted above from a man whose financial position was such as to induce him to give it, he (respondent) was no longer fit to sit in council and effectively discharge his duty. The restrictive interpretation pressed upon us of this statute is not in harmony with the rules laid down in *Heydon's Case* (1) as applicable to penal as well as other statutes.

The duty of the judge relative to statutes and their interpretation can never be better defined than as expressed therein. And, if we are ever tempted by reason of a case presenting a want of "honour among thieves" or such like cause, to forget this, let us read the rule again.

Then it is argued that the three thousand dollars by the discounting of the corporation's note or notes were paid and cannot be recovered back.

Had the parties so proceeded as to bring this about, an arguable question might have been raised. But the best evidence they did not is that the respondent held on to the document quoted above and was driven to a tender thereof in answer to the demand of the appel-

(1) 3 Rep. 7b.

lant to settle by paying the balance of the proceeds of the corporation's notes.

His rapacity was such that he insisted on retaining the whole five thousand dollars and the interest he claimed and shews how and what he thought of the question of payment. It was still an unsettled thing and so remained, has herein been in substance and effect claimed by him in his pleadings as his due, and asserting that as his right he has never so pleaded as to raise the question his counsel now seeks to raise as a matter of law.

The issue has been fought out on such contentions at the trial and the suggestion now made is the thought of the able and ingenious counsel, who was not at the trial. There is no room left for arguing that this is a suit to recover back that already paid. If there were I should have to consider the effect of 58 Vict. ch. 42, sec. 11, cited in the appellant's factum.

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

DUFF J.—In September, 1907, the appellant entered into a contract for the construction of certain municipal sewers. Finding himself unable to obtain the necessary advances from his bankers he applied to the defendant for assistance, who agreed to lend his credit in consideration of a bonus of $3,000. This term of the arrangement was evidenced by a promissory note for the sum of $3,000 and a contemporaneous acknowledgment in writing by the appellant of the receipt of the note which was declared to be renewable until the municipal works in question should be completed.

1914

LAPOINTE v. MESSIER.

Duff J.

The respondent was the mayor of the municipality and, on behalf of the municipality, had executed the contract to which the appellant was a party. In August, 1908, the works in question having been finished, the appellant received from the municipality a promissory note for $22,720.50 (the sum due to him under his contract), payable in six months, the understanding being that the note was to be renewable at maturity. This promissory note, indorsed by the appellant, was delivered to the respondent; and one of the controversies at the trial related to the terms of the arrangement under which that was done. On this point it is sufficient for the present to observe that the appellant himself admits that the note of the municipality was transferred to the respondent "*en garantie* of the notes which I owed him."

The respondent discounted the municipality's note at the Merchants Bank. In September, the appellant offered to repay the respondent the sums actually advanced by the respondent to him, with interest, demanding at the same time the return of the promissory note just referred to. This the respondent refused, alleging that he was entitled to retain a sum of $17,500 out of the proceeds, offering at the same time to return the difference between that sum and those proceeds. The appellant then procured possession of the note by paying the amount due upon it at the Merchants Bank; and this action was brought to recover the difference between the amount so paid and the advances made by the respondent.

The dispute concerns the amount nominally payable in respect of the promissory note already referred to by way of bonus. The position taken by the appellant is this. He says that this note was the outcome

1914

LAPOINTE v. MESSIER.

Duff J.

of an arrangement which in effect gave to the respondent an interest in his contract with the municipality. And such an agreement he says is void as offending against public policy. The respondent meets this by denying that the arrangement gave him any interest in the appellant's contract and by asserting that, in any event, the note was paid and that, consequently, the appellant is in the position of being obliged to rely upon an agreement which he alleges was unlawful to which he himself was a party.

The appellant's contention is based upon the provisions of sections 1 and 2 of 58 Vict. ch. 42 (Que.), which are as follows:—

1. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, by himself or his partner, any share or interest in any contract or employment, with, by or on behalf of the council, or who knowingly during the existence of his mandate, has or had through himself, or his partner or partners, any commission or interest, directly or indirectly, or who derives any interest, in or from any contract with the corporation or council of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

2. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a member or knowingly during the existence of any mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

There can be no doubt, I think, that it was understood between the appellant and the respondent in September, 1907, that the bonus of $3,000 should be paid out of the proceeds of the appellant's contract. Such being the understanding it appears to me that

1914

LAPOINTE v. MESSIER.

Duff J.

the respondent acquired an interest in the contract within the meaning of this statute, and that an agreement having that as its effect and one of its direct objects must, in view of the statute, be held to be an agreement contrary to public policy and void as such.

The substantial point in issue appears to be whether or not the appellant is precluded from recovering the amount of the note in question on the principle that the court will not assist a party to an illegal contract to recover moneys paid or property delivered under it where, at all events, the illegal purpose of the contract has been completely performed.

The appellant disputes the application of this principle, first, on the ground that, in the circumstances, there was no payment. This particular contention, I think, misses the mark. As I have already pointed out the note was delivered, by the appellant's own admission, to the respondent as collateral security for the promissory notes held by the respondent. It is not suggested that any exception of this note of $3,000 was made and, if the arrangement under which the note was given had not been tainted by illegality, it seems indisputable that the respondent would have been entitled to retain the note received from the municipality until the bonus note had been discharged. Assuming that the respondent committed a wrongful act in negotiating the municipality's note, the appellant would still only be entitled to recover, all question of illegality put aside, the damages suffered by him which would be measured by the difference between the value of the municipality's note and the amount for which the respondent was entitled to retain it as security.

1914

LAPOINTE v. MESSIER.

Duff J.

In either view the appellant must impeach the bonus note as given for an illegal consideration and could, therefore, succeed only through setting up the illegality of his own contract. The question comes squarely to be decided whether, according to the law of Quebec, such an action can succeed on such grounds. The respondent's counsel largely rests upon the decisions of the English courts, and, since the argument was mainly devoted to a discussion of these decisions, it is worth while, perhaps, going through them, although they do not appear to me to be strictly relevant to the point to be determined.

In applying the English law it may be observed the same principles apply as if the amount of the bonus note had been paid in money. *Taylor* v. *Chester*(1).

The general rule of the English law is stated in the judgment of Lord Mansfield in *Holman* v. *Johnson* (2) :—

> The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ,* or the transgression of a positive law of the country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault. *potior est conditio defendentis.*

(1) 10 B. & S. 237.

(2) Cowp. 341, at p. 343.

1914

LAPOINTE v. MESSIER.

Duff J.

There are, however, apparent exceptions to this rule and the question is whether or not the present case comes within any of those exceptions. These exceptions have been stated in two text-books of high repute and in two comparatively recent judgments. And before considering the scope of them in their application to this case it will be convenient to reproduce the passages:—1st, Pollock on Contracts, pages 404, 405:—

> Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party — unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral);
>
> Or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief.—Note *b*. This form of expression seems justified by *Harse* v. *Pearl Life Assurance Co.*(1).
>
> Or in the case of an action to set aside the agreement, unless in the judgment of the court the interests of the third persons require that it should be set aside.

Secondly, Anson on Contracts, p. 253-4:—

> But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect, before it is sought to recover the money paid or goods delivered in furtherance of it.

The first of the judgments is in *Kearley* v. *Thomson*(2), where Lord Justice Fry says (pp. 745-6):—

> To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and

(1) [1904] 1 K.B. 558. (2) 24 Q.B.D. 742.

oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the dictum is not par, and, therefore, the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

I do not think the transaction in question here could be brought within the exceptions as stated by Lord Justice Fry, by Sir Frederick Pollock, or by Sir William Anson. Take first the judgment of Fry L.J. The transaction, as I view it, is not one prohibited by a statute passed for the "protection of a class of persons" of whom the appellant is one. It is a statute merely intended to disqualify from occupying certain positions of trust in relation to municipalities persons who bring themselves within the provisions of the Act. The object is to protect the municipalities and the public generally against the evils of corruption in municipal office. I do not think there is any ground for saying that this statute was passed with the object of protecting the interests of persons who engage in contracts with municipalities. The statute has nothing material to the present purpose in common with the class of statutes to which Lord Justice Fry refers — to the "Usury Acts" and the statutes against lottery-keepers.

Then, is this a transaction between "oppressor and oppressed" as the phrase is used by Lord Justice Fry? It will be convenient to expand this

1914

LAPOINTE v. MESSIER.

Duff J.

phrase a little. Sir William Anson puts it in a slightly different way. He speaks of contracts procured "by strong pressure." And Sir Frederick Pollock sums up the exceptions as consisting of agreements made in

> such circumstances as between the parties that, if otherwise lawful, they would be voidable at the option of the party seeking relief;

in other words, all cases in which illegal agreements completely executed may be set aside by a person who is a party to them and in the interests of such persons alone are cases in which on substantive grounds, independently altogether of illegality, the transaction would be voidable by and for the benefit of such persons according to the general principles of law or according to the true intendment and effect of the statute which forbids it. The author cites in support to his proposition the following passage from the judgment of Collins M.R. in *Harse* v. *Pearl Life Ass. Co.*(1), p. 563:—

> Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss.

Whether or not this view of the law on this point be open to criticism, it is clear enough when one comes to consider the decisions referred to in the text-books mentioned illustrating the attitude of the courts towards such plaintiffs, that one cannot bring the present transaction within the class of cases referred to by Fry L.J., as being cases of "oppressor and op-

(1) [1904] 1 K.B. 558.

pressed" or by Sir William Anson as contracts procured "under strong pressure." In *Reynell* v. *Sprye* (1) it was held that the champertous agreement was obtained by fraud and that alone was sufficient ground for setting it aside. In *Osborne* v. *Williams* (2) the court had to consider a transaction between a father and son, the transaction itself being unfair and the son being at the time wholly within the father's control. In *Atkinson* v. *Denby* (3) the defendant had taken advantage of the plaintiff's situation to force him into an unfair bargain.

There is no evidence in this case of any such fraud or undue influence or unconscientious taking advantage of the appellant's situation. The appellant had a valuable contract; he approached the respondent, not as mayor, but as a person of capital in a position to assist him. The respondent was able to dictate terms quite independently of his position as mayor, and I think there is no adequate ground for holding that in fact the appellant was intimidated by the circumstance that the respondent held that office. The appellant had not entered upon the performance of his contract; if he were unable to get the necessary assistance to carry it out there is no reason to suppose that the municipality would not have permitted him to abandon it.

It was suggested that public policy would be better served by compelling the respondent to refund. That may be so; but I do not think the law of England on this subject leaves it to the judge or the court to determine in each particular case whether or not

(1) 1 DeG. M. & G. 660. (2) 18 Ves. 379.
(3) 6 H. & N. 778; 7 H. & N. 934.

1914

LAPOINTE v. MESSIER.

Duff J.

public policy will be best served by allowing moneys paid or property delivered under an executed contract void as against public policy to be recovered back by the party paying. On the contrary the general principle of the law is that stated by Lord Mansfield in the passage quoted above. The person seeking to recover must bring himself within one of the recognized exceptions to that principle or he must fail. I think in this case the appellant has not done so, and that if his right to recover were to be determined according to the law of England he could not succeed.

It remains to consider the question whether according to the law of the Province of Quebec the appellant is precluded from recovery because of the unlawful character of his agreement with Messier.

The present case, I think, is not a case of payment of money. The appellant affirms that the respondent had no authority to discount the note; and, in view of the conduct of the respondent in the litigation and the discredit cast upon him by the trial judge, the appellant's story should, I think, be accepted. However, as I have already pointed out, the appellant can only make out his case by alleging the illegality of his contract and on principle he appears to be in the same position as if payment had been made; and, moreover, as I have already said, it was, no doubt, understood that the bonus was ultimately to be paid out of the proceeds of the contract. The general question is dealt with very elaborately in the judgment of the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*(1), with which Mr. Justice Sedg-

(1) 31 Can. S.C.R. 244.

wick and Mr. Justice King concurred. The authorities cited appear to shew that according to the more modern view the effect of section 989 of the Civil Code, a plaintiff in the situation of the appellant is entitled to relief on the ground that the illegal contract being without effect the defendant ought not to be permitted to retain that to which he never had any legal right.

Although it may be doubtful whether that decision is strictly binding upon us in view of the subsequent course of the litigation, yet I think I ought to give effect to the opinion of the majority of the court which was not overruled by the Judicial Committee.

ANGLIN J.—The evidence, in my opinion, clearly discloses that the defendant had a share or interest in the plaintiff's contract with the municipal corporation of the Village of DeLorimier which falls under the penalizing provisions of articles 1 and 2 of the Quebec statute, 58 Vict. ch. 42. I am, with respect, unable to understand how the Court of King's Bench reached the conclusion that the agreement between the plaintiff and the defendant was not "illegal, prohibited or against good morals or public policy." But the case, in my opinion, is not within the purview of section 11 of the statute. There is no evidence that the defendant either performed or agreed to perform any service in his official capacity for the plaintiff in consideration of the $3,000 note given him.

If I could read the evidence as warranting a conclusion that the plaintiff had never authorized the defendant to retain out of the proceeds of the note of the municipal corporation, the amount of the $3,000 note now in question, the disposition of this case

1914

LAPOINTE v. MESSIER.

Anglin J.

would be comparatively simple. The plaintiff would, in that event, be suing to recover money had and received to his use by the defendant, and the latter would be compelled to invoke the illicit contract as his only justification for retaining it. In such a defence he certainly could not succeed. I feel constrained, however, to take the view that, in directing the defendant to retain out of the proceeds of the note of the municipal corporation the sums due him, the plaintiff intended that he should pay to himself the amount of the $3,000 note which represented his illicit share of the plaintiff's profits on the contract with the municipality, and that this should be deemed a payment of this sum of $3,000 by the plaintiff to the defendant. It is, I think, a fair inference from the evidence that "it was understood" that the defendant was to pay himself the amount of the $3,000 note out of the proceeds of the discount of the note of the municipality.

I agree with the view which has prevailed in the provincial courts in regard to the $2,000 kept by the defendant on the pretext that he was entitled to it for financing a second contract — that he has neither right nor colour of right to retain it. There was no second contract.

Two objections are urged against the plaintiff's right to recover the sum of $3,000: 1st, that it was paid voluntarily, and, if in mistake, that the mistake was of law, not of fact; and 2ndly, that, in order to recover, the plaintiff must invoke the illegality of the contract under which this money was paid. Notwithstanding these objections, under the Civil Code of the Province of Quebec, the right to recover appears to exist.

Article 1047 of the Civil Code provides that:—

He who receives what is not due to him through error of law or of fact is bound to restore it.

Money voluntarily paid in mistake of law is, therefore, recoverable, as has been held in many cases: *Leprohon* v. *Le Maire de Montréal*(1); *Leclerc* v. *Leclerc* (2); *Bain* v. *City of Montreal*(3), at pages 265, 285.

There appears to be no doubt that under the system which prevailed before the adoption of the Civil Code full effect was given in French courts to the maxim of the Roman law, *ex turpi causâ non oritur actio,* and the action *en répétition de l'indu* did not lie to recover moneys paid under illegal contracts, save in cases of the sale or cession of public offices, which were treated as exceptional. It suffices to cite Pothier in support of this statement. But, by article 989 C.C., it is declared that

a contract without consideration or with an unlawful consideration has no effect.

Modern commentators, as well as modern decisions, appear to agree that, by this article, it was intended to do away with the operation of the Roman rule in so far as it precludes actions to recover back moneys paid under illicit contracts. Otherwise, it is said, some effect would be given to the illicit contract in contravention of the article of the Code. And it is pointed out that, while the Code was based largely upon the views of Pothier, in this particular his ideas were deliberately departed from. The right to recover moneys illegally paid is now the accepted rule, at all events where, as in the present case, the contract under which the payment has been made is merely

(1) 2 L.C.R. 180. (2) Q.R. 6 Q.B. 325.
(3) 8 Can. S.C.R. 252.

1914

LAPOINTE v. MESSIER.

Anglin J.

illicit or contrary to public policy and not *in se* immoral or criminal. With this latter class of contract we are not now called upon to deal.

This subject was carefully reviewed by the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*(1), at pages 298 *et seq.* His conclusion was that, under the Civil Code, money paid upon such an illicit contract is recoverable. I regard this authority as binding and I follow it without hesitation both as to the principal sum of $3,000 and as to the interest, $396.65, which the provincial courts disallowed.

In such a case as we have now before us, if the difficulty as to voluntary payment did not exist (*Wilson* v. *Ray*(2)), the money illegally paid to the defendant would be recoverable in an English court. Although ordinarily money paid upon an illegal contract is not recoverable in a court administering English law, because *nemo allegans suam turpitudinam est audiendus,* and the maxim *potior est conditio defendentis* is applied

> where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him as we know from various authorities of which *Osborne* v. *Williams*(3) is one. *Reynell* v. *Sprye*(4), at p. 679.

As I have already said, the principle of the decisions in such cases as *Osborne* v. *Williams*(3), and *Morris* v. *M'Cullock*(5), appears to have been accepted in France in regard to the sale of public offices even when it was held that the action *en répétition*

(1) 31 Can. S.C.R. 244.
(2) 10 A. & E. 82.
(3) 18 Ves. 379.
(4) 1 DeG. M. & G. 660.
(5) Amb. 432.

did not lie to recover payments under illegal contracts.

Where, as here, there is a statutory prohibition of the contract under which the money has been paid and a penalty imposed on only one of the parties, they may be regarded as not *in pari delicto;* and, where public policy requires it, the party who is not penalized may have relief. 15 Am. and Eng. Encyc. (2 ed.) 1005.

It is very material that the statute itself, by the distinction it makes, has marked the criminal. For the penalties are all on one side; upon the office keeper.

Browning v. *Morris*(1), at page 793, *per* Lord Mansfield; *Williams* v. *Hedley*(2). Here the penalties are imposed only on the municipal office-holder. The purpose of the legislation is to ensure, for the protection of the public, whom the office-holder represents, that he shall not have interests which may conflict with his duty to them. Public policy requires that he shall not be allowed to retain profits made out of contracts which give or may give him such a conflicting interest. In such a case public policy demands the intervention of the court. The guilty party to whom relief is granted is simply the instrument by which the public is served. 7 Cyc. 750.

It is upon grounds of public policy that similar relief is granted by English courts of equity in marriage brokage cases. *Hermann* v. *Charlesworth*(3); *Hall* v. *Potter*(4).

These references to English law are probably quite superfluous in the present case, since I dispose of it

(1) 2 Cowp. 790.
(2) 8 East 378.
(3) (1905) 2 K.B. 123.
(4) Show. P.C. (4 ed.) 98.

1914

LAPOINTE v. MESSIER.

Anglin J.

on the authority of *Consumers' Cordage Co.* v. *Connolly*(1). I make them merely to indicate that, in courts in which the maxim *ex turpi causâ non oritur actio* ordinarily precludes relief where the plaintiff is obliged to set up illegality in which he has participated, such a case as the present would, on grounds of public policy, be deemed an exception to the general rule and the public official would not be permitted to retain the fruits of his illicit bargain.

While the plaintiff's conduct may savour of ingratitude and may appear to be such as not to entitle him to assistance of a court of justice, it must be borne in mind that he succeeds, notwithstanding his own demerit, solely because of the supreme importance, in the public interest, of frustrating attempts on the part of public officials to enrich themselves by forbidden means.

I am, with respect, of the opinion that the plaintiff's appeal should be allowed with costs in this court and in the Court of King's Bench, and that the judgment of the Superior Court should be restored.

BRODEUR J.—Nous avons à déterminer dans cette cause:—

1. Si le maire d'une municipalité peut être intéressé dans un contrat qu'un entrepreneur a fait avec cette municipalité;

2. S'il peut réclamer le paiement d'un billet promissoire qui lui aurait été donné pour son intérêt dans ce contrat.

Nous avons aussi à examiner en troisième lieu si le billet promissoire ayant été payé ou compensé il y a

(1) 31 Can. S.C.R. 244.

lieu à une action en répétition de la part de l'entrepreneur signataire du billet.

Le législateur a vu avec un soin jaloux à ce que les conseils municipaux soient composés d'hommes désintéressés qui, en acceptant de devenir membres du conseil, doivent se laisser guider exclusivement par l'intérêt public.

Il peut arriver sans doute que la décision de certaines questions affecte particulièrement un ou plusieurs membres du conseil. Par exemple, s'agit-il d'un chemin ou d'un cours d'eau dans lequel des conseillers municipaux pourraient être intéressés, ils doivent alors s'abstenir de siéger ainsi que le déclare l'art. 135 du code municipal qui dit:—

> Nul membre d'un conseil ne peut prendre part aux délibérations sur une question dans laquelle il a un intérêt personnel.

La question de savoir s'il est intéressé ou non, doit être décidée par ses collègues sans qu'il puisse voter sur cette question.

Nombre de décisions ont été rendues par nos tribunaux annulant des procès-verbaux ou des règlements parce que les conseillers qui les avaient adoptés étaient personnellement intéressés.

Quand il s'agit de contrats avec la municipalité, non seulement ils ne peuvent pas voter sur ces contrats mais ils ne peuvent pas être nommés membres du conseil ni agir comme tels (art. 205 du Code Municipal).

Dans le cas actuel, Lapointe, l'appellant, avait le 26 septembre, 1907, fait un contrat avec le municipalité de DeLorimier pour la confection d'égoûts. Il s'est trouvé, à un moment donné, gêné dans ses affaires, et il s'est adressé au maire, l'intimé, Messier,

1914

LAPOINTE v. MESSIER.

Brodeur J.

pour qu'il lui aide à financer son entreprise. Ce dernier accéda volontiers à sa demande, mais exigea en retour que Lapointe lui donnât la moitié de ses profits. Lapointe a trouvé que les exigeances de Messier étaient trop fortes et ils se sont entendus pour une somme de $3,000. Et Lapointe donna son billet pour ce montant le 26 octobre, 1907.

Messier avança alors, dans le cours de l'automne 1907 et du printemps 1908, l'argent nécessaire, savoir environ $12,000, pour payer les matériaux et la main d'œuvre en prenant des billets prômissoires de Lapointe qu'il escomptait dans une banque ou qu'il gardait en sa possession.

L'entreprise fut terminée au commencement de l'été de 1908. Tous comptes tirés, la municipalité devait à Lapointe $22,720.50, et comme il n'avait dépensé qu'environ $12,000, il se trouvait avoir fait un profit de $10,000.

Il était convenu par le contrat entre Lapointe et la corporation que les paiements devaient se faire par cinq versements annuels et consécutifs dont le premier devenait dû un an après l'acceptation des travaux.

Le premier versement serait donc devenu dû au commencement de l'été de 1908. Messier, le maire, a-t-il trouvé que les échéances étaient trop éloignées, ou bien est-ce le résultat d'une erreur de la part des autorités municipales ? Le conseil municipal, à tout évenement, a décidé d'autoriser son maire à signer au nom de la municipalité un billet promissoire qui serait payable en janvier, 1909, pour tout le montant.

C'était là une faveur considérable qui était faite à l'entrepreneur mais qui en même temps permettait au maire de rentrer dans ses fonds sans plus de délai.

La preuve ne nous dit pas les circonstances qui ont

motivé ce changement dans les termes de paiement. Mais il est à présumer que l'intimé n'y a pas été absolument étranger. D'ailleurs il a signé lui-même le billet qui allait lui permettre de se rembourser de suite des avances qu'il avait faites à Lapointe.

Le billet est endossé par Lapointe et remis à Messier qui en fait faire l'escompte et en touche le montant.

Messier, qui n'avait avancé qu'environ $12,000 à Lapointe, aurait dû remettre à ce dernier environ $10,000. Mais il exigea d'abord $3,000 pour le billet qu'il s'était fait donner le 26 octobre, 1907, et il réclamait en outre environ $2,000 pour l'avoir aidé à l'égard d'un autre contrat avec la municipalité. La cour supérieure et la cour d'appel ont été unanimement d'opinion que Messier n'avait pas droit à ces $2,000.

La cour d'appel cependant a déclaré que Messier pouvait garder les $3,000, montant du billet du 26 octobre, 1907.

Ce billet de $3,000 représente-t-il une convention légale ?

Je n'hésite pas à dire que non.

Le maire d'une municipalité ne peut pas avoir directement ni indirectement un intérêt dans un contrat avec sa corporation (art. 205). Cette prohibition du code municipal a été édictée en termes encore plus sévères dans la législation contenue dans le chapitre 42 de 58 Vict.

Le section 2 dit :—

Tout membre d'un conseil municipal qui a sciemment, pendant la durée de son mandat, directement ou indirectement, par un associé ou des associés, ou par l'intermédiaire d'une autre personne, quelque intérêt ou commission dans un contrat avec le conseil muni-

1914

LAPOINTE v. MESSIER.

Brodeur J.

cipal dont il est membre, ou qui a sciemment, pendant la durée de son mandat, retiré de ce contrat quelque avantage pecuniaire pour travaux exécutés ou a exécuter, sera, sur jugement obtenu contre lui, en vertu de cette loi, déclaré inhabile à remplir une charge dans le dit conseil ou sous le contrôle du dit conseil durant l'espace de cinq ans.

Nous relevons à la section 11 du même statut la disposition suivante qui autorise dans certains cas l'action en répétition et qui dit:—

Quiconque a payé quelque somme d'argent, commission, honoraire ou récompense à un membre du conseil municipal pour services rendus ou à rendre par tel membre en sa qualité officielle, qu'il s'agisse de services rendus par tel membre lui-même, directement ou indirectement ou par l'entremise d'un tiers, et pour s'occuper d'une affaire devant le conseil ou devant un comité du conseil, peut, en tout temps, recouvrer cette somme par action ordinaire devant une cour de juridiction compétente.

Il est bien évident pour moi que la considération du billet de $3,000 en question était pour la part de bénéfice du défendeur intimé dans les travaux exécutés pour la corporation.

Cette considération était illégale parce qu'elle est contraire à l'ordre public et aux bonnes mœurs.

L'article 990 du Code dit:—

La considération est illégale quand elle est prohibée par la loi, ou contraire aux bonnes moeurs ou à l'ordre public.

Les bonnes mœurs et l'ordre public requièrent que les municipalités soient administrées par des personnes désintéressées, que les membres du conseil n'aient pas d'intérêts ni directement ni indirectement dans aucun contrat municipal.

Ils sont les mandataires des municipes et l'intérêt public doit être leur seul guide. Même s'il n'y avait pas de disposition formelle dans nos lois statutaires contre la mauvaise foi du mandataire infidèle, sa responsabilité serait la même sous la loi commune.

1914

LAPOINTE v. MESSIER.

Brodeur J.

Toute convention qu'il fait contrairement à cela, viole les principes de la loi naturelle et elle est contraire à l'ordre public et aux bonnes mœurs.

Le billet du 26 octobre, 1907, est donc nul et de nul effet. Je trouve dans la jurisprudence américaine la décision suivante qui peut s'appliquer à la présente cause: *Smith* v. *City of Albany*(1): "Where by the charter of a city the members of the common council were prohibited from being interested in any contract for which payment must be made under any ordinance of the common council and a member of the council, by a secret arrangement with a contractor, became interested in such a contract, it was held that a note given by the contractor to such member for his share of the profits of the contract was void and, being void, an assignee thereof could not recover upon it."

L'action en répétition existe-t-elle si ce billet a été payé ?

Il y a eu divergence d'opinion à ce sujet. Mais l'opinion générale chez les auteurs modernes est que cette action existe. Voir Marcadé, vol. 4, No. 458; Huc, vol. 8, No. 392; Laurent, vol. 16, No. 164; Baudry Lacantinerie, vol. 11, No. 316.

Cette question est venue devant cette cour dans la cause de *Consumers' Cordage Co.* v. *Connolly*(2), et mon prédécesseur, le regretté juge Girouard, dans son jugement, en a fait une étude complète. On a dit que cette opinion avait été renversée par le Conseil Privé. C'est là une erreur. Au contraire, le Conseil Privé l'a adoptée, puisqu'il a ordonné un nouveau procès pour trouver si l'acte criminel que l'on reprochait aux parties et qui donnait lieu à l'action en répétition

(1) 61 N.Y. 444.

(2) 31 Can. S.C.R. 244; 89 L.T. 347.

1914

LAPOINTE v. MESSIER.

Brodeur J.

avait réellement eu lieu. Voir la décision du Conseil Privé rapporté au volume 89 du Law Times, p. 347.

En résumé, je suis d'opinion que le billet de $3,000 avait été donné pour une considération illégale et que le maire est obligé de le remettre à l'entrepreneur Lapointe sans pouvoir en exiger le paiement.

L'appel doit donc être maintenu avec dépens de cette cour et de la cour d'appel.

Appeal allowed with costs.

Solicitors for the appellant: *Angers, deLorimier, Godin & deLorimier.*

Solicitors for the respondent: *Monty & Duranleau.*

ARZÉLIE LAMOUREUX (PLAINTIFF) . APPELLANT; 1913

*Nov. 20, 21.

AND

1914

ISAIE CRAIG (DEFENDANT) . . . . . RESPONDENT.

*Feb. 3.

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

Will—Execution—Testamentary capacity—Undue influence—Captation—Approval by testatrix—Evidence—Beneficiary propounding will—Onus of proof.

A person propounding a will, in the preparation of which he was instrumental and by which he is sole beneficiary, is obliged to support it by evidence sufficient not only to shew that the will was duly executed, but also to justify the righteousness of the transaction and to establish that it truly expresses the last testamentary wishes of the testator and that the testator knew and appreciated the effect of its dispositions and approved of them.

Two days before her death the testatrix, to whom morphine was being administered to alleviate pain, executed two wills in the English form. She requested her husband to have a will prepared and, on his instructions, his brother, an advocate, drafted a will whereby the husband was made sole beneficiary. Upon this will being read over to her, in the forenoon, the testatrix took exception to it because it ignored a promise, made to her father, that certain property she had received from him should ultimately revert to members of her own family; and she did not then execute it. Another will was drafted by the husband's brother to meet her wishes, but, either on account of her drowsiness or because of the presence in her bedroom of friends, including her sister, the plaintiff, the second will, though ready at noon, was not presented to the testatrix for signature until late in the afternoon, when she attempted to sign it, but the brother declared it worthless owing to the illegibility of the signature. On being told of this opinion, the will read to her in the morning, or one similar in its contents, was presented to her for

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

LAMOUREUX v. CRAIG.

signature and her husband offered to read it to her, but she declined to have this done, saying that she had already heard it read and knew its contents; she then signed it with her mark in presence of witnesses. In an action to set aside the last will, the evidence failed to establish that the testatrix understood its contents and the difference between its provisions and those of the will which she had attempted to sign, nor did it remove suspicion arising from the fact that the impeached will had been prepared under the instructions of the sole beneficiary, and other peculiar circumstances attending its execution.

Held, reversing the judgment appealed from (Q.R. 22 K.B. 252), the Chief Justice dissenting, that the evidence failed to establish that the will in question expressed the true last testamentary wishes of the testatrix and, consequently, that it should be set aside.

Barry v. *Butlin* (2 Moo. P.C. 480); *Fulton* v. *Andrews* (L.R. 7 H.L. 448); *Tyrrell* v. *Painton* ((1894), P. 151); *McLaughlin* v. *McLennan* (26 Can. S.C.R. 646); *Brown* v. *Fisher* (63 L.T. 465); *St. George's Society of Montreal* v. *Nicholls* (Q.R. 5 S.C. 273); *Harwood* v *Baker* (3 Moo. P.C. 282); *Tribe* v. *Tribe* (13 Jur. 793); *Mignault* v. *Malo* (16 L.C. Jur. 288), and *Mayrand* v. *Dussault* (38 Can. S.C.R. 460), referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment in the Superior Court, District of Montreal(2), and dismissing the plaintiff's action with costs.

The circumstances in which it was sought to set aside the will in question are stated shortly in the head-note and are fully set out in the judgments now reported.

Surveyer K.C. and *Hurteau* for the appellant.

A. Cinq-Mars for the respondent.

THE CHIEF JUSTICE (dissenting).—The will in this case is attacked on several grounds. I quote from the plaintiff's declaration:—

(1) Q.R. 22 K.B. 252. (2) Q.R. 42 S.C. 385.

1914

LAMOUREUX v. CRAIG.

The Chief Justice.

(1) Le dit testament est nul et entaché de nullité pour cause d'erreur de la part de la testatrice, de dol, de suggestion et de captation de la part du défendeur et d'autres personnes d'après lui au moment où le prétendu testament parait avoir été fait; (2) les formalités relatives au testament suivant le mode dérivé de la loi d'Angleterre et relatées dans les articles 851, 852, 853, 854 et 855 du code civil n'ont pas été remplies dans le cas actuel; (3) au jour et à l'heure où le testament parait avoir été fait, la testatrice, dame Flore Lamoureux, vu son état de grande faiblesse, tant de corps que d'esprit, les médicaments qu'on lui servait, les souffrances atroces qu'elle endurait, ne pouvait donner un consentement entier et valable à ce prétendu testament.

That the will was duly executed was found by both courts below. The trial judge found against the will on the ground that the husband of the deceased induced her to sign it on the false representation that the previous will was invalid because the signature was illegible. Whether it was or not, I submit respectfully, is not in issue here, but that the husband was so informed by his brother, a professional man, cannot be doubted. I understand that the majority here is of opinion that the will in question was properly executed and that the testatrix was of sound and disposing mind, but that it does not truly express her last intentions and that she was in error as to its provisions when she signed it.

What are the facts ? The parties married in Quebec, under what is known there as a "régime de séparation de biens." The husband, therefore, would not, in case of intestacy, inherit anything from his wife. They apparently lived together for twenty-seven years. During all that time the wife was under the impression that the last survivor would inherit everything. When the attention of her husband was drawn to the true situation, his observation was "in my wife's present condition, I am not to trouble her about such

1914

LAMOUREUX v. CRAIG.

The Chief Justice.

things." This is not evidence of rapacity on his part. The respondent's father saw the priest who was about to attend on the deceased and he was asked to speak to her about her temporal affairs, and it was only as a result of that interview that the husband came to interfere in the matter at all. For what occurred when the wife gave her instructions to draw the will we must rely entirely upon his evidence. He says that her suggestion was that he should have the property, but that, when he came finally to dispose of it, he should bear in mind her promise to her father to give what she had received back to her family. I read the husband's evidence to mean that the deceased was prepared to execute the will leaving everything to him on his personal undertaking to comply with her request. He thought, however, that it would be more satisfactory to have the wife's wish expressed in the will itself. Hence the change.

If anything is clear in this unfortunate controversy, it is that the wife's wish was to give her husband her estate, relying upon him to carry out her verbal request with respect to her family, and the effect of this judgment is to defeat that intention. For that reason I think the appeal should be dismissed. As the evidence was carefully and ably analyzed by the Chief Justice of the Court of King's Bench, I do not think it necessary to do more than to say that I adopt his conclusions as well as his reasons.

IDINGTON J.—The respondent's late wife, whose health had not been very satisfactory for some time, fell rather suddenly very ill. She was nervous and suffered such pain that her physician, in order to alleviate her sufferings, administered morphine. He in-

timated to her husband that her condition was such that her spiritual adviser should be called in, and the reverend Father Charbonneau was accordingly sent for. On his reaching the house, he was interviewed by the father of the respondent, domiciled with him, and asked to bring under the notice of the sick woman the fact that her worldly affairs were not settled and to advise her to consider same.

Something is sought to be made of the different versions given on the trial hereof, by respondent's father and the priest, both as to what transpired at this interview and what the priest reported to him after leaving the sick-room of the dying woman.

I attach little importance to any such discrepancy, though accepting the priest's version of what was said.

The eagerness of respondent's father is, of course, the subject of fair criticism. But the important thing to be observed is that it was not until after the priest had discharged his duties as required, by administering the last rites of the church to the sick woman, that the subject of making a will had ever been considered by her.

Immediately after the departure of the priest, respondent tells that he was called into her room and, when the nurse had retired and no one else present, he was spoken to by her on the subject of her worldly affairs which, up to then, she had seemed to think settled.

The result of what seems to have been a very brief interview was that the brother of the respondent, also living in the same house and an advocate by profession, was asked to draw a last will and testament for his wife according to instructions given by him.

1914

LAMOUREUX v. CRAIG.

Idington J.

The brother, accordingly, without any interview with her, drew up the following very short will:—

Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends, à tout énvénement, les présentes dispositions: Je donne et lègue, sans restriction, à mon époux, Isaïe Craig, tous mes biens, tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs. Et je déclare ne pouvoir signer.

When this was read to her by respondent, she, as he testifies, said:—

Si tu pouvais faire quelque chose pour ma famille; mon père m'a toujours demandé de penser à eux autres en autant que la chose serait de mon goût, j'aimerais que tu ferais la même chose si tu peux.

He says that, thereupon, he withdrew and instructed his brother accordingly. The brother drew then a will which reads as follows:—

Outremont, Montréal, 5 Juillet, 1911.

Par mesure de prudence et sans me croire dangereusement malade, je prends à tout événement les présentes dispositions: Je donne et lègue à mon époux, Isaïe Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches, comme souvenirs. Suivant les recommendations de mon défunt père, je lui recommande de même de ne donner ou lèguer ces dits biens à nuls autres qu'aux membres de ma famille, et je signe.

FLORE LAMOUREUX.

I omit in each case the attesting clause signed by the witnesses. I desire only to present the actual operative form of each of these wills. All this took place about half-past ten or eleven o'clock in the morning of the 5th of December.

Why she was not asked to sign this latter will till five o'clock in the afternoon is not, to my mind, at all clearly established beyond suspicion.

It is said, by and on behalf of the respondent, that she slept and only awoke about five o'clock.

It appears, however, that her sister, the appellant,

had called about eleven o'clock in the forenoon and stayed until five p.m. Nothing was said to her of these wills or of the purpose that existed relative thereto. It may be but a coincidence that she slept whilst the sister remained, but I cannot rid my mind of the suspicion that her sister's presence was equally a barrier in the way.

However that may be, the sands of life were meantime ebbing fast, for in forty hours she was dead. The stock of vitality which was able in the morning to discuss the difference between the will first read to her and what it omitted and she would have preferred to have it provide for, had become so low at five o'clock that she could not write her name so as to be legible when she attempted to subscribe the second will and, obviously, could not see the material difference between them, and treated the one as the equivalent of the other.

We are asked to believe as conclusive of her capacity to understand that she asked if this one to which she set her mark was the same as read in the morning, and to have her spectacles handed to her.

There is a marked difference between these two wills. And the fact that she did not observe it seems conclusive that she did not apprehend clearly what she was doing or saying.

I am not concerned with any difference in their legal effect. I cannot assume that she was possessed of that legal knowledge and acumen that would have enabled her to decide that they were (if they were) in law the same.

To the ordinary mind they were as widely different as can be on the point she had called attention to in the morning and requested consideration of. She had

1914

LAMOUREUX v. CRAIG.

Idington J.

forgotten. She had been drugged. She, when aroused from the slumber that induced, clearly had not that grasp of thought to enable her to discover this vast difference in language. That difference ought, but for the condition of mind thus induced, to at least have revived her memory relative to what she had requested. Nay, more, her request, veiled in the language of affection and politeness as quoted above, ought, to my mind, to have been treated by her husband as that of a command, or have, at least, driven him to the straight course of bringing to his wife the adequate assistance in the way of the independent skill of some one to whom she might have given instructions freed from the embarrassment of his presence.

The dying are entitled to such consideration at the hands of those they have loved and cared for. Or if he had even taken the appellant into his confidence and left the sisters to settle the matter and the dying woman had then, as the result of such consideration, persisted in leaving it entirely in his discretion whether she should leave him absolute owner or not, he would have possibly been relieved from the suspicion he must now forever rest under.

He has not removed it so as to comply with the law as laid down in the leading cases of *Barry* v. *Butlin* (1), and *Fulton* v. *Andrew* (2).

In the latter case, at foot of page 471 and top of page 472, Lord Hatherly uses language to be borne in mind in such cases as this. It is as follows:—

> There is one rule which has always been laid down by the courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly

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

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

were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

"Now," again adopting the language of Lord Hatherly, "how did the respondent discharge this onus in the present case"?

What I have related and suggested answer that he failed.

But, when we find that she left no children, that her property came from her father, that her sister had children surviving, that her father had extracted from her a solemn promise that the property should return ultimately to his family, the hopes and wishes she had expressed to her husband, so illuminated by such facts and read in light of the law applicable to one directing all and so directing it as to make the result enure entirely to his benefit, seem to have been so disregarded that this instrument cannot be called her will.

I think we must find that he undoubtedly failed to discharge the onus resting upon him.

There is much that might be said relative to the details of the execution and attestation of this pretended will but, in view of the answer which these broad features of the case present, it seems needless to dwell on such details.

The appeal should be allowed with costs throughout and the judgment of the learned trial judge be restored.

1914

LAMOUREUX v. CRAIG.

Anglin J.

DUFF J. concurred with Brodeur J.

ANGLIN J.—This case has given me not a little trouble and anxiety. Three questions arise: First: Had the testatrix mental capacity? Second: Was the will propounded by the defendant duly executed? Third: Does the evidence sufficiently remove the suspicion created by the facts that the instrument in question was prepared under the instructions of the husband of the testatrix, the defendant, who is the sole beneficiary, and its execution was procured by him — a suspicion which is augmented by the peculiar circumstances of this case — and establish that it expresses the true last will of the testatrix and that she knew and approved of its contents? *Tyrell* v. *Painton*(1).

The evidence has satisfied me that the testatrix had testamentary capacity at certain times on the day in question. *McLaughlin* v. *McLellan*(2); *Martin* v. *Martin*(3); *Kaulbach* v. *Archbold*(4). From about noon until after four o'clock she slept most of the time under the effect of a dose of a quarter of a grain of morphine administered about eleven o'clock. She appears to have been awake and fully conscious from about half-past four until after five o'clock, when the nurse gave her another dose of one-eighth grain of morphine to allay her pain. Whether the effect of this latter dose had not so much benumbed her faculties by six o'clock, or shortly after, when the will now propounded was executed, that she was unable to fully appreciate the differences between it and the paper she

(1) [1894] P. 151.
(2) 26 Can. S.C.R. 646.
(3) 15 Gr. 586.
(4) 31 Can. S.C.R. 387.

had attempted to sign a short time before, is, I think, extremely doubtful. Yet it is essential to the validity of the will propounded by the defendant that he should establish that, at this time, the testatrix was capable of thus discriminating between the two wills and of understanding and approving the contents and effect of that to which she finally put her mark.

It is not satisfactorily proven that the formalities prescribed for the execution of a will in the English form were observed. The evidence of nurse Laporte, although in some parts uncertain, in the end seems clear enough that the three witnesses signed this will in the room of the testatrix and in her presence and that it was another will, to which the testatrix had previously put an illegible signature, which, although then believed to be of no value, was subsequently signed by the same witnesses in another room — a peculiar circumstance, if it be the fact, of which there is no real explanation in the evidence. The witness, Marie-Louise Craig, is most unsatisfactory; and the evidence of the third witness, Dorila Amyot Lessard, while by no means clear, rather goes to shew that it was the signatures to the document now propounded which were affixed by the witnesses in another room and out of the presence of the testatrix. On the whole evidence, perhaps the balance of probability is in favour of the due execution of the will propounded. But it is not satisfactorily proven.

It is upon the third question, however, that the chief difficulty arises. The suspicion created by the facts that the defendant is the sole and absolute beneficiary under this will, that it was he who gave the instructions for its preparation to his brother, Fernand Craig, who is a lawyer, and that he was present at and

1914

LAMOUREUX v. CRAIG.

Anglin J.

procured its execution is greatly increased by the following circumstances, deposed to by himself. The testatrix, when the defendant read this instrument to her on the morning of the 5th of July (possibly in the presence of nurse Laporte, as was found by the trial judge upon evidence which is very slender, to say the least), expressed a desire that he should do something for her family in conformity with a wish of, if not in fulfilment of a promise made by her to, her father from whom she had received her property. The trial judge finds that she then refused to sign the will as drawn. As pointed out by the learned Chief Justice of the Court of King's Bench, there is no direct proof of such a refusal. The evidence, however, warrants the inference that the testatrix took exception to the will in the form in which it was read to her. In order to comply with the wish thus expressed by his wife, the defendant had his brother draft another will in which, after bequeathing her property to her husband, she recommends him not to give or bequeath it to any persons other than members of her family. This will was drawn about noon, but was not presented to the testatrix until after five o'clock in the afternoon, either because she was drowsy from the effect of the dose of morphine given to her about eleven o'clock, or because of the presence of visitors in her room, including her sister, the plaintiff, who remained from about eleven o'clock to five o'clock. The testatrix signed this will, apparently with much difficulty, and at the cost of considerable effort. It was subsequently attested, but, probably, not in her presence. This opinion is expressed by Archambeault C.J. in rendering the judgment of the Court of King's Bench. The signature of the testatrix is said to have been illegible. The brother

of the defendant, who had drawn the wills, was not present at the execution of either and was not called as a witness in this case. On seeing the defective signature, he expressed the opinion that it was worthless and that the will which bore it was invalid. The good faith of this professional opinion may be open to serious doubt. But I proceed on the assumption that fraud was not intended. On being told that her signature was insufficient, the testatrix, according to the testimony of the defendant, asked that the first writing of the morning should be brought to her. The defendant and the three witnesses say that he offered to read to her the document which he brought, but that she said it was unnecessary, that he had read it to her and that she knew its contents. She asked for a pen and her spectacles and signed it by making a cross. The witnesses then signed, probably in the room of the testatrix and in her presence. This took place about or shortly after six o'clock in the evening. The testatrix died on the morning of the 7th of July. The will now in question was admitted to probate in common form on the 3rd of August.

In his preliminary examination, although asked generally to tell the circumstances surrounding the preparation and execution of this will, which he propounds, the defendant made no allusion to the preparation or attempted execution of the other will. At the trial, during the early part of his evidence, occupying fourteen pages of the appeal case, he entirely suppressed the fact that another will had been drawn. He gives a manifestly false explanation of the delay in the execution of the will now propounded, which was read to the testatrix in the morning but not signed until the evening. It is only when pointedly asked

1914

LAMOUREUX v. CRAIG.

Anglin J.

whether there were two wills made that, after first pretending to be surprised and not to understand the question, ("je ne saisis pas la chose,") when pressed he discloses the circumstances which led to the preparation of the second instrument and the facts concerning it. He was undoubtedly trying to conceal those facts. In a number of particulars — some important, some not — his evidence at the trial differs from the testimony which he gave on preliminary examination. He is not a frank or candid witness and his conduct in the litigation adds to the very grave suspicion which already surrounded this case.

The will to which the testatrix attempted to place her signature undoubtedly expressed with approximate accuracy her real testamentary wishes. It was only because she was told that the illegibility of her signature to that document rendered it worthless that she assented to signing another. The defendant sought to make it appear that it was the testatrix herself who asked that the document first prepared should be brought to her for signature. The other witnesses, Laporte, Marie-Louise Craig and Lessard, do not corroborate him on this point. His father, speaking of the time when the testatrix had endeavoured to sign the second instrument, says:—

> Elle a essayé de le signer, elle a voulu faire des lettres et elle n'a pas eu la force de mettre sa signature comme il faut. Fernand était absent, il est arrivé sur ces entrefaites-là, immédiatement après, il a dit: "cela ne vaut rien, celui qui a été fait ce matin vaudra mieux; faites-lui donc signer celui-la;" ç'a été fait, ç'a été signé.

Moreover, although the witnesses agree that, when the defendant brought in the will now in question, he offered to read it to his wife and she declined to hear it read upon being told that it was the will which had

been read to her in the morning, in the evidence of nurse Laporte we find this passage:—

Q. Qu'est-ce qui s'est passé, qu'est-ce qui s'est dit ?

R. On a rapporté ce papier, vingt minutes, une demi-heure après, peut-être pas tout à fait autant, on est arrivé avec celui-là et elle a demandé si c'était bien le même; on lui a dit—"Oui, je te l'ai lu," et elle a mis sa croix.

There is, no doubt, evidence from which an inference might be drawn that the testatrix knew that she was signing the document which had been read to her in the morning; but it is far from being absolutely clear that she was not confused or that she fully appreciated that it was not to a copy of the second will, which had been read to her shortly before and which she had attempted to sign, that she was asked to make her mark. The execution of this instrument took place about or shortly after six o'clock — nurse Laporte says about twenty minutes — Dorila Amyot Lessard, some few minutes — after she had endeavoured to sign the other document. She had an injection of one-eighth grain of morphine about five o'clock. Did she appreciate the difference between the two instruments when asked to make her mark to that now propounded because her attempted signature to the other was illegible ? Did she, consciously and fully realizing what she was doing, abandon the wish she had expressed in the morning and the will giving effect to that wish, with which she had announced her satisfaction when it had been read to her some fifteen or twenty minutes before ? Whether benumbed faculties afford the true explanation of her signing at six o'clock a will to which she had taken exception at noon, or whether she accepted the document presented to her because she was fatigued and

1914

LAMOUREUX v. CRAIG.

Anglin J.

tired of the whole affair and anxious to be done with it, as her repeated expression "dépêchez vous" would indicate, or, perhaps, feared that she might not continue in a fit state to make a will long enough to have another prepared more exactly in accord with her wishes, is by no means clear. Whatever the explanation, she put her mark to an instrument which did not fully express her wishes — not of her own initiative, but upon this document being presented to her for signature by her husband at the suggestion of his brother, Fernand Craig, who undoubtedly could have given evidence that would be very valuable upon material points in this case. He was not called. The defendant, on whom lay the burden of proof, must bear the consequences of failure to call him.

Whatever the true facts may be, no adequate reason is given for the testatrix relinquishing her desire to have her father's wish carried out — and the evidence is by no means convincing that she did consciously and deliberately abandon her intention to give effect to that wish and decide of her own volition to make the will in which it is ignored.

The learned trial judge found against the will propounded on the ground that its execution was invalid because procured by a mistaken representation of law, viz., that the imperfection of the signature to the other will rendered it valueless. The court of appeal held that this mistake did not avoid the later will. Apparently proceeding on the footing that the burden of proof was on the plaintiff and that she had failed to prove the allegations of her declaration, the appellate court held that the will attacked contained the last wishes of the testatrix; that she was of sound mind at the time of its execution; and that this will was made

1914

LAMOUREUX v. CRAIG.

Anglin J.

in conformity with the formalities prescribed by law. The judgment of the Superior Court was reversed and the action dismissed. With great respect I think there was error in charging the plaintiff with the burden of proving that the formalities of execution were not observed and, more especially, that the will propounded by the defendant did not really express the last wishes of the testatrix. Probate in common form of this will having been granted, the plaintiff was, no doubt, obliged to begin. But, so soon as it appeared that the will had been procured by the defendant who was the sole beneficiary, the burden of proof shifted. *Tyrell* v. *Painton*(1); *Brown* v. *Fisher*(2); *Fulton* v. *Andrew* (3); *St. George's Society of Montreal* v. *Nichols*(4); art. 858 C.C.

Something has been said of alleged intrinsic evidence afforded by the documents themselves that the will to which the testatrix finally affixed her mark was not the document read to her in the morning. But, as this aspect of the case does not appear to have been gone into at the trial, I pass no opinion and rest nothing upon it.

On the whole case, though not without some hesitation, due chiefly to the contrary view unanimously taken by the learned judges of the court of appeal, I have reached the conclusion that the burden which rested upon the defendant, particularly in regard to establishing that the will propounded expresses the true last testamentary wishes of the testatrix and that when executing it she knew and approved of its contents, has not been satisfactorily discharged. The

(1) [1894] P. 151.
(2) 63 L.T. 465.
(3) L.R. 7 H.L. 448.
(4) Q.R. 5 S.C. 273.

1914

LAMOUREUX v. CRAIG.

Anglin J.

principle of the decision in *Harwood* v. *Baker*(1), cited by counsel for the appellant, applies to this case. See also *Tribe* v. *Tribe*(2).

The appeal should be allowed with costs in this court and in the court of appeal, and the judgment of the Superior Court should be restored.

BRODEUR J.—Il s'agit du testament de Madame Isaie Craig, née Flore Lamoureux, dont on conteste la validité.

Ce testament qui a été fait suivant la forme dérivée de la loi d'Angleterre, est daté à Montréal le 5 juillet, 1911. Il est signé d'une croix et porte l'attestation de trois personnes du sexe féminin, savoir, Madame Dorilla Amiot Lessard, une amie de la testatrice, Mlle. Marie-Louise Craig, une cousine du légataire universel, et Mlle. Anna-Maria Laporte, la garde-malade de la testatrice.

Par ce testament, elle lègue tous ses biens à son mari dans les termes suivants:—

Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends à tout événement les présentes dispositions: Je donne et lègue, sans restriction, à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs. Et je déclare ne pouvoir signer.

ma
DAME FLORE [X] LAMOUREUX.
marque

L'attestation des témoins se lit comme suit:—

Nous attestons que la signature ci-dessus faite "de sa marque" est celle de Dame Flore Lamoureux, épouse séparée de biens de Isaie Craig et nous signons comme témoins de suite après elle en sa pré-

(1) 3 Moo. P.C. 282, at p. 313. (2) 13 Jur. 793.

sence et à sa réquisition et qu'elle reconnaît que le document produit est signé par elle de sa marque et est son testament.

DORILLA AMIOT LESSARD.
MARIE LOUISE CRAIG.
ANNA MARIA LAPORTE.

Comme il a été produit dans la cause, au cours du procès, un autre testament dont j'aurai à parler plus loin, je désignerai celui dont je viens de donner le texte comme "le testament sous croix" ou le testament P. 1.

La testatrice est décédée le surlendemain, le 7 juillet, 1911.

Le légataire, qui est le défendeur et intimé en la présente cause, a, le 2 août, 1911, présenté au protonotaire une requête pour vérification de ce testament sous croix; et a produit au soutien de sa requête l'affidavit du témoin, Mlle. Marie-Louise Craig, sa cousine, qui a déclaré que:—

La croix apposée au bas du dit testament est celle de Dame Flore Lamoureux, qui n'a pas pu signer de sa main ses nom et prénom, vu son état de faiblesse;

La signature apposée au bas du dit testament Marie-Louise Craig est ma propre signature, et je l'ai apposée en présence et à la réquisition de la testatrice;

Les signatures "Dame Dorilla Amiot Lessard" et "Anna-Maria Laporte" sont celles de ces personnes qui ont signé devant moi en présence et à la réquisition de la testatrice.

Les héritiers de la défunte n'avaient pas été appelés à cette vérification qui s'est faite *ex parte* et le protonotaire a alors déclaré le testament dûment prouvé.

Le 21 août, 1911, la présente action a été instituée par la sœur de la testatrice, l'une de ses héritières, pour faire annuler ce testament en alléguant en substance que ce testament était le fruit de l'erreur et du dol,

1914

LAMOUREUX v. CRAIG.

Brodeur J.

qu'il y avait eu suggestion et captation, qu'il ne représentait pas la volonté de la testatrice et que les formalités essentielles n'avaient pas été remplies.

Le défendeur a comparu par le ministère de l'avocat Craig, son frère, celui-là même qui avait rédigé les deux ou trois projets de testament en question à cette date du 5 juillet, 1911. Il y a eu cependant substitution de procureur et M. l'avocat Craig a cessé d'occuper comme avocat du défendeur.

La cour supérieure, présidée par l'honorable juge Bruneau, a annulé le testament P. 1, en disant qu'il avait été signé par erreur.

La cour d'appel a renversé le jugement de la cour supérieure et a maintenu le testament.

La demanderesse, par le présent appel, nous demande de considérer la validité du testament et de l'annuler.

Il s'agit surtout d'apprécier la preuve qui a été faite; car la différence d'opinion entre les deux cours inférieures résulte de leur interprétation des faits. Il y a cependant la question de *l'onus probandi* qui se présente aussi.

Le demandeur a examiné les trois témoins du testament et le défendeur. Je suis d'opinion que la preuve qu'il a faite est suffisante pour faire mettre de côté le testament.

A tout événement, cette preuve était suffisante pour faire disparaître la présomption qui résultait de la vérification en faveur du testament. *L'onus probandi* retombait sur le défendeur. Ce dernier aurait dû alors faire entendre son frère, l'avocat qui a rédigé ce testament et qui aurait pu éclairer la justice sur les incidents de cette journé du 5 juillet, 1911.

Avant de disséquer cette preuve, il convient que je

rappelle brièvement des faits qui me paraissent admis par les deux parties et au sujet desquels la preuve offre une certitude assez parfaite.

M. et Mde. Craig, le légataire et la testatrice, étaient mariés depuis plusieurs années et n'avaient pas d'enfants. Ils étaient séparés de biens.

Le 5 décembre, 1904, le père de Madame Craig, Olivier Lamoureux, lui aurait fait donation d'une somme de $7,000. Il lui aurait fait promettre plus tard, et même jurer sur les évangiles, de donner le capital de ses biens aux membres de sa famille.

Madame Craig était d'une santé délicate, souffrant de gastrite depuis plusieurs années. Le 3 juillet, 1911, elle a été obligée de prendre le lit. Les médecins ont été mandés et son cas paraissant désespéré, une garde-malade fut appelée à son chevêt. Elle demeurait depuis longtemps chez son beau-père avec son mari et les deux frères de ce dernier. Parmi ces frères se trouvait l'avocat Fernand Craig.

Le 5 juillet au matin, on décida de faire venir le prêtre pour lui administrer les sacrements. Et alors le père Craig a demandé à son fils, le mari de la malade, si elle avait fait un testament. Sur réponse négative et sur le refus du mari d'aborder ce sujet avec sa femme, le père a attendu l'arrivée du prêtre; et, avant que ce dernier entrât dans la maison, il lui a dit de suggérer à la malade de faire un testament.

Le curé s'est chargé du message; et après son départ la mourante aurait demandé à la garde-malade de faire venir son mari à qui elle aurait exprimé le désir de faire son testament.

Nous n'avons quant à ses instructions que le témoignage du mari, le légataire, car la garde-malade n'était pas restée dans la chambre.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

Au lieu de faire venir un notaire, il crut qu'il était préférable de faire rédiger le testament par l'avocat Fernand Craig, son frère, qui était alors dans la maison.

Ce dernier aurait évidemment préparé un testament par lequel le mari était institué légataire universel en jouissance et en propriété.

Ce projet de testament ainsi rédigé aurait été communiqué par le mari à sa femme. Nous ne savons ce qui s'est alors passé que par le témoignage du mari. Il est sur ce point aussi bien que sur bien d'autres, si peu satisfaisant, et même si contradictoire, que je ne puis pas l'accepter sans corroboration.

A tout événement, ce testament n'a pas été agréable à la femme et elle a dû alors lui rappeler la promesse ou le serment qu'elle avait fait à son père et elle a dû suggérer de faire un autre testament par lequel elle lèguerait ses biens en jouissance à son mari et en nue propriété aux membres de sa famille, puisque l'avocat Fernand s'est mis à l'œuvre pour rédiger un nouveau testament par lequel, après avoir légué ses biens à son mari, elle ajoutait:—

> Suivant des recommendations de mon défunt père je lui (à mon époux) recommande de même de ne donner ou léguer ces dits biens à nuls autres qu'aux membres de ma famille.

On ne sait pas pourquoi ce testament ne fut pas alors signé de suite. Sur ce point il y a deux versions également probables. La première, c'est que la malade s'est endormie ou qu'elle était trop faible et qu'on n'a pas voulu la déranger. La seconde, c'est que l'arrivée de la demanderesse, vers cette heure-là, a gêné le défendeur, qui n'a pas voulu qu'il fût question du testament en présence de la sœur de la testatrice.

Je dois dire ici que depuis une couple de jours on

faisait prendre à la malade de la morphine pour apaiser ses douleurs qui, au témoignage de tout le monde, étaient des plus atroces. Les médecins experts qui ont été examinés sont d'opinion que ce traitement avait pour effet d'amoindrir ses facultés intellectuelles, que son cerveau ne pouvait pas être aussi clair et aussi lucide et que la morphine diminuait la force de sa volonté.

Dans le cours de l'après-midi, après le départ de la sœur, le défendeur s'est mis en frais de faire signer ce second testament. Il l'aurait lu en présence des trois témoins, Madame Lessard, Mlle. Craig et Mlle. Laporte. La testatrice aurait alors demandé ses lunettes et aurait griffonné sa signature.

Le juge instructeur déclare que les témoins auraient de suite, en sa présence, signé l'attestation.

A l'arrivée à la maison de l'avocat Fernand Craig, il prit connaissance de la signature de Mde. Craig et, ayant trouvé qu'elle était illisible, il aurait alors dit en présence de son père qui nous le rapporte:—

Cela ne vaut rien; *celui qui a été fait ce matin, vaudra mieux*, faites lui donc signer celui-là.

Et alors le mari serait revenu dans la chambre avec un autre projet de testament. On ne le lui aurait pas lu. Elle aurait fait sa marque d'une croix. Ce testament est celui qui est en litige et qui, comme je l'ai dit plus haut, a été annulé par la cour supérieure, mais maintenu par la cour d'appel.

Comme le testament portant la signature plus ou moins lisible de la testatrice devra être mentionné assez souvent au cours de ce jugement, je vais le désigner comme le testament de jouissance, ou le testament P. 2.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

Nous sommes en présence de deux testaments bien différents. Dans l'un elle donne tous ses biens à son mari, sans restriction. Dans l'autre, elle lui recommande de ne léguer ou donner ces biens qu'aux membres de sa famille. Sons décider de la portée exacte de ces deux testaments, mais pour simplifier les faits en litige, je dirai que dans le premier elle institue son mari légataire en jouissance et en propriété tandis que dans le second il n'est que le légataire en usufruit, la famille de la testatrice devant avoir la nue propriété.

Quelles étaient les intentions de la testatrice avant de tester ?

Nous avons la promesse formelle qu'elle a faite à son père de ne pas laisser sortir les biens de sa famille. Ce serment qu'elle avait donné, elle s'en est évidemment rappelé, puisqu'elle a suggéré qu'on en fasse mention dans le testament P. 2. Elle avait d'ailleurs déclaré à ses sœurs, avec que elle était dans les relations les plus intimes, que son mari aurait la jouissance et que ses neveux auraient la nue propriété de ses biens.

Nous avons bien, d'un autre côté, la déclaration du père Craig qu'elle lui aurait dit à plusieurs reprises que tout ce qu'elle avait, retournerait à son mari. Mais la cour supérieure, en présence de ces témoignages contradictoires a accepté la version des premiers témoins en disant: "qu'il est certain d'après la preuve que le testament exhibit P. 2 celui considéré comme portant une signature illisible, contient et exprime exactement la volonté et l'intention de l'épouse du défendeur dans la disposition de ses biens."

Et la cour d'appel ne paraît pas attacher au

témoignage du père Craig plus d'importance que la cour supérieure.

Donc nous pouvons dire que l'intention de la testatrice était de disposer de ses biens de manière à ce qu'ils ne sortent pas en définitive de sa famille.

Ce sentiment est d'ailleurs conforme à ce qui se fait d'ordinaire dans les familles canadiennes-françaises. On y est toujours soucieux de conserver les biens dans une famille. Nous en avons d'ailleurs la preuve évidente dans le principe des substitutions qui, quoique aboli en France, a été conservé cependant dans la province de Québec.

Cette intention de la testatrice de laisser ses biens à sa famille, non seulement elle l'avait manifestée avant de tomber dangereusement malade, mais elle l'a évidemment déclaré à son mari quand il est venu lui lire le premier projet de testament. Ce projet, suivant la version du mari, et il est le seul pour nous dire ce qu'il s'est passé, ne donnait rien à sa famille. Elle lui a rappelé les recommandations de son père, et c'est alors que le frère du mari, l'avocat Craig, a préparé un nouveau testament, l'exhibit P. 2, qui contenait le legs de nue propriété en faveur de la famille de la testatrice.

Ce testament aurait été lu en présence des témoins. La testatrice aurait paru l'avoir bien compris et elle y aurait apposé sa signature avec beaucoup de difficulté, c'est vrai, ce qui montre son grand état de faiblesse. Mais quand on montre cette signature à l'avocat à son retour, il dit:—

> Celle ne vaut rien, celui qui a été fait ce matin vaudra mieux, faites lui donc signer celui-là.

Le mari informe sa femme qu'il faut recommencer parce que la signature n'est pas correcte; et alors on

1914

LAMOUREUX v. CRAIG.

Brodeur J.

substitue au testament P. 2, c'est à dire au testament où le mari n'était légataire qu'en usufruit, un autre testament, l'exhibit P. 1, où il est légataire en usufruit et en propriété.

Comment cela s'est-il fait ? Comme c'est le fait le plus important dans la cause, il est bien important de disséquer soigneusement la preuve sur ce point. C'est ce que je vais faire.

Il faut d'abord dire que les trois femmes qui ont attesté ce testament, ont, en général, donné leur témoignage avec peu de clarté. Elles paraissent bien de bonne foi, surtout Madame Lessard et Mlle. Laporte, la garde-malade. Quant à l'autre, Mlle. M.-L. Craig, elle était tellement énervée qu'on a été obligé de suspendre son témoignage et de remettre la cause à une date ultérieure. Elle paraît bien disposée en faveur du défendeur. On lui a demandé si elle était en amour avec lui et la question n'a pas été permise. Mais il est établi que le défendeur allait la voir tous les jours, c'était sa cousine, c'est vrai. Et devant cette cour il a été affirmé et non contredit de l'autre côté, qu'elle était maintenant mariée au défendeur.

La demanderesse appelante prétend que la testatrice, en signant de sa croix l'exhibit P. 1, croyait signer un testament semblable à celui qu'elle avait essayé de signer quelques minutes avant.

Le défendeur intimé, au contraire, prétend que la testatrice a demandé de changer ses dernières volontés et qu'elle ne voulait pas donner ses biens en propriété à sa famille.

Pour arriver à réussir, la défendeur doit démontrer formellement qu'il y a eu un changement d'opinion chez la testatrice. Autrement il devra succomber dans ses prétentions. Voyons la preuve.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

D'abord, prenons Mlle. Laporte, la garde-malade. Il y a dans son témoignage beaucoup de confusion et d'incertitude. Elle est de la meilleure foi du monde, j'en suis convaincu; mais elle n'est pas brisée aux affaires, elle a, comme les autres témoins du testament, été laissée dans l'ignorance de ce qui s'était passé le matin entre le mari et la femme lorsque celle-ci a demandé de faire un testament et a manifesté ses intentions.

Ce qui a donné lieu aussi à beaucoup de confusion, c'est que pour les avocats le premier testament, c'est celui qui avait été préparé le matin, c'est à dire le testament donnant tout sans restriction; tandis que pour les témoins, le premier testament est celui qu'elles ont signé le premier, c'est à dire l'exhibit P. 2, ou le testament avec signature illisible.

Voici ce que dit Mlle. Laporte. On lui demande:

Voulez-vous prendre connaissance de l'original du testament qui est déposé devant la cour et que je vous exhibe, et dire si c'est le premier ou le deuxième qui est ici ?

R. C'est le deuxième celui-là.

Q. Etes-vous bien certaine de cela ?

R. Oui, monsieur.

Par Mtre. G. Lamothe, C.R., conseil du défendeur:

Q. Celui, qu'on vous exhibe maintenant, c'est le deuxième ?

R. Oui, monsieur.

Par Mtre. J. A. Hurteau:—

Q. Ce testament qui vous est exhibé maintenant et qui est marqué comme document "A" dans la liasse de documents, qui a été déposée devant la cour, est le deuxième ?

R. Oui, monsieur.

Elle a là bien identifié les testaments. On l'interroge plus loin, pour savoir si le testament déposé devant la cour, c'est à dire le testament vérifié, a été lu. Voici le texte de sa déposition à ce sujet:—

1914

LAMOUREUX v. CRAIG.

Brodeur J.

Q. Le testament qui est devant la cour, vous dites qu'il a été lu par qui ?

R. Par monsieur Isaie Craig.

Par le juge :—

Q. En présence des trois témoins ?

R. Oui, monsieur.

Par Mtre. J. A. Hurteau :—

Q. Qu'est-ce qui s'est passé immédiatement après ?

R. Ils se sont tous retirés pour aller souper; moi, je suis restée seule avec elle dans la chambre.

Cette déclaration est absolument inexacte. Ce testament déposé devant la cour n'a pas été lu. La testatrice a declaré que ce n'était pas nécessaire. Il n'y a eu qu'un testament de lu; c'est l'exhibit P. 2, mais non pas le testament vérifié, ou celui devant la cour.

On l'interroge encore sur cette lecture et elle n'est pas aussi positive. Voici d'ailleurs cette partie de son témoignage :—

Q. Savez-vous qu'est-ce que Monsieur Craig a lu ?

R. Il a lu un papier d'après lequel son épouse lui donnait tout ce qu'elle possédait.

Q. Savez-vous quel papier ? Est-ce celui-là ? Etes-vous capable de jurer que c'est celui-là ou le second testament ?

R. Je crois que c'est celui-ci, celui qui est déposé.

Q. Vous le croyez ?

R. Oui, monsieur.

Q. Etes-vous capable de le jurer ?

R. Je ne me rappelle pas assez, mais je crois que c'est celui-ci.

On lui fait dire la différence qu'il y avait entre les deux testaments et, en parlant du testament par lequel la testatrice désirait que ses biens iraient à sa famille, on lui demande :—

Q. Ce testament a été lu à la malade ?

R. Oui, monsieur.

Comme on le voit, elle s'est contradite; mais elle était de bonne foi; c'est évident.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

L'honorable juge-en-chef de la cour d'appel déclare que la testatrice, après avoir signé le testament P. 2 et après avoir été informé qu'il était nul,

demanda d'apporter le premier projet de testament, celui qui avait été préparé dans l'avant-midi.

Et il se base sur le témoignage de Mlle. Laporte et de Mlle. Craig.

Mlle. Laporte est loin d'être positive. Voïci d'ailleurs ce qu'elle dit, quand on lui en parle pour la première fois, après qu'on lui eût fait rapporter ce qui s'était passé au sujet du testament P. 2.

Q. Qu'est-ce qui s'est passé, qu'est-ce qui s'est dit ?

R. On a rapporté ce papier vingt minutes, une demi-heure après, peut-être pas tout à fait autant, on est arrivé avec celui-là et elle a *demandé si c'était bien le même, on lui a dit: "Oui, je te l'ai lu" et elle a mis sa croix.*

Par Mtre. Cinq-Mars:—

Q. Vous avez dit tout à l'heure, si j'ai bien compris, que Madame Craig avait demandé à son mari si c'était le même testament qu'elle avait signé dans l'après-midi qu'on voulait lui faire marquer de sa croix ?

R. Non, si c'était bien ce qu'on lui avait lu.

Q. Si c'était ce qu'on lui avait lu ?

R. Oui, monsieur.

Q. Voulez-vous dire qu'en parlant de cela, madame Craig voulait mentionner le testament qu'elle avait signé d'une manière illisible ? Ou du testament qui est produit en cette cause ?

R. Moi, je veux parler de celui-ci, de celui qui est produit en cour.

Par le juge:—

Q. Est-ce que dans le temps le testament qui est devant vous, lui avait été lu ?

R. Oui, monsieur.

Par Mtre. J. A. Descarries, C.R., conseil de la demanderesse:—

Q. Avez-vous vu l'autre document ou testament sur lequel vous avez dit que la testatrice avait mis une signature illisible ?

R. Oui, monsieur.

Q. L'avez-vous lu ?

1914

LAMOUREUX v. CRAIG.

Brodeur J.

R. Oui, monsieur.

Q. Que disait ce testament ?

R. Exactement la même chose, excepté qu'il y avait un désir d'exprimé.

Q. Quel désir ?

R. Que ses biens iraient à sa famille.

Par le juge:—

Q. Que ses biens iraient à sa famille ?

R. Oui, un désir.

Q. Ce qu'on voudrait savoir de vous, mademoiselle Laporte, si quand on est venu avec vous avec le testament qu'elle a signé de sa croix, et qu'elle a demandé si s'était le testament qu'on lui avait lu, est-ce le testament qui est produit maintenant devant la cour dont parlait la malade ?

R. Celui qui est avec la croix.

Q. Celui qui est maintenant devant la cour ?

R. Oui, monsieur.

Par Mtre. J. A. Descarries, C.R., conseil de la demanderesse:—

Q. Voulez-vous dire qu'à ce moment-là on présentait à la malade le testament qui est maintenant devant la cour et la malade a demandé: "Est-ce le testament qu'on m'a lu ?

R. Oui, monsieur.

Q. Quand elle disait cela, voulait-elle parler du testament qui est maintenant devant la cour ? Ou de l'autre testament dont vous avez parlé vous-même ? Quand elle a dit "est-ce le testament qu'on m'a lu" voulait-elle parler, quand elle disait cela, voulait-elle mentionner l'autre testament ou bien celui-ci ?

R. Je crois que c'est celui-ci ?

Q. Vous croyez que c'est celui-ci ?

R. Oui, monsieur.

Q. Quand elle parlait de la sorte, voulait-elle parler du testament dans lequel un désir était exprimé que ses biens iraient à sa famille ?

R. Non, monsieur.

Q. Elle ne voulait pas parler de celui-là ?

R. Non, monsieur.

Q. Pourquoi dites-vous cela ?

R. *Parce qu'on nous a lu la première partie du testament qui était, si je me rappelle bien, la même chose que celui-ci et le désir a été rapporté.*

Par le juge:—

Q. Sur le testament ?

R. Oui, sur celui qui avait une signature illisible.

Par Mtre. J. A. Descarries, C.R., conseil de la demanderesse:—

Q. C'est après avoir été rapporté que celui qui est devant la Cour a été présenté à la malade pour être signé ?

R. Oui, monsieur.

Q. Là, elle a demandé: "Est-ce celui que vous m'avez lu"? et on lui a répondu: Oui" parce qu'il avait été lu ?

R. Oui, monsieur.

Peut-on conçevoir quelque chose de plus incertain et d'aussi peu satisfaisant ?

Trouve-t-on dans cette déposition l'intention formelle de la testatrice de changer son testament ?

Non. Suivant Mlle. Laporte, elle aurait demandé: "Est-ce le testament qu'on m'a lu ?" Le mari a répondu: "Oui, je te l'ai lu." La testatrice devait supposer que c'était celui qu'on venait de lui lire, c'est à dire, l'exhibit P. 2, celui où elle faisait certains legs à sa famille.

Maintenant Mlle. Laporte suppose cependant qu'il peut s'agir du testament préparé le premier, le matin. Ce n'est là qu'une supposition de sa part; mais nullement basée sur les propres termes de la testatrice. Et quand on la presse à ce sujet, elle finit par cette phrase incompréhensible:—

Parce qu'on nous a lu la première partie du testament qui était, si je me rappelle bien, la même chose que celui-ci et le désir a été rapporté.

Je suis incapable, avec une preuve comme celle-là, de dire avec la cour d'appel que cette testatrice a changé d'idée et que le testament sous croix représente sa volonté. D'ailleurs, on demande à Mlle. Laporte:—

Y a-t-il eu quelque suggestion de faite devant vous par la testatrice de changer le premier testament qu'elle avait signé dans lequel elle exprimait le désir que ses biens iraient à sa famille ?

R. Pas à ma connaissance.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

Cette réponse catégorique, suivant moi, règle le point.

Mlle. Craig, la cousine du défendeur, est l'autre témoin sur lequel la cour d'appel se base pour déclarer qu'il y a changement d'idée chez la testatrice. Son témoignage cependant n'est pas beaucoup plus clair que celui de Mlle. Laporte. Elle était tellement énervée qu'on a été obligé de suspendre les procédures et d'ajourner la cause pour lui donner l'avantage de se remettre.

Que dit-elle ?

Elle commence sa déposition par ces déclarations-ci qui ne sont guère compréhensibles.

Q. Y a-t-il eu seulement un testament ?

R. C'est à dire qu'il y en a eu deux.

Q. Voulez-vous expliquer la chose ?

R. Il y en a eu un qu'elle a signé, mais la signature était illisible.

Q. Est-ce le premier qu'elle a signé ?

R. C'est le deuxième.

Q. Celui dont la signature était illisible, c'était le deuxième ?

R. Oui, monsieur.

Q. Vous êtes bien positive que c'est le deuxième ?

R. Autant que je peux me rappeler, vous savez dans ces occasions-là.

Q. Expliquez à la cour ce qui s'est passé afin que je sache par vous même comment les choses se sont passées ?

R. Quand je suis arrivée, monsieur Craig, quelques minutes après, m'a demandé de lire un papier que j'ai lu, il m'a demandé si je voulais le signer. Madame Craig ne l'a pas signé, elle a fait sa croix sur le testament, et c'est *plus tard qu'on a signé*, c'est-à-dire qu'on a signé après elle, elle avait signé un testament dont la signature était illisible.

Q. Avant ou après ?

R. Après, autant que je peux me rappeler, il me semble.

Q. Pourquoi aurait-elle signé un second testament; pouvez-vous le dire à la cour ?

R. Moi, je ne le puis pas.

Q. Dites ce que vous savez ?

R. La signature n'était pas beaucoup compréhensible.

Q. C'est pour cela qu'elle aurait signé un deuxième testament, le premier n'était pas compréhensible ?

R. Oui, d'après moi.

Q. D'après vous ?

R. Oui, monsieur.

Q. Vous venez de dire que le testament dont la signature n'était pas compréhensible avait été signé le deuxième. Vous venez de dire cela ?

R. Vous m'embrouillez tellement que je ne puis me le rappeler.

Q. Comment est-ce que je vous embrouille ?

R. Je ne puis pas vous répondre.

Q. Persévérez-vous à dire que le testament sur lequel on dit que la testatrice a mis une signature illisible a été fait le deuxième ?

R. Je ne puis pas le dire.

Q. Pourquoi ?

R. Parce que je suis malade.

La déposition du témoin est ajournée à onze jours et Mlle. Craig, qui dans l'intervalle avait eu les visites presque quotidiennes du défendeur, réapparut et, nous relevons ce qui suit:—

Q. Oui, comment il se fait qu'on a changé de testament ?

R. Elle a signé un papier.

Q. Où ?

R. Dans sa chambre, elle a signé un papier, la signature était illisible; alors on a pensé que ce papier-là n'était pas bon et on a rapporté un autre que son mari lui a demandé pour lui lire et elle a dit: "Si c'est *celui de ce matin*, je n'ai pas besoin, je le sais," elle a signé d'une croix, et après l'avoir lu je l'ai signé.

Q. Jurez-vous qu'elle a prononcé ces mots-là, "celui qui a été lu ce matin"?

R. Oui, je le jure.

Plus loin on lui demande:—

Q. Qu'est-ce qu'on a dit a madame Craig pour lui faire signer l'autre testament, vu qu'elle venait d'en signer un ?

R. On lui a dit que la signature était illisible — je crois que c'est cela qu'on lui a dit; je ne me le rappelle pas au juste, vous savez cette journée-là j'étais si impressionée de la voir malade que je ne pouvais presque pas rester là.

Où est la preuve là que la testatrice ait changé d'idée? Serait-ce dans cette phrase:—

Si c'est celui de ce matin, je n'ai pas besoin, je le sais ?

1914

LAMOUREUX v. CRAIG.

Brodeur J.

Mais elle n'a jamais demandé d'apporter celui du matin. D'ailleurs ces mots "si c'est celui du matin," on ne les retrouve pas dans la bouche de Mlle. Laporte et encore moins dans celle de Mde. Lessard.

D'ailleurs, Mlle. Craig nous dit elle-même qu'elle n'a jamais entendu madame Craig dire cette journée là qu'elle voulait donner ses biens à son mari. Elle nous dit aussi, Mlle. Craig, que la testatrice n'a pas voulu entendre la lecture du second testament parce que cela la fatiguait trop.

Madame Lessard nous dit bien franchement qu'elle a toujours cru que les deux testaments comportaient la même chose, c'est à dire, jouissance au mari et propriété à la famille de la testatrice.

Ce témoin aussi se mêle quant à l'exécution des testaments et elle nous dit tantôt que c'est le testament P. 1 qui a été signé le premier et plus tard elle se reprend et dit que c'est celui P. 2.

Elle est certainement de bonne foi.

Maintenant quant à la phrase qui aurait été dite par la malade quand on lui a apporté le testament P. 1, voici ce qu'elle dit:—

Q. Ce testament sur lequel elle a signé de sa croix lui a-t-il été lu en votre présence ?

R. Non, monsieur Craig a offert de lui lire encore et elle n'a pas voulu, elle a dit: *"Ce n'est pas nécessaire, je vais signer tout de suite."*

Q. Son mari lui a offert de lui lire encore ?

R. Oui, monsieur.

Il n'est pas là question de testament du matin, comme le dit Mlle. Craig.

Voilà ce que nous disent les témoins du testament.

Je ne puis arriver à d'autres conclusions que la testatrice en signant de sa croix le testament attaqué a cru signer un document semblable à celui qu'elle

avait signé quelques minutes auparavant. Ces dépositions ne sauraient justifier un tribunal de déclarer qu'elle voulait donner ses biens à son mari seul.

Cette substitution s'est faite suivant le désir de l'avocat Fernand Craig qui déclarait en présence de son père, après avoir vu le testament P. 2 portant la signature illisible:—

Cela ne vaut rien, celui qui a été fait ce matin vaudra mieux; faites lui donc signer celui-là.

Et alors on a substitué un testament à l'autre.

Ces deux testaments étaient bien différents et sans entrer dans les mérites de la dissertation qui a été faite, je me contenterai de citer le jugement que nous avons rendu dans la cause de *Shearer* v. *Hogg*(1), pour démontrer que la recommandation d'un testateur peut engendrer des obligations.

Je pourrais aussi sur ce point citer: Baudry Lacantinerie, vol. X., No. 1836; Coin Delisle, sur l'art. 967, No. 4; Laurent, vol. XIII., No. 480; Fuzier Herman, Repertoire, *vo.* "Testaments," No. 68; Demolombe, vol. XXI., No. 51; Zachariæ, Aubry et Rau, vol. V., p. 492.

ONUS PROBANDI.

Je suis d'opinion qu'il n'est pas prouvé si le testament attaqué a été signé par les témoins en présence de la testatrice.

La preuve sur ce point n'est pas non plus très satisfaisante. Les trois femmes ne sont guère bien positives. Il est un fait bien certain, c'est que l'un de ces testaments a été signé dans la chambre de la malade

(1) 46 Can. S.C.R. 492.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

et l'autre a été signé dans la chambre de l'avocat, hors de la présence de la testatrice.

Il aurait été intéressant de connaître à ce sujet la version de l'avocat. C'est bien malheureux qu'il n'ait pas été entendu comme témoin.

Nous devons au sujet de ce testament fait suivant la forme anglaise appliquer les règles du droit anglais. C'est ce qui a été décidé par le Conseil Privé dans la cause célèbre de *Migneault* v. *Malo*(1).

> The law which introduced into Canada the English law as to wills must be considered as having introduced it with all its incidents, and, therefore, with the admissibility of oral evidence.

Dans un cas aussi peu clair que celui qui nous occupe, c'était le devoir du défendeur de prouver lui-même que le testament était valide. Cette règle par laquelle le fardeau de la preuve retombe dans des circonstances comme celle-ci sur le légataire, a été énoncée par Lord Hatherly dans la cause de *Barry* v. *Butlin*(2) :—

> There is one rule which has always been laid down by the courts having to deal with wills and that is that a person who is instrumental in the framing of a will and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it.
>
> But there is a further onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. *They have thrown upon themselves the onus of shewing the righteousness of the transaction.*

Et cette cour a énoncé le même principe dans la cause de *Mayrand* v. *Dussault*(3), en décidant :—

(1) 16 L.C. Jur. 288. (2) 2 Moo. P.C. 480.
(3) 38 Can. S.C.R. 460.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

That as the promoter of the will by which he took a bounty, had failed to discharge the onus of proof cast upon him to shew that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside.

Il s'agissait dans cette cause de Dussault d'un testament authentique fait dans la province de Québec.

Le juge Tait dans la cause de *St. George's Society of Montreal* v. *Nichols* (1), a aussi rejeté le fardeau de la preuve sur le légataire qui avait préparé le testament.

C'est une règle juste et equitable que nous devons appliquer dans cette cause.

Il y avait un témoin bien important qui aurait pu nous donner une foule de renseignements sur la confection de ces testaments. C'est l'avocat qui les a rédigés.

Il aurait pu nous dire pourquoi le testament P. 1 se termine par les mots: "Et je déclare ne pouvoir signer" et pourquoi le testament qui aurait été écrit quelques minutes après se termine par les mots: "Et je signe."

Il aurait pu nous dire comment il se fait que certains mots au bas de l'attestation paraissent y avoir été insérés après que les témoins eussent signé.

J'aurais voulu lui entendre répéter les instructions qu'il a reçues de son frère pour préparer deux on trois projets de testament et comment il en est venu a faire signer l'un de ces projets dans sa chambre.

Tous ces faits et bien d'autres, auraient éclairé la justice. Mais le défendeur n'a pas jugé à propos de le faire entendre.

Il aurait pu également nous dire lequel des deux

(1) Q.R. 5 S.C. 273.

1914

LAMOUREUX v. CRAIG.

Brodeur J.

testaments a été signé par les témoins dans sa chambre, la preuve de ces pauvres femmes est si peu satisfaisante sous ce rapport.

L'onus devait pour une autre raison retomber sur le défendeur.

Dans l'affidavit qu'il a produit au soutien de sa requête pour vérification, il y est déclaré par Mlle. Craig que

> la signature apposée au bas du dit testament, Marie-Louis Craig est ma propre signature et je l'ai ainsi apposée en présence et *à la réquisition de la testatrice.*

Quand elle est en présence du juge à l'enquête en cette cause, on lui demande:—

> Q. A-t-il été question des testaments pendant que vous étiez là par madame Craig ?
>
> R. Bien, quand je suis arrivée on m'a demandé à lire un papier qui était un testament et on m'a demandé de le signer quand madame Craig l'aurait signé.

Par le juge:—

> Q. Qui vous a demandé cela ?
>
> R. Monsieur Craig, mon cousin.

Où est la réquisition de la testatrice ?

Les deux autres témoins Mlle. Laporte et Mde. Lessard, déclarent également que la demande de signer leur a été faite par le mari. Le femme ne leur a jamais demandé.

En résumé, je trouve, comme la cour supérieure, que le testament attaqué ne représente pas la volonté de la testatrice. Elle voulait évidemment conserver ses biens dans sa famille et cette disposition ne s'y trouve pas.

Je suis également d'opinion avec l'honorable juge Bruneau que le testament P. 2 exprimait mieux les volontés de la testatrice. Il est nul, dit la cour d'ap-

pel, parce qu'il n'a été signé par les témoins. C'est possible. Mais tant pis pour le défendeur. Pourquoi au lieu de se cacher comme il l'a fait, n'a-t-il pas fait ce testament au grand jour en présence d'un notaire qu'il lui aurait été si facile d'avoir dans une grande ville comme Montréal.

Je suis d'opinion que le défendeur n'a pas fait la preuve qu'il devait faire et que le testament n'ayant pas été fait suivant les exigences de l'article 851 du Code Civil, il est aux termes de l'article 855 du même code nul.

L'appel doit être maintenu avec dépens de cette cour et des cours inférieures et les conclusions du jugement de la cour supérieure déclarant le testament P. 1 nul doivent être confirmées.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. Hurteau.*

Solicitors for the respondent: *Cinq-Mars & Cinq-Mars.*

1913
*Nov. 13.
1914
*Feb. 23.

LA COMPAGNIE ELECTRIQUE DORCHESTER (DEFENDANTS). } APPELLANTS;

AND

HESIODE ROY (PLAINTIFF) ..... RESPONDENT.

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

Rivers and streams—Industrial improvements—Penning back waters—Permanent works—Damages—Measure of damages—Expertise—Arbitration—Reparation—Loss of water-power—Future damages—Compensation once for all—Right of action—Practice—Statute, R.S.Q., 1909, *arts.* 7295, 7296.

Per Davies, Duff and Brodeur JJ., Idington and Anglin JJ. *contra.*—In an action for damages occasioned by constructions in a stream for industrial purposes the plaintiff is entitled, under the provisions of article 7295 of the Revised Statutes of Quebec, 1909, to recover the full extent of damages which experts acting under article 7296, R.S.Q., 1909, would have authority to award as compensation, once for all, for the injuries sustained. *Breakey* v. *Carter* (Cass. Dig. (2 ed.) 463) and *Gale* v. *Bureau* (44 Can. S.C.R. 312), referred to.

By the judgment appealed from it was held that the plaintiff was entitled to reparation for loss incurred in respect of the diminution in value of his water-power and the adjoining property on account of the construction of the works in question.

Held, affirming the judgment appealed from (Q.R. 22 K.B. 265), Idington and Anglin JJ. dissenting, that the plaintiff was entitled to reparation for such injuries.

Per Idington and Anglin JJ.—As it was apparent that the defendants could operate their works in such a manner as to avoid, or diminish, the inconveniences occasioned thereby, it would not be proper, in such an action, to include possible future losses in assessing the damages to be given as compensation for the injuries complained of. *Montreal Street Railway Co.* v. *Boudreau* (36 Can. S.C.R. 329); *Chambly Manufacturing Co.* v. *Willett* (34 Can. S.C.R. 502); and *Backhouse* v. *Bonomi* (9 H.L. Cas. 503), referred to.

---

*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Per Davies, Anglin and Brodeur JJ.—Where no effective steps have been taken by the party from whom damages are claimed to have the damages resulting from improvements constructed in a stream ascertained by an expertise, in the manner provided by article 7296, R.S.Q., 1909, he cannot set up a mere proposal of such an arbitration as an exception to an action against him to recover compensation.

Per Duff J.—The defendants not having taken steps under the statute for several months, and not having shewn that they were in fact ready and willing to proceed under the statute, the action lies.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), which varied the judgment of McCorkill J., in the Superior Court for the District of Quebec(2), by increasing the damages awarded to the plaintiff.

The plaintiff was the owner of a mill driven by water-power, on the River Etchemin, near the site of which the company, defendants, erected a dam in connection with a power-house which they were constructing on the same stream a short distance below the plaintiff's mill. The dam was of a permanent character and had the effect of penning back the water, raising its level and flooding the tail-race of plaintiff's mill to such an extent that his mill-wheels were drowned. Another effect of the dam was to make still water where previously there had been a rapid, that ice formed in the pond so created and, when it came out in freshets, the ice carried away the plaintiff's mill. For all these injuries the plaintiff sued to recover $6,000 damages and, at the trial, McCorkill J. assessed the damages at $1,070, being for the actual losses incurred up to the time of action, less $110 for some of the machinery which had been saved, and re-

(1) Q.R. 22 K.B. 265. (2) Q.R. 22 K.B., at p. 266.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

course was reserved to the plaintiff to bring further actions for any damages happening subsequently. Both parties appealed and, by the judgment now appealed from, the Court of King's Bench dismissed the appeal taken by the company and allowed that of the plaintiff by increasing his damages to $3,685 in consideration of the diminished value of the plaintiff's water-power and adjoining property.

The questions in issue on the present appeal are stated in the judgments now reported.

L. A. Cannon K.C. for the appellants.

Eusèbe Belleau K.C. for the respondent.

DAVIES J.—The trial judge did not grant damages once for all because he felt himself concluded from doing so by the decision of this court in *Gale* v. *Bureau*(1). I do not think, however, that that case decided that point absolutely. There are obviously many cases in which future damages may or may not arise and which may or may not be foreseen or capable of being estimated at the time action is brought or proceedings begun under the statute to fix them. In all such cases recourse may be reserved for future damages. But with respect to damages which have been incurred and which are capable of being estimated when action is brought or proceedings taken under the statute to estimate them I see no reason whatever why they should not be estimated and determined.

With respect to the value of the water-power of the plaintiff which the trial judge did not include in his

(1) 44 Can. S.C.R. 305.

judgment, because he thought it was a subject-matter for future damages which the authorities prohibited him from considering, I cannot see why such value may not now be estimated as well as later.

It is found as a fact by both courts that the plaintiff's mill has been destroyed and his water-power had ceased to be a water-power — as such it has been destroyed. The defendant does not plead that the dam erected by him which caused this destruction was a temporary construction or other than a permanency. In the absence of any such plea we must hold it to be intended as a permanent work. If the plaintiff is not now entitled to be compensated for the loss of this water-power, when will his future right to such compensation arise? A reservation of future rights in such a case would be an illusory one. He has, in my opinion, under the circumstances a right to damages as well for the destruction of his water-power as for the destruction of his mill. The assessment of damages made by the court of appeal, on the basis of the plaintiff being entitled to such damages once for all, I see no reason to quarrel with.

On the other question as to the right of the plaintiff to take proceedings for the recovery of the damages in the courts, without resorting to the method prescribed by the statute, I am of opinion that we are bound by the authorities to hold that the statute does not take away the common law right of the party damnified to sue unless at any rate proceedings had been properly commenced and prosecuted under the statute for the assessment of the damages.

I do not think the letter written to the plaintiff in this case before suit began constituted such a valid commencement of proceedings under the statute. It

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Davies J.

was, no doubt, an invitation to the plaintiff to name an arbitrator under the statute, but that was all and such a mere invitation without the naming of an arbitrator by the party himself making it cannot be held to constitute a valid commencement of proceedings.

I would dismiss the appeal.

IDINGTON J. (dissenting).—It seems to me that to allow damages based on the supposition that the respondent's water-power has been permanently taken away, is contrary to the law as laid down in the judgment of this court in the case of *Montreal Street Railway Co.* v. *Boudreau*(1), which I think should be followed.

It was and is quite competent for the appellant to so lower its dam as to avert future damages.

Of course, if the appellant chose to avail himself of the statutory provisions for assessing damages what is allowed here might well be proper measure of such.

But in an action even where the right to assess damages is provided by arbitration under a statute that does not necessarily determine same measure of damages in each case.

The appellant being liable for actions from day to day we ought not in this case to depart from the law so laid down and add to the confusion that prevailed before that case.

The appeal should be allowed with costs.

DUFF J.—The respondent was the proprietor of a mill situate on the River Etchemin worked by the

(1) 36 Can. S.C.R. 329.

direct application of water-power derived from the river. The appellant company, at a place below the respondent's mill, erected a dam, for the purpose also of obtaining water-power for working its plant. The respondent's mill was carried away by a freshet in April, 1911, and it was charged by the respondent and has been held by the courts below that this was due to the presence of the appellant's dam. It has also been found as a fact that the effect of erecting the dam was to raise the level of the river to such an extent as to submerge the respondent's turbines and permanently to diminish the head of water available for the working of his mill. The learned trial judge held that the plaintiff was entitled to compensation in respect of the injury proved to have been suffered by him down to the time of the commencement of the action — such damages comprising the value of the mill swept away and loss of profits arising, first from the diminished efficiency, and afterwards from the destruction of the mill. The court of appeal held that the plaintiff was entitled to reparation not only in respect to the damages mentioned, but also for loss in respect of the diminution in the value of respondent's land by reason of interference with his water-power. Two questions arise: First: Can compensation for such loss be awarded ? and, Secondly: Whether, by reason of certain proposals made by the appellant's solicitors, prior to the commencement of the action, the action ought to be entirely dismissed ?

The appellant's dam was erected and worked under the authority of article 7295 of the Revised Statutes of Quebec of 1909. That article and the succeeding article 7296 are as follows:—

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Duff J.

7295. Every proprietor of land may improve any water-course bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

7296. (1) The proprietors or lessees of any such works are liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

(2) Such damages shall be ascertained by experts to be appointed by the parties interested in the ordinary manner.

(3) In default of either of the said parties appointing an expert, experts selected by the warden of the county shall act; and, in case of difference of opinion, the two experts appointed shall choose a third.

(4) The experts shall be sworn before a justice of the peace faithfully to perform their duty as such.

(5) In assessing the damages and fixing the compensation to be paid, the experts may, whenever proper, set off against the whole or any part of such damages, any increased value which the property of the claimant has acquired by reason of the erection of such works, mills, manufactories or machinery.

(6) In default of payment of the damages and indemnity so awarded, within six months from the date of the report of the experts, together with legal interest to be computed from the said date, the party by whom the payment is due, shall demolish the works which he shall have erected, or they shall be so demolished at his expense, upon judgment to that effect rendered, the whole without prejudice to the damages already incurred.

It was held by this court in *Breakey* v. *Carter*(1), (I am quoting for convenience from my own judgment in *Gale* v. *Bureau*(2)):—

That the right given by article 7295, in so far as it justified the penning back the waters of a stream upon the upper riparian proprietors, is to be regarded as a right of servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it.

It was also held in that case(1), and the decision on that point was followed in *Gale* v. *Bureau*(2), that this statutory right to reparation was one in respect

(1) Cass. Dig. (2 ed.) 463. (2) 44 Can. S.C.R. 305, at p. 312.

of which the person damnified has recourse to the courts as damage from time to time accrues notwithstanding the provisions of article 7296. I think, moreover, that there is no satisfactory ground for holding that (assuming an action to lie in the circumstances) the plaintiff cannot recover in the action reparation once for all to the full extent to which experts proceeding under the Act would be entitled to award him compensation. I may add that I regard this action as a proceeding to recover compensation under this statute; I decide nothing as to the rules of law by which, apart from the statute, the measure of damages would be determined.

As to the second ground of appeal, I think that, in the circumstances, the appellants were, at least, bound to shew that they were in point of fact ready and willing to proceed under article 7296 and, having regard to the delay that had already taken place, I agree with Mr. Justice Cross that they have failed to do so.

ANGLIN J. (dissenting).—Two questions arise on this appeal — the first, whether the plaintiff's right of recourse to the courts is taken away by article 7296, R.S.Q. 1909; the other, whether the plaintiff's recovery should be once for all, in respect of damages future as well as past, or should be confined to damages already sustained.

No case was made for a review of the finding that the appellants' dam caused the injuries complained of. The quantum of the damages awarded in the Superior Court, if they should be confined to injuries already sustained, or of those awarded by the court of appeal,

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Anglin J.

if they should be now allowed once for all, has not been seriously attacked.

If the first of the two substantial questions presented for determination, were *res integra,* I should incline to the view that the appellant's contention upon it is well founded. By article 7295 certain works are authorized; by article 7296 the proprietor or lessee of such works is required to pay "all damages resulting therefrom," and it is provided that "such damages shall be ascertained by experts, etc." the liability thus created would seem to be only for damages so ascertained. But it has been held in a series of cases in the Province of Quebec (see *Gale* v. *Bureau* (1), at page 308), and by this court in *Breakey* v. *Carter* (2), followed in *Gale* v. *Bureau* (1), that the jurisdiction of the courts is not ousted by these statutory provisions. If, as Mr. Justice Cross appears to think, effective steps to commence proceedings under article 7296, taken before action has been brought in the courts, would oust the jurisdiction of the latter, I agree in his view that it has not been established in the present case that such steps were so taken. The appeal on this branch fails.

The second question presents a little more difficulty. The decision of this court in *Gale* v. *Bureau* (1) does not appear to be decisive upon it. There is no suggestion made that the structure of the defendants is not meant to be permanent or that the invasion of the plaintiff's rights was unintentional. In *Gale* v. *Bureau* (1) the defendant appears to have done what was complained of inadvertently (p. 311) and it was not his avowed intention to maintain the dam in such

(1) 44 Can. S.C.R. 305. (2) Cass. Dig. (2 ed.) 463.

a way as to continue the flooding complained of (p. 317). In the present case the appellants may so manage the gates of their dam in future years that the water privileges of the respondents will not be affected at all, or at least, not to the same extent as during the period complained of.

I incline to think that the plaintiff did not in his declaration claim to recover for permanent loss of his water-power. The judgment awarding damages for that loss seems, therefore, to be *ultra petita,* and, as such, in contravention of article 113, C.P.Q.

The case is not one of trespass. The appellants were not wrong-doers in constructing the dam. They had statutory authority to do so, subject to the condition that they should pay "all damages resulting therefrom." It is the resulting damages which constitute the cause of action and they are recoverable when and as they occur. *Chambly Mfg. Co.* v. *Willet*(1); *Montreal Street Railway Company* v. *Boudreau*(2). The well-known principle of the decision in *Bâckhouse* v. *Bonomi*(3) seems to be applicable. Although the appellants have not exercised a right of expropriation, yet it would appear to be within the purview of article 7296 that damages once for all may be awarded in the expertise for which it provides. But I do not think that future damages are recoverable in an action such as that now before us.

I would for these reasons allow this appeal to the extent of restoring the judgment of the learned trial judge.

(1) 34 Can. S.C.R. 502. (2) 36 Can. S.C.R. 329.
(3) 9 H.L. Cas. 503.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Brodeur J.

BRODEUR J.—Le demandeur intimé avait un moulin sur la rivière Etchemin dans le comté de Dorchester. Ce moulin était mû par un pouvoir d'eau et existait depuis un grand nombre d'années. La compagnie appelante, en vertu de l'article 7295 des Statutes Revisés de Québec, érigea dans l'automne de 1910 une digue à quelques arpents plus bas de l'endroit où était le moulin en question.

Cette digue a eu pour effet de faire refluer l'eau et de rendre absolument sans valeur le pouvoir d'eau qui alimentait le moulin du demandeur.

De plus, la rivière, à cet endroit, ne gelait presque jamais; mais, à raison de la construction de cette digue, l'eau est devenue plus limpide, la glace s'est formée; et, au printemps de 1911, en se dégageant, elle est venue frapper le moulin, l'a emporté et a causé de très grands dommages. Le demandeur, à raison de cela, réclame une somme de $6,000 par son action instituée le 28 avril, 1911.

Vers le même temps où cette action était instituée, mais avant qu'elle fût signifiée, la défenderesse appelante a, par lettres de ses avocats, du 2 mai, 1911, invité le défendeur à faire évaluer ces dommages par arbitres, suivant les dispositions des articles 7295 and 7296 des Statuts Revisés de la province de Québec.

Le demandeur n'en a pas moins persisté dans son action et, après enquête, la cour supérieure lui a accordé une somme de $1,070 pour les dommages jusqu'alors encourus et lui a réservé sa réclamation pour les dommages futurs.

La première question qui se soulève est de savoir si le demandeur pouvait procéder par action directe sans avoir ces dommages déterminés par experts.

Cette question a déjà fait l'objet de nombreuses

décisions devant les tribunaux et elle s'est présentée devant cette cour dans une cause de *Gale* v. *Bureau* (1). Il a alors été décidé que les dispositions de la loi statutaire n'empêchaient pas le recours par action ordinaire.

La jurisprudence a d'abord hésité; mais elle est maintenant bien établie. Il ne peut y avoir de doute que les personnes qui souffrent à raison de l'érection de digues peuvent procéder par voie d'action ordinaire. (1869) *Blais* v. *Blais*(2); (1869) *Nesbitt* v. *Bolduc*(3); *Emond* v. *Gauthier*(4); (1879), *Jean* v. *Gauthier*(5); (1878) *Breakey* v. *Carter*(6); (1881) *Proulx* v. *Tremblay*(7); (1898) *Cie. de pulpe de Mégantic* v. *Village d'Agnes*(8); (1906) *Leclerc* v. *Dufault*(9).

Quant aux dommages, je dois dire que la cour d'appel a modifié le jugement de la cour supérieure et a condamné la compagnie défenderesse à payer une somme de $3,685. L'appelante nous demande de rétablir le jugement de la cour supérieure et de renverser celui de la cour d'appel.

Dans son action, le demandeur disait que la construction de la digue avait eu pour effet de faire refluer l'eau sur sa propriété, d'inonder son moulin, de noyer ses turbines et d'empêcher son exploitation. Il ajoutait aussi que la crue des eaux occasionnée par la chaussée et l'amas de glace qui en avait été la suite

(1) 44 Can. S.C.R. 305.
(2) 13 L.C. Jur. 277.
(3) 15 R.L. 513, *note* 1.
(4) 3 Q.L.R. 360.
(5) 5 Q.L.R. 138.
(6) 4 Q.L.R. 332; Cass. Dig. (2 ed.) 463.
(7) 7 Q.L.R. 353.
(8) Q.R. 7 Q.B. 339.
(9) Q.R. 16 K.B. 138.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Brodeur J.

avaient détruit complètement la bâtisse où se trouvait son moulin et il réclamait une somme de $6,000.

La cour supérieure a évalué les dommages, et a accordé au demandeur la valeur du moulin détruit plus la perte que le demandeur avait subie par le fait qu'il n'avait pas pu exploiter son moulin depuis l'érection de la chaussée jusqu'au moment de l'institution de l'action; mais elle ne lui a rien accordé pour la destruction de son pouvoir d'eau et pour l'impossibilité où il va se trouver à l'avenir de pouvoir continuer son exploitation.

La cour supérieure a réservé ces dommages pour l'avenir; et l'honorable juge dans ses notes nous dit qu'il n'a pas accordé tous ces dommages, vu la décision de *Gale* v. *Bureau*(1).

En lisant, en effet, la note qui se trouve en tête de la décision on serait porté à croire qu'il a été décidé dans cette cause que les dommages qui seraient accordés ne devaient pas être des dommages globaux mais des dommages annuels.

Dans cette action de *Gale* v. *Bureau*(1) le jugement avait accordé une somme annuelle et on disait que c'était là une illégalité. Le juge-en-chef de cette cour, se basant sur l'autorité de Sourdat, décida que la cour avait parfaitement le droit d'accorder des annuités ou une rente. Il n'a jamais été décidé dans cette cause que la cour ne pouvait pas accorder une somme fixe une fois payée.

En effet, si nous consultons Sourdat, qui a été mentionné dans le jugement de l'honorable juge-en-chef, vol. 1, No. 132 *bis*, il dit ceci:—

> Du principe que les tribunaux apprécient souverainement le dommage et l'étendue de la réparation, il suit qu'ils peuvent accorder *soit une somme fixe une fois payée, soit une rente ou annuité.*

(1) 44 Can. S.C.R. 305.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Brodeur J.

Et comme le dommage peut cesser ou se restreindre dans un temps donné, ils peuvent également réduire l'indemnité dans ces prévisions. Ainsi dans une affaire jugée par la Cour de Dijon, l'on a maintenu la disposition d'un jugement qui allouait, à une femme dont le mari avait été tué, une rente, avec condition que cette rente serait réduite de moitié si la veuve convolait à un second mariage.

Ils peuvent encore limiter le service de la rente à un certain temps, passé lequel il sera statué de nouveau, les droits du plaignant étant ainsi réservés quant au préjudice qui se manifesterait ultérieurement,

On a référé à la cause de *Montreal Street Railway* v. *Boudreau*(1), et on a dit que la décision dans cette cause ne justifie pas une indemnité définitive.

Je crois que les deux cas ne sont pas analogues.

Dans la cause de *Boudreau*(1), le caractère permanent des dommages ne pouvait pas être assumé par la manière dont les travaux avaient été faits; au contraire, la cause de ces dommages pouvait être facilement évitée. Et, à raison de cela, il n'a pas été jugé à propos d'accorder des dommages globaux.

Il fait bon de mentionner le fait que la cour était divisée sur cette question et que le juge-en-chef, Sir Elzéar Taschereau, et M. le Juge Girouard étaient d'opinion qu'une indemnité définitive devait être accordée, suivant en cela la décision de cette cour dans une cause de *Gareau* v. *Montreal Street Railway*(2).

Nous sommes dans la présente cause en présence d'un statut qui invite à régler définitivement cette question d'indemnité, vu qu'il s'agit virtuellement de l'expropriation d'un droit dont jouissait le demandeur. Or, en vertu de l'article 407 du Code Civil, l'exproprié a droit à une indemnité *juste et préalable*. Cette indemnité doit couvrir tous les dommages.

La compagnie défenderesse ne suggère pas dans ses plaidoiries, ou dans ses prétentions, que la digue

(1) 36 Can. S.C.R. 329.

(2) 31 Can. S.C.R. 463.

1914

LA COMPAGNIE ELECTRIQUE DORCHESTER v. ROY.

Brodeur J.

qu'elle a élevée n'est que temporaire. Au contraire, cette digue a un caractère de permanence.

Le pouvoir d'eau dont le demandeur jouissait se trouve détruit par le fait de cette digue. Le préjudice qu'il éprouve a donc un caractère permanent et la suggestion que cet homme pourrait venir tous les ans devant les tribunaux pour réclamer de la compagnie défenderesse le dommage résultant du fait qu'il ne peut plus exploiter son moulin parait contraire à l'idée que nous devons empêcher autant que possible la multiplicité des procès.

Mais on dit: Vous accordez alors des dommages futurs.

Je ne crois pas que cela soit exact. Le dommage peut être futur en ce sens qu'il se réalisera dans l'avenir par suite du fait dommageable; mais à vrai dire le préjudice est actuel et il continuera à se manifester. (Laurent, vol. 20, p. 570.)

Fuzier-Herman dans son code annoté sous l'art. 1382 nous rapporte aux nos. 116 et 117 un jugement de la cour de cassation au sujet d'une mine dont les travaux d'exploitation avaient altéré les eaux d'une source où il a été décidé

> qu'il peut être alloué aux propriétaires inférieurs à titre de dommages-intérêts au lieu d'une rente annuelle un capital une fois payé, répondant à la fois à la perte déjà subie et à celle qui doit être éprouvée.

L'appelante prétend que la cour d'appel a ajugé au-delà des conclusions de l'action en indemnisant le demandeur intimé pour la perte de son pouvoir d'eau.

Je vois au contraire dans la déclaration que le demandeur allègue spécialement que la construction de la chaussée a eu pour effet d'inonder ses moulins, de noyer ses turbines et l'a empêché de les exploiter; et

après avoir ensuite allégué la crue des eaux et l'amas de glaces occasionnés par la chaussée, il demande une condamnation contre l'appelante de $6,000 de dommages. Ces allégations étaient certainement suffisantes pour justifier la cour d'appel de faire l'évaluation de tous ces dommages et d'accorder $3,685.

Dans ces circonstances, je suis d'opinion que le jugement de la cour d'appel est bien fondé et que l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Fitzpatrick.*

Solicitors for the respondent: *Pelletier, Belleau, Baillargéon & Belleau.*

1913
*Dec. 3, 4.
1914
*Feb. 23.

WILLIAM H. SNELL (PLAINTIFF) .... APPELLANT;

AND

CHARLOTTE BRICKLES, EXECUTOR OF THE ESTATE OF ISAAC BRICKLES, DECEASED (DEFENDANT) ..... } RESPONDENT.

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

Vendor and purchaser—Contract for sale of land—Payment by instalments — Specified dates — Time of essence—Forfeiture—Penalty —Payment declared to be deposit.

An offer to purchase land provided for payment of the price as follows: $500 "as deposit accompanying this offer" to be returned if offer not accepted, the balance by instalments at specified dates; it also provided that if the vendor was unable or unwilling to remove any valid objection to the title, and purchaser did not wish to accept it otherwise the former could return the deposit and cancel the contract; that the offer if accepted should constitute a binding contract of purchase and sale and "time shall in all respects be strictly of the essence hereof"; and that should the purchaser fail to complete the purchase in the manner and at the time specified the vendor could retain any monies paid on account as liquidated damages, rescind the contract and re-sell the property.

Held, reversing the judgment appealed from (28 Ont. L.R. 358), Fitzpatrick C.J. and Anglin J. dissenting, that the $500 paid "as deposit" was part of the purchase money, that the retention by the vendor of monies paid when the purchase was not completed was only a penalty for failure to make the payments promptly; and that the court could grant the purchaser relief from the consequences of such failure. *Kilmer* v. *British Columbia Orchard Lands* ([1913] A.C. 319), followed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment at the trial in favour of the plaintiff.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

(1) 28 Ont. L.R. 358.

There was but one question of law raised for decision in this appeal, namely, whether or not, where a contract for sale of land to be paid for by instalments at fixed dates, with a forfeiture of instalments paid in case of default in any, time being of the essence of the contract, the stipulation that the initial payment is a deposit takes it out of the rule in *Kilmer* v. *British Columbia Orchard Lands*(1), that the forfeiture of the money is only a penalty and default does not of itself disentitle the purchaser to decree for specific performance. The trial judge granted the decree, but his judgment was overruled by the Appellate Division.

Proudfoot K.C., for the appellant. The appellant never had nor indicated any intention of abandoning the contract and his failure to pay on the day stipulated was not his fault. See *Labelle* v. *O'Connor*(2), at pages 522, 523, 530; *Tilley* v. *Thomas*(3).

Kilmer v. *British Columbia Orchard Lands*(1) sets at rest any doubt heretofore existing as to the soundness of the rule in *In re Dagenham (Thames) Dock Co.*(4), that the condition of forfeiture in case of default in a contract of this nature is only a penalty and this rule entitles the appellant to a decree for specific performance.

J. E. Jones for the respondent. Making the first payment a deposit takes this case out of the doctrine laid down in *Kilmer* v. *British Columbia Orchard Lands*(1). See *Howe* v. *Smith*(5); *Hall* v. *Burnell* (6).

(1) [1913] A.C. 319.
(2) 15 Ont. L.R. 519.
(3) 3 Ch. App. 61.
(4) 8 Ch. App. 1022.
(5) 27 Ch. D. 89.
(6) [1911] 2 Ch. 551.

1914

SNELL v. BRICKLES.

Davies J.

THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Anglin.

DAVIES J.—I am not able to distinguish this case from that of *Kilmer* v. *British Columbia Orchard Lands*(1), and, therefore, think that the appeal must be allowed with costs, and the plaintiff's claim for specific performance granted.

DUFF J.—I think this case is governed by the decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands*(1).

The application of that decision becomes as I think very clear when the real nature of the agreement now before us is once understood. It was constituted by a proposal from the purchaser accompanied by the sum of $500 on account of the purchase money and an acceptance by the vendee. The proposal and acceptance are as follows:—

OFFER OF PURCHASE.

Toronto, February 20th, 1912.

To G. W. Ormerod,
Agent.

I hereby make you the following offer, that is to say: I offer to buy that certain parcel of land situate in the Township of Scarboro and County of York and being composed of Lots 1 and 2 according to Registered Plan, Number 412, save and except (1) the portions of said lots heretofore conveyed to the School Board of S.S. No. 12, in the Township of Scarboro for a school site; (2) the most westerly 100 feet frontage on Danforth Road of Lot 2, by a depth of 200 feet, for the price or sum of seven thousand five hundred dollars $7,500

payable as follows: Five hundred dollars ..... $ 500
paid G. W. Ormerod, as deposit accompanying this offer, to be returned to me if offer not accepted; two thousand dollars 2,000

(1) [1913] A.C. 319.

to be paid upon the acceptance of title and delivery of deed and give you back a first mortgage on the property for the remainder, re-payable in 5 years from the date of closing	$5,000	
	$7,500	$7,500

with interest from date of closing at 6 per cent. per annum payable half-yearly, said mortgage to be drawn on the vendor's solicitor's usual form and contain clauses providing for the following:—

(1) A discharge of such portions of said lands as may be required for public streets, upon the payment of $1,500 upon the mortgage;

(2) A discharge of any portion of said lands upon a further payment of $2 per foot frontage on any street;

(3) The right to pay off the whole mortgage at any time, by giving three months' notice or paying three months' advance interest.

Rent, fire insurance premiums, taxes, rates of assessments, local or otherwise, to be proportioned and allowed to date of closing, which shall be 15th March, 1912.

The purchaser shall take the property subject to existing tenancies.

The vendor shall not be bound to produce any abstract of title or any title deeds or evidence of title except such as he may have in his possession, nor to furnish a surveyor's plan or description or proof that the buildings stand wholly within the limits of the said lands.

The purchaser shall search the title at his own expense and shall have ten days from said date of acceptance to examine the same, and if no written objection be made within that time he shall be deemed to have accepted the title. If any valid objection be made within that time the vendor shall have reasonable time to remove it, and if he be unable or unwilling so to do, and the purchaser is unwilling to accept said title subject to the objections, he, notwithstanding any intermediate negotiations, may cancel the contract and return the deposit, and neither party shall have any claim on the other for damages or expenses.

This offer, if accepted as aforesaid, shall with such acceptance, constitute a binding contract of purchase and sale, and time shall in all respects be strictly of the essence hereof.

Should the purchaser make default in completing the purchase in the manner and at the time above mentionel, any money theretofore paid on account shall at the option of the vendor be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end and the vendor shall be entitled to resell the said land without reference to the purchaser.

The vendor is to have the right to remove raspberry canes, currant bushes, asparagus and rhubarb roots, up to 1st November, 1912.

1914

SNELL
v.
BRICKLES.

Duff J.

Signature of Purchaser—W. H. Snell.
Purchaser's Occupation—Baker.
Purchaser's Address—156 Main Street.
Purchaser's Solicitor—Proudfoot, Duncan, Grant & Skeans.
I hereby accept the above offer.
February 20th, 1912. (Sgd.) G. W. ORMEROD.
The above acceptance is hereby confirmed and I agree to pay G. W. Ormerod a commission of 5 per cent. on the sale price.
(Sgd.) ISAAC BRICKLES.
Vendor's Solicitor—DuVernet, Raymond, Ross & Ardagh.
Amount received, $500.
Date received, February 20th, 1912.

The important provisions bearing on the point in dispute are these:—

This offer, if accepted as aforesaid, shall with such acceptance, constitute a binding contract of purchase and sale, and time shall in all respects be strictly of the essence hereof.

Should the purchaser make default in completing the purchase in the manner and at the time above mentioned, any money theretofore paid on account shall at the option of the vendor be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end and the vendor shall be entitled to resell the said land without reference to the purchaser.

There can be no doubt as to the application of this last paragraph to the sum of $500 paid on the acceptance of the offer. It is true that this sum is said to be "deposited" pending the acceptance, but it is plainly described as and unquestionably was paid as part of the purchase money. In *Ockenden* v. *Henly* (1), at page 492, Lord Campbell speaking for the court adopted the statement of law in Sugden, Vendors and Purchasers:—

It is well settled that by our law following the rule of the civil law a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge.

Whatever disputes might have arisen in the absence of express provision on the subject, the terms of

(1) E. B. & E. 485.

this agreement are perfectly unambiguous upon the point that in the event of the vendee making default in respect of any of the things necessary for completion on the day named the vendor may terminate the agreement and retain the moneys theretofore paid. If any part of the sum of $2,000 should remain unpaid on the 15th of March, 1912, the consequences mentioned were to ensue by the express language of the contract.

Now, the decision in *Kilmer's Case*(1) as I understand it is that such a clause must be read as providing for a penalty against which the court will relieve.

In that case their Lordships of the Privy Council adopted and acted upon the principle of *In re Dagenham*(2), as that principle is explained in the judgment of Lord Macnaghten delivered by Lord Moulton at pp. 79 and 80 of 82 L.J., in the following passage:

> In the case of *Dagenham Thames Dock Co.; In re Hulse's Claim* (2), Lord Justice Mellish expresses himself as follows: "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in part unperformed —in which case the real damage may be either very large or very trifling — there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." That was a case like this of forfeiture claimed under the letter of the agreement met by an action for specific performance. Lord Justice James seems to have been of the same opinion. "In my opinion," he says, "this is an extremely clear case of a mere penalty for non-payment of the purchase money." He ends by stating that he agreed with the Master of the Rolls (Lord Romilly) that it was a penalty from which the company were entitled to be relieved on payment of the residue of the purchase money with interest. No doubt the learned Lord Justice referred in detail to the special circumstances of the case, but it appears to their Lordships that that reference was made in answer to the arguments which had been addressed to the court on behalf of the appellants. As regards the ground of his decision the two Lord Justices seem to have been in perfect accord.

(1) [1913] A.C. 319. (2) 8 Ch. App. 1022.

1914

SNELL v. BRICKLES.

Duff J.

This passage contains the *ratio decidendi* of their Lordship's judgment and is, of course, an absolutely authoritative exposition (and — need I add — by one of the greatest of the English Equity judges) not only of the effect of the decision of the Lord Justices in *Re Dagenham*(1), but of the law upon the point in question; and the agreement now in controversy as I construe it, is well within the rule here laid down.

Two points in Mr. Jones' most ingenious argument ought to be noticed. He says first that the effect of adopting this view must be virtually to abrogate the principle that time may by agreement be made of the essence of a contract for the sale of land. This argument is founded on a misapprehension; the view involves no such consequence. Where the effect of a stipulation that time is of the essence of the agreement is expounded in express terms by the agreement itself and according to that exposition that stipulation gives the vendor a right to rescind the contract on failure to pay an instalment of purchase money whether it be the last instalment or not at the exact hour named for such payment by the contract and to forfeit the moneys already paid, then these stipulations are treated as constituting a penal clause for securing the punctual payment of the purchase money and the penalty is relieved against. That, as I understand it, is the effect of *Re Dagenham*(1) as explained by the judgment and the decision in *Kilmer's Case*(2). It may be observed that, before the decision in *Kilmer's Case*(2), *Re Dagenham*(1), although it appears to have been overlooked by English text-writers and some English judges (it is not mentioned in Fry, Specific Performance, 1911, or in the last

(1) 8 Ch. App. 1022. (2) [1913] A.C. 319.

edition of Dart, Vendors and Purchasers, or in Williams' Vendors and Purchasers, or in Halsbury under Specific Performance or Sale of Land and in Talbot and Fort's Index only two references are noted, both in 1900, it was not mentioned either in *Wallis* v. *Smith*(1) or in *Howe* v. *Smith*(2)) was correctly appreciated (*i.e.*, in accordance with the interpretation afterwards adopted in *Kilmer's Case*(3)) in *Whitla* v. *Riverview Realty Co.*(4), a decision of the Manitoba Court of Appeal, and in *Chadwick* v. *Stuckey*(5), a decision of the full court of Alberta both of which courts in effect adopted the views expressed by Meredith C.J. in his dissenting judgment in *Labelle* v. *O'Connor*(6).

The other point is perhaps the same argument in another form. The respondent, it is said, is not exercising the power of rescission given by the agreement. But he has professed to put an end to the agreement and he has retained the moneys paid; and he does not, of course, pretend that he has kept the moneys inadvertently, but asserts his right to them. He does not really argue that in the circumstances he could have kept these moneys except under some stipulation express or implied to that effect; and he finds such a stipulation implied in the use of the word "deposit." As I have said above, the presence of the express stipulation excludes any implication which might otherwise have arisen in respect of the precise matter upon which that stipulation makes provision; and it is pursuant to this stipulation that the vendor must be taken to have acted.

(1) 21 Ch. D. 243.
(2) 27 Ch. D. 89.
(3) [1913] A.C. 319.
(4) 19 Man. 746.
(5) 5 Alta. L.R. 145.
(6) 15 Ont. L.R. 519.

1914

SNELL v. BRICKLES.

Duff J.

Although in the view above expressed it is not strictly relevant, I think it is not improper to add that I am far from satisfied that even in the absence of the express stipulation the plaintiff would have been entitled in the circumstances to terminate the agreement and retain the moneys already paid. He had always been anxious to carry out his contract and personally was in a position to do so on the appointed day, the 15th of April. The responsibility for the delay, such as it was, lay with his solicitor; and on the 20th of April the purchase money, a properly executed mortgage and a deed prepared for execution were tendered. The action was brought on the 23rd. It is contended that in these circumstances, even in the absence of express stipulation, the respondent could refuse to execute the conveyance and retain that part of the purchase money already paid. And this is said to result from the fact that the sum of $500 being denominated a "deposit" is to be treated as security for the performance by the vendee of his contract with the consequence that "time being of the essence" of the agreement his failure to complete on the day named, the 15th of April, entitles the vendor to retain the moneys so placed in his hands as security.

Now it has been many times laid down and it is undoubtedly law that where an instalment of purchase money is declared by the contract to be paid as a "deposit," and there is no modifying context, it is thereby implied that this sum besides being a part payment of the purchase money stands as security for the completion of the purchase.

But, what is the consequence of this where the contract contains a provision that time is the essence of

it and the vendee fails, let us say, through the carelessness of his solicitor, to make the final payment? Does it follow that the vendor becomes *instanter* indefeasibly entitled to refuse to transfer the property and at the same time retain the moneys in his hands?

There are, no doubt, *dicta* to this effect. But I think there is no decision, and I think it is very questionable whether the *dicta* are consistent with principle. Certainly the difficulties of reconciling the *dicta* with the doctrine of *Re Dagenham,* as interpreted in *Kilmer's Case,* are not trifling. In *Howe* v. *Smith*(1) the decision proceeded upon the ground that the vendee had so acted "as to repudiate his contract," as Cotton L.J. put it; "to recede from his bargain," as Bowen L.J. put it. The vendee had "accepted the repudiation," treated the agreement as dissolved in consequence of the vendee's conduct, and sold the property. The vendee in such circumstances, demanding the return of his deposit, was met with the answer that "this sum was paid as security by you for the performance of your contract, and having deliberately elected not to perform it and your election having been so acted upon that it is now impossible to carry it out, you cannot get back your security." In the agreement in question in that case, time was not declared to be of the essence of the contract; and the decision has no direct bearing upon the effect of such stipulation. The same observation may be made with regard to *Ex parte Barrell*(2), which was cited and relied upon in *Howe* v. *Smith*(1). Indeed, the judgment of Lord Justice James contains two sentences which sum up the point of both decisions. They are:

(1) 27 Ch. D. 89. (2) 10 Ch. App. 512.

1914

SNELL v. BRICKLES.

Duff J.

"The money was paid to the vendor as a guarantee that the contract should be performed. The trustee (vendee) refuses to perform the contract and then says: Give me back the deposit." In *Hall* v. *Burnell* (1), Mr. Justice Eve states the principle upon which he proceeds (p. 554) in these words:—

> Such being the nature of the deposit and the implied terms upon which it was paid, is there any sufficient reason why I should not, as against a purchaser who *has receded from and persistently refused to perform the contract*, declare that the deposit has been forfeited and belongs to the *vendor*, who has been in no way in default and *has done everything in his power to force the purchaser to carry out his bargain?* I think not.

In *Sprague* v. *Booth* (2) the purchaser was also refusing to carry out his contract. I have not found any decision and I do not think there is one in which the vendee's default being merely the technical default of failing to pay at the hour named, there being in fact admittedly the intention as well as the ability on his part to carry out his contract, and an offer to perform it made almost immediately after the default has occurred, there being no equity against the vendee or in favour of the vendor, except such as may be created by the existence of the formal stipulation making time the essence of the contract and technical default in exact performance — I say I have found no decision and I do not think one can be found — that a vendor in such circumstances is on equitable principles entitled to terminate the agreement and retain the moneys paid on the sole ground that such moneys are declared by the agreement to be paid as a "deposit."

As to whether such a decision could be justified on principle there are two observations which appear to

(1) [1911] 2 Ch. 551. (2) [1909] A.C. 576.

me to be of weight. It ought to be noted that in the traditional view of courts of equity the vendor's interest in the contract of sale has been considered to lie in the right it gives him to demand and enforce the payment of the purchase money. This has been compendiously put by saying that the estate in equity was considered to have passed to the vendee or that the vendor was considered to be a trustee of the land for the purchaser subject to the interest he had in it as security for the purchase money. Expressions of this kind, of course, may easily be misunderstood by people who leave out of sight the manner in which the doctrine they are intended to epitomize is applied by courts of equity; but one may say, I think, with entire accuracy that the Court of Chancery looked at such contracts from a point of view which brought into relief the interest of the vendor in the payment of the purchase money as his substantial interest in the contract. See the judgment of Jessel M.R. in *Cave* v. *Mackenzie*(1), at page 219, and of Mowat V.-C. in *Parke* v. *Riley*(2), at page 230. The second observation is this:—The English doctrine of the equity of redemption is only a particular application of the principle governing the law as to penalties and forfeitures. The Lord Chancellor in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*(3), at page 35, says that the equitable jurisdiction *in personam* over mortgagees

> was merely a special application of a more general power to relieve against penalties and to mould them into mere securities.

In the light of these observations some of the results of the contention I am now considering appear rather

(1) 37 L.T. 218. (2) 3 E. & A. 215.
(3) [1914] A.C. 25.

1914

SNELL v. BRICKLES.

Duff J.

singular. First, this sum that is to stand as security for the performance of the vendee's obligations which in their substance consist in making the payments mentioned on the stipulated days, is, according to the contention, to become the absolute property of the vendor on the vendee's failure to pay on the exact hour named and against this forfeiture the courts have no power to relieve; and this consequence is not only not prevented by the fact that the intention of the parties was that the sum mentioned was to stand as security only, it is expressly on the ground that it was intended to be and is a security for the payment of the purchase money that (according to the argument) the court is powerless to afford relief. The process referred to by the Lord Chancellor is reversed. Instead of a penalty being moulded into a security and relieved against a security is turned into a penalty and forfeited as a penalty. Secondly, the effect of declaring the initial payment to be a "deposit" coupled with a stipulation that time is of the essence of the contract being to raise an implied agreement that the vendor shall upon default of punctual payment be entitled to terminate the agreement and retain the moneys deposited and these stipulations giving rise to this implied agreement being (according to the respondent's argument) sanctioned and enforceable according to the doctrine of the court; nevertheless, it is indisputably the law as laid down in *Re Dagenham* (1) and in *Kilmer's Case* (2), that if such an agreement be stated in express terms on the face of the contract, that is to say, if it be declared in so many words that in the event of non-completion on the day named the contract of sale may be re-

(1) 8 Ch. App. 1022. (2) [1913] A.C. 319.

scinded and the initial payment forfeited, that is a stipulation which the courts will relieve against as a penalty. A stipulation stated in plain terms is a penal stipulation; a stipulation precisely the same in effect is not penal when stated in terms which can only be understood by lawyers. This, presumably, is regarding substance rather than form.

The difficulties arising from conflict among views from time to time expressed by distinguished lawyers and judges in relation to this subject are, no doubt, considerable. I am inclined to think it will be found, if the decisions themselves be looked at as distinguished from the expressions of individual judges, that most of the apparent difficulties disappear. In the meantime the case before us seems to me, as I have already said, to be governed by the decision in *Kilmer's Case*(1), according to which I think the appellant is entitled to be relieved from the exigency of the penalty and to have judgment for specific performance.

On the other points in the case I express no opinion.

ANGLIN J. (dissenting). — The material facts of this case are as follows:—

On the 20th February, 1912, by accepting a written offer of purchase from William H. Snell, Isaac Brickles agreed to sell to him, for $7,500, certain land in the Township of Scarborough. The purchase money was payable, $500 as a deposit accompanying the offer, $2,000 on acceptance of title and delivery of deed; and $5,000 by the purchaser giving a mortgage "to be drawn on the vendor's solicitors' usual form." Pro-

(1) [1913] A.C. 319.

1914

SNELL v. BRICKLES.

Anglin J.

vision was made for the return of the deposit if the offer should not be accepted, or if, after acceptance of the offer, the vendor should be unable or unwilling to remove any objection to the title on which the purchaser should insist. The agreement provided for payment of a commission of 5% to the vendor's agent, who received and still retains the deposit of $500.

One of the terms of the agreement was that the transaction should be closed on the 15th March, 1912, and it provided that

> time shall in all respects be strictly of the essence hereof.

The agreement also contains this clause:—

> Should the purchaser make default in completing the purchase in the manner and at the time above mentioned, any money theretofore paid on account shall, at the option of the vendor, be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end, and the vendor shall be entitled to resell the said land without reference to the purchaser.

The agreement is silent as to the preparation of the deed and the mortgage.

The solicitors for the vendor on the 21st of February, 1912, sent to the solicitors for the purchaser a draft deed for approval. The purchaser's solicitors did not return this draft deed or signify approval of it, although, on February 27th, the vendor's solicitors wrote asking its return. The purchaser's solicitor admits that he received the draft deed and states that he found difficulty in settling the description. In his evidence he says:—

> On the 12th, Mr. Ross 'phoned to me and said Mr. Brickles was in his office and that the 15th was the date of closing and his client was very anxious to close * * *. He asked me for the return of the draft deed and I said I would return it. Then that was, I think, on Tuesday, and next morning I was going to return the draft deed, but in the afternoon I had brought the deed to send it back, that

was on Wednesday, and then I discovered that there was not anybody in to dictate a letter to, and so left it over till Thursday morning.

His Lordship: That would be the 14th? A. Yes, my Lord.

Mr. Proudfoot: Then what happened? A. I was not down either on the 14th or the 15th or the 16th. I was sick the last three days of that week.

Q. Were you confined to your home? A. Oh, yes, I was not out of the house the last three days of the week.

Q. Then the draft deed was not returned? A. No.

Q. What took place on the Monday, that would be the 18th? A. The deal should have been closed on Friday, and then there was Saturday morning. Monday I came down, and the first thing I took up was this matter. I had it on my desk and it was the first thing I attended to. I 'phoned to Mr. Ross and asked him if we could close the matter. I said we were ready and would like to get the matter closed. Mr. Ross then told me that his client had been in, and as the matter had not been closed on the 15th that his client refused to carry it out. * * * I prepared the mortgage on that day and had it executed, and asked Mr. Snell for a cheque, and got a cheque, and then called Mr. Ross up again and asked him if there was any possibility of closing and he said there was not; and I spoke about tender on that occasion; and he said that his client would not do anything in the matter. Then I asked him if there was any possibility of settlement in any way, and he said that he did not think so, but he would write to his client.

Before these telephone interviews occurred the vendor's solicitors, apparently, had already written a formal letter to the purchaser's solicitor notifying him that their client would not carry out the contract. Elsewhere in the evidence of the purchaser's solicitor there is the following passage referring to his conversation with the vendor's solicitor on the 12th March:

Q. It is entered in your docket that he telephoned you up and insisted on closing on the 15th? A. Yes.

Negotiations for settlement ensued, but they proved abortive. On the 20th of April the purchaser's solicitor made a tender of $2,000, and of a mortgage for $5,000 executed by his client and he presented the

1914

SNELL v. BRICKLES.

Anglin J.

deed for execution by the vendor, which was refused. He brought this action for specific performance on the 23rd of April.

Falconbridge, C.J., who tried the action, decreed specific performance with costs. The executrix of the defendant, in whose name the action had meantime been revived, appealed and her appeal was unanimously allowed by the Appellate Division. From that judgment the present appeal is taken.

Two questions present themselves for decision: (*a*) whether the vendor was in default in regard to the conveyance of the property and cannot on that ground take advantage of the provision making time of the essence of the contract in all respects; and (*b*) whether, notwithstanding that provision, the purchaser, although in default, is entitled to specific performance.

The first point presents little difficulty. The agreement being silent as to it, the duty of preparing the conveyance fell upon the purchaser. "An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct": *Earl of Egmont* v. *Smith*(1), at page 474. The rule, in the absence of a stipulation, is that the purchaser must prepare and tender the conveyance. Dart on Vendors and Purchasers (7 ed.), p. 1002. This rule of English law is well recognized in the courts of Ontario: *Bolton* v. *Hugel*(2), at page 407; *Mooney* v. *Prevost*(3), at page 419; *Stevenson* v. *Davis*(4), at page 633. With very great respect for the learned Chief Justice of the King's Bench, I agree with Sutherland J., that there

(1) 6 Ch. D. 469.
(2) 35 U.C.Q.B. 402.
(3) 20 Gr. 418.
(4) 23 Can. S.C.R. 629.

appears to be nothing in the agreement before us which makes it inapplicable. The fact that the vendor's solicitors actually prepared and submitted a draft deed for the approval of the purchaser's solicitors did not change the legal rights or duties of the parties. If the vendor unnecessarily assumed the burden of drafting the conveyance it was at least the duty of the purchaser's solicitor to peruse and return it approved in due time to permit of its being engrossed and executed by the vendor and ready for delivery on the day fixed for closing. That he failed to do. It was also the duty of the purchaser's solicitor to prepare a draft mortgage and to submit it to the vendor's solicitor for approval in time to have it properly considered and returned for engrossment and execution before the day fixed for closing. It was his business to ascertain what was the vendor's solicitors' usual form of mortgage, and if they had no special form to submit a draft mortgage in the statutory form. The purchaser introduced the provision for a mortgage into his offer for his own benefit and convenience. In so doing he undertook to bear the additional conveyancing expense thus entailed: *Fahner* v. *Ran*(1); and that fact cast on him the duty of preparing the instrument: *Foster* v. *Anderson*(2). On the 16th of March the draft deed had not been returned, the draft mortgage had not been submitted and the $2,000 due on the 15th had not been tendered. There was the clearest default on the part of the purchaser and I find none on the part of the vendor. On the contrary his solicitor appears to have been unnecessarily diligent. He

(1) 1 Ch. Ch. 246.

(2) 15 Ont. L.R. 362, at p. 371; 16 Ont. L.R. 565, at pp. 570, 574; 42 Can. S.C.R. 251

1914

SNELL v. BRICKLES.

Anglin J.

had prepared and submitted a draft conveyance. He had written on the 27th of February asking its return; and he had notified the purchaser's solicitors three days before the time fixed for closing the transaction that his client expected punctuality.

The appeal, therefore, fails on the first point.

Nor do I see how it can succeed on the second point unless we are to consider a point in the law of specific performance which has been settled for over half a century (27 Halsbury's Laws of England, p. 67) to have been overturned by the recent decision of the Privy Council in *Kilmer* v. *British Columbia Orchard Lands*(1), on which the appellant chiefly relies, and to hold that, as a result of that judgment, it is no longer possible for parties by explicit terms to make time of the essence of a contract for the sale of land. I do not understand that to have been the intention of their Lordships of the Judicial Committee, nor to be a consequence fairly deducible from their decision.

That case differs in many important particulars from the one now before us. There $2,000 had been paid, not as a deposit, but as an instalment of the purchase money; there had been an extension of time for payment of the second instalment (although that is not always material, *Barclay* v. *Messenger*(2)); and the subsequent insistence on the provision making time of the essence rather took the purchaser by surprise; a forfeiture clause, applicable although the entire purchase money except a small fraction had been paid, was invoked by the vendors; provision was also made for subdivision of the property to which the vendors were bound to assent on receiving three-fourths of the money for which the subdivided lots might be

(1) [1913] A.C. 319. (2) 43 L.J. Ch. 449.

sold, and the right of forfeiture was reserved in regard to money paid in respect of these subdivided lots. Here no instalment of the purchase money had been paid, but merely a deposit; there had been no extension of time; on the contrary the purchaser had been notified that punctuality would be exacted; the vendor does not invoke the forfeiture clause in the agreement; he says that the $500 deposit had not become "money paid on account" within the purview of that clause; and there is no provision for subdivision such as there was in the *Kilmer Case*(1). That decision, as I understand it, leaves untouched the familiar doctrine laid down in such authorities as *Howe* v. *Smith*(2), and *Hall* v. *Burnell*(3), in regard to cases where there has been default by a purchaser who has paid nothing except a deposit. In *Howe* v. *Smith*(2) the purchaser had paid £500 which has stated in the contract to be paid "as a deposit and in part payment of the purchase money." Cotton L.J., at p. 94, cites *Collins* v. *Stimson*(4), where Baron Pollock said:—

> According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.

In *Ex parte Barrell*(5), Lord Justice James, who had presided at the hearing of the *Dagenham Case*(6), upon the authority of which *Kilmer* v. *British Columbia Orchard Lands*(1) was disposed of, says, speaking of a deposit paid on a contract for the sale of land by a purchaser who had become bankrupt and whose trustee sued to recover it:—

(1) [1913] A.C. 319.
(2) 27 Ch. D. 89.
(3) [1911] 2 Ch. D. 551.
(4) 11 Q.B.D. 142.
(5) 10 Ch. App. 512.
(6) 8 Ch. App. 1022.

1914

SNELL v. BRICKLES.

Anglin J.

The trustee in this case had no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed.

As Lord Justice Cotton says in *Howe* v. *Smith*(1), at page 95:—

The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit.

I do not say that in all cases where this court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this court in declining, and which would require the court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make his conduct amount to a repudiation on his part of the contract.

In the same case, Fry L.J., said:—

Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

As shortly put by Bowen L.J.:—

A deposit is * * * a security for the completion of the purchase.

(1) 27 Ch. D. 89.

1914

SNELL v. BRICKLES.

Anglin J.

In the recent judgment of Eve J., in *Hall* v. *Burnell*(1), the nature of a deposit is fully considered and the doctrine laid down in *Howe* v. *Smith*(2) is applied.

A divisional court of which I was a member, had occasion, a few years ago, to review the authorities bearing upon a contractual stipulation that time shall be of the essence in a contract for the sale of land, in *Labelle* v. *O'Connor*(3), to which I refer for a convenient collection of the cases. My conclusion then was that an express stipulation making time of the essence of a contract for the sale and purchase of land is efficacious in equity as well as at law and that, where clearly established and there is no ground for suggesting fraud, surprise, accident or mistake, it will be enforced unless there has been waiver by the party claiming the benefit of it. I have had no reason to change my opinion. There are certainly no circumstances from which waiver can be inferred in this case and, unless we are to hold that such a stipulation should be disregarded, however clear and explicit, I am unable to see how the purchaser can obtain specific performance.

In claiming to retain the deposit the vendor does not invoke or rely upon the clause of the agreement which expressly provides for the forfeiture of purchase money paid on account. The deposit becomes part payment, or money paid on account, only "if the sale goes on." If not, it remains "an earnest" or "security." It may well be that had the $2,000, or some part of it, been paid on or before the 15th of March, the court would have relieved against the con-

(1) [1911] 2 Ch. 551. (2) 27 Ch. D. 89.
(3) 15 Ont. L.R. 519.

1914

SNELL v. BRICKLES.

Anglin J.

sequences of default for which that clause provided. The present case might then have been brought within the authority of the *Dagenham Case*(1) and the *Kilmer Case*(2) as to the purchaser's right to be relieved from the forfeiture of purchase money paid on account. But I should require to consider very carefully whether, even in that case, he would be entitled to specific performance — which was accorded in the *Kilmer Case*(2) but was apparently not sought in the *Dagenham Case,* so far as the report in 8 Ch. App. 1022 shews, although in the *Kilmer Case*(2) it appears to have been assumed that it was. The present case is simply one of default under a contract, of which the parties have expressly stipulated that time shall be of the essence, by a purchaser who has paid merely a deposit. There is no excuse for the default; no case of fraud, surprise, accident or mistake has been suggested; and there has been no waiver of the stipulation. No authority has been cited, and I am satisfied that none can be found, which would support a decree for specific performance under such circumstances. Wide as the powers and discretion of a court of equity are, they do not extend to making new contracts for suitors. *Hipwell* v. *Knight*(3), at page 416; *Seaton* v. *Mapp*(4), at page 564; *Honeyman* v. *Marryat*(5), at page 24.

The plaintiff does not ask for a judgment rescinding the contract. At bar his counsel asserted and relied upon the right of his client to rescind without curial assistance. A return of the deposit has not been asked for by the plaintiff. It could not in any case

(1) 8 Ch. App. 1022.
(2) [1913] A.C. 319.
(3) 1 Y. & C. Ex. 401.
(4) 2 Coll. 556.
(5) 21 Beav. 14.

properly be granted except as to the balance of $125 over and above the agent's commission, which amounts to $375, and to which he is clearly entitled. But, having regard to the very short default — three days — and to the circumstances in which it occurred, I think the defendant should return this $125. The purchaser did not refuse to perform his contract and his conduct did not amount to a repudiation of it. On the contrary he is and always has been anxious to carry it out, though he neglected to comply with its terms. In dismissing this appeal I should be disposed to give the respondent his costs in this court only on condition that this sum of $125 is returned to the plaintiff or that the respondent should agree to credit it upon such costs: *Howe* v. *Smith*(1), at page 95; *Gee* v. *Pearse*(2). If this is done, however, it must be on the basis that the contract is to be deemed rescinded. If the appellant should decline so to treat it, the appeal will simply be dismissed with costs.

BRODEUR J.—I am of opinion that this appeal should be allowed for the reasons given by my brother Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Proudfoot, Duncan & Grant.*

Solicitors for the respondent: *Rowan, Jones, Somerville & Newman.*

(1) 27 Ch. D. 89.

(2) 2 DeG. & Sm. 325.

1913
*Nov. 4.
1914
*Jan. 21.

SAMUEL W. D. FRITH (PLAINTIFF) . . APPELLANT;

AND

THE ALLIANCE INVESTMENT COMPANY (DEFENDANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of lands—Contract—Agreement for re-sale—Novation—Rescission — Specific performance—Defence to action—Practice—Evidence—Statute of Frauds—Principal and agent—Agent purchasing—Disclosure—Findings of fact.

In a suit for specific performance of a contract for the sale of lands an agreement for the re-sale of the lands may be set up as a defence notwithstanding that such re-sale agreement does not satisfy the requirements of the 4th section of the Statute of Frauds. Judgment appealed from (10 D.L.R. 765) affirmed.

Such an agreement for re-sale affords a sufficient reason for refusing a decree for specific performance of the original contract for sale.

The Supreme Court of Canada refused to review the finding of the courts below that the defendants, while agents for the sale of the property in question, when purchasing it themselves under the contract for re-sale, had discharged their duty towards the plaintiff in regard to disclosure of material facts relating to the value of the property.

Per Davies and Idington JJ. — Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together the effect of the second agreement is to rescind the first.

APPEAL from the judgment of the Supreme Court of Alberta (1), affirming the judgment of Harvey C.J., at the trial (2), by which the plaintiff's action was dismissed with costs and the counterclaim of the defendants was disallowed without costs.

The action was brought by the appellant for speci-

(1) 10 D.L.R. 765. (2) 4 Alta. L.R. 238.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

fic performance of an agreement by the company to sell certain lots in Calgary, Alta., to him. Being dissatisfied with the situation of the property the plaintiff had listed it for sale with the company which, being unable to secure a purchaser, offered to buy the property back and, owing to what took place between them, the defence of the company was that the appellant had resold the property to them and they relied upon this also by counterclaiming for specific performance of the alleged agreement by the appellant to re-sell the property to them. At the trial Chief Justice Harvey dismissed the plaintiff's action with costs, and, on account of the agreement for re-sale being ambiguous and not available as a memorandum in writing within the Statute of Frauds, the counterclaim was disallowed without costs. It was also contended, on the appeal, that the defendants were in a fiduciary relationship towards the appellant; that they had information as to increased value of the property which they did not communicate to the appellant, and that, on the whole evidence, there should have been a decree for specific performance of the agreement to sell to him.

W. B. A. Ritchie K.C. and *J. Leslie Jennison K.C.* for the appellant.

Aimé Geoffrion for the respondents.

THE CHIEF JUSTICE.—I have had an opportunity of reading the notes of Mr. Justice Anglin and I agree that this appeal should be dismissed for the reasons stated by him.

DAVIES J.—I concur in dismissing this appeal for the reasons stated by Mr. Justice Idington.

1914

FRITH v. ALLIANCE INVESTMENT CO.

Idington J.

IDINGTON J.—The appellant bought from the respondent, for $641.25, some property, of speculative value, paid part of the price, complained of its being unprofitable, listed it with respondent to re-sell at $900, and, respondent's officials, concluding it was good value at that, decided on behalf of respondent to offer the appellant this price on the terms in his listing, but varied the terms so as to please him, and, so varied, he accepted the offer.

The first transaction is in writing, and so is the last also, but ambiguously so, by reason of the cancellation of some words in the receipt rendering it doubtful if it fulfils the requirements of the Statute of Frauds.

This defect arose from the effort of the respondent to so vary it as to meet appellant's views.

He seeks specific performance of his contract to purchase, whilst repudiating his contract to re-sell to his vendor; after having for a month $50 of respondent's money in his pocket and having enjoyed its forbearance during that month and many previous months in regard to his overdue payments under the contract he sues on.

The parties, instead of simplifying matters by striking a balance between them and making one transaction of these two, let each contract take care of itself, and thus left it open for appellant, by way of experimental litigation, to claim that he was entitled to specific performance of his contract, in April, when the last payment should fall due thereunder, and that respondent could not set up this contract of re-sale to his vendors either as rescission of the first or an answer to the claim for specific performance.

I think it is quite possible to hold that, in light of

all that transpired between the parties, rescission is, in truth, what they intended, subject merely to this, that the ultimate result of the financial adjustment (balancing accounts as the respondent's payments fell due and were made) should be left to work itself out in the few months that they had to run.

Such conditional rescission might well be treated as a complete answer to the claim for specific performance.

For purposes, not involving the bringing of an action, a contract falling within the fourth section of the Statute of Frauds is valid if otherwise binding and not illegal.

Such a contract may and has often been held a complete answer by way of defence to an action for specific performance, and the cases so maintaining were cited in argument before us and relied upon herein and in the courts below.

It is urged, however, with some force, that, however that may be, when the new contract involves rescission, it cannot be so in a case where the parties contemplated the continued existence of the contract.

It is always desirable to look at the substance of what the parties in litigation had in view in their transactions out of which the litigation has arisen, and to discard, if possible, the mere form of expression, if clearly but a mere form of expression.

It is upon this or something like this principle that the legal rights of these parties must be decided.

It is laid down in Fry on Specific Performance (4 ed.), section 1031, thus:—

> Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in Roman law.

1914

FRITH v. ALLIANCE INVESTMENT CO.

Idington J.

He then reviews a number of authorities and in conclusion, in section 1039, says, as follows:—

> But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision. But, in point of principle, it seems to stand on the same footing as a simple agreement to rescind.

I think his conclusion fits this case and puts the principle on which it must be decided in its true light.

Again, let us assume the receipt in question herein constitutes a compliance with the Statute of Frauds, and the appellant's action was resisted upon no other ground than thus furnished: Does any one believe that a court proceeding upon the fundamental principles upon which the right to specific performance rests, would listen to such a claim for a moment — as to enforce a conveyance in April when clearly there must be a re-conveyance in August following ?

Such a thing, I imagine, would be treated by a court so appealed to as most palpably trifling.

Then, if the written contract of re-sale is a bar, so must the oral one, or partly written partly oral, be a complete defence upon the authority of the cases cited.

And, as to the question springing from the relation of principal and agent, I do not think on the evidence before us there is anything open to the appellant herein.

There was no concealment by respondent, no failure on respondent's part to disclose anything known

1914

FRITH v. ALLIANCE INVESTMENT CO.

Idington J.

to it, but unknown to appellant. Each used his own judgment. The respondent's may have been better than that of the appellant, but that is always liable to happen.

The law has not pushed the principles governing the relation of principal and agent so far as to preclude that sort of thing, or it would render it impossible for an agent ever to buy from his principal.

The dealing must be fair, but is not impossible.

And the evidence of the opinion of others next day in regard to values in a highly speculative market can be of no value, standing alone, as a test of what is fair.

The appellant was a speculator himself and his opinion is just as good. See *Kelly* v. *Enderton*(1).

The appeal should be dismissed with costs.

DUFF J.—I have come to the conclusion that, in the absence of any defence based upon the 4th section of the Statute of Frauds, the respondents would be entitled to enforce against the appellant the agreement of the 18th of February. The real question is whether (there being no memorandum sufficient under that enactment) that agreement was an answer to the appellant's action. At the date of the trial, 7th February, 1912, the respondents would have been entitled under the terms of the agreement of February, 1911 (assuming that agreement enforceable) to demand an assignment of the appellant's interest in the lands on payment of the purchase price; and, in these circumstances, I think the Chief Justice of Alberta was right in refusing specific performance of the earlier agreement.

(1) [1913] A.C. 191.

1914

FRITH v. ALLIANCE INVESTMENT CO.

Duff J.

I shall assume that, under the law of Alberta, the appellant, by virtue of the agreement of April, 1910, acquired before the second agreement was entered into an interest in the lands in question that would be an "interest in lands" within the meaning of the Statute of Frauds (4th section). The law of England is clear enough that a purchaser under an agreement for the sale of lands still *in fieri,* the circumstances being such that on the performance of his obligations he would be entitled to a decree for specific performance of it, has such an interest in the land; but the interest is an equitable interest and it rests upon the fact that there is an agreement of sale in respect of which a court of equity would decree specific performance. The existence of an agreement enforceable by action at law only would not vest in him an interest in the land. Primarily the equitable rights were rights *in personam,* but the peculiar nature and efficacy of the remedies available in the Court of Chancery for the enforcement of such rights together with the effect of the equitable doctrine of notice, in enormously widening the field over which rights *in personam* would otherwise have been enforceable, eventually led in certain cases to such rights being regarded as *jura in re* and protected as rights of ownership. But every merely equitable right of ownership or interest in the property owes its vitality to the jurisdiction of the Court of Chancery.

The question to be determined here is whether, notwithstanding the agreement of February, 1911, the appellant is entitled to demand the exercise of that jurisdiction by way of decreeing specific execution of the contract of April, 1910. I concur with Har-

vey C.J. in thinking that the existence of the subsequent agreement is a proper ground for refusing the equitable remedy.

All the other points resolve themselves in questions of costs in regard to which this court ought not to intervene.

ANGLIN J.—There is much in the circumstances under which the defendants procured from the plaintiff the contract for the re-sale of the property in question that is calculated to arouse a suspicion that they failed to make to him that full disclosure of material facts which is incumbent on agents for sale when they themselves become purchasers. But the trial judge has said that it was

established to my entire satisfaction that the plaintiff knew he was dealing with the defendants as purchasers, and that no advantage whatever had been taken of him.

Although, in appeal, Mr. Justice Walsh expressed his dislike of

at least one incident in connection with the dealings between the parties on this re-sale,

he accepted, as did Mr. Justice Scott and Mr. Justice Simmons, "the findings of fact adverse to the plaintiff." While not satisfied that, if I had been presiding at the trial of this action, I should, upon my present appreciation of the evidence, have reached the conclusion that the defendants had fully discharged their duty to the plaintiff as his agents, I am not prepared to reverse the concurrent finding of two courts upon that point, which must to a considerable extent, in the case of the learned trial judge, have rested upon the view taken by him of the credibility and weight of the testimony of the several witnesses.

1914

FRITH v. ALLIANCE INVESTMENT CO.

Anglin J.

On the other branch of the case, while, in my opinion, the contract of re-sale did not effect and was not intended to effect a rescission of the original contract — the terms of the re-sale contract, the conduct of the parties in regard to the payments and the retention by the defendants of the purchase money paid on the original contract make that very clear — I do not think the plaintiff is entitled to invoke the exercise of the equitable jurisdiction of the court to decree specific performance. He made a contract of re-sale which is unenforceable by action only because an ambiguity in the receipt which he gave for the first instalment of the purchase money renders it insufficient as a memorandum to satisfy the requirements of the fourth section of the Statute of Frauds. Under that contract, if enforceable, the defendants would be entitled on their counterclaim to a decree for specific performance of it and a re-conveyance to them of the property in question concurrently with the decree which the plaintiff claims requiring the defendants to convey the same property to him. Under such circumstances the court should not, I think, decree specific performance in favour of the plaintiff. While not available to support an action, the contract of re-sale may be used as a defence. To that the Statute of Frauds offers no obstacle. Given as a defence the effect which it would have had in an action upon it, if properly evidenced, the contract of re-sale affords a sufficient answer to the plaintiff's claim to a decree for specific performance.

Whatever may be thought of the conduct of the defendants, the plaintiff's own course of dealing in

this matter was not such as to entitle him to any special consideration from a court of equity.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

1914

FRITH
v.
ALLIANCE
INVESTMENT
CO.

Anglin J.

Solicitor for the appellant: *W. R. McLaurin.*
Solicitor for the respondent: *W. T. D. Lathwell.*

1913
*Dec. 9.
1914
*Feb. 23.

SHERMAN E. TOWNSEND, ASSIGNEE OF THE ESTATE AND EFFECTS OF JOSEPH E. BRETHOUR (PLAINTIFF) ..... APPELLANT;

AND

THE NORTHERN CROWN BANK (DEFENDANTS) ..... RESPONDENTS.

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

Banks and banking—Loans—Security—Wholesale purchaser—"Products of the forest"—"Bank Act," s. 88.

By sec. 88(1) of the "Bank Act" a bank "may lend money to any wholesale purchaser * * * or dealer in products of agriculture, the forest, etc.; or to any wholesale purchaser * * * of live stock or dead stock and the products thereof, upon the security of such products or of such live stock or dead stock and the products thereof."

Held, affirming the judgment of the Appellate Division (28 Ont. L.R. 521) which affirmed the decision of a Divisional Court (27 Ont. L.R. 479) by which the judgment of the trial Judge (26 Ont. L.R. 291) was maintained, that a person who purchases lumber by the carload having on hand at times 200,000 or 300,000 feet and sells it by retail or uses it in his business is a "wholesale purchaser" within the meaning of the above provision.

Held, also, that sawn lumber is a "product of the forest" on which money can be lent under said provisions. *Molsons Bank* v. *Beaudry* (Q.R. 11 K.B. 212) overruled.

Held, per Duff and Anglin JJ.—The words "and the products thereof" at the end of the above sub-section mean the products of live or dead stock and not of the other articles mentioned.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

(1) 28 Ont. L.R. 521.

judgment of a Divisional Court(1), which maintained the judgment for the defendants at the trial(2).

The appellant is assignee of one Brethour, who carried on business as a builder and contractor and as such applied to the respondent bank for a line of credit and advances "on the security of the cordwood, lumber, cement, nails, glass and other articles used in the business of building and contracting, etc." In carrying on his business Brethour bought his lumber by the carload, selling some to other persons in the village and using the rest in his business. Having become insolvent he made an assignment for benefit of his creditors and the assignee brought action to set aside the security held by the bank on the assets. The main grounds on which he relied in this action were, that Brethour was not a "wholesale purchaser," and that the lumber purchased by the insolvent was not a "product of the forest" both within the meaning of sec. 88(1) of the "Bank Act." The trial judge and both Appellate Courts below held in favour of the bank on both grounds and decided other points raised mainly in the same way.

Laidlaw K.C. and *Atwater K.C.* for the appellant. Sawn lumber is not a "product of the forest" within the meaning of that term in sec. 88(1) of the "Bank Act." *Molsons Bank* v. *Beaudry*(3).

The "Ontario Bills of Sale and Chattel Mortgage Act" makes a mortgage of personal property void as against creditors unless it is registered. The "Bank Act" cannot, and does not, purport to override this provision. See *Montreal Street Railway Co.* v. *City of Montreal*(4), at page 228.

(1) 27 Ont. L.R. 479.
(2) 26 Ont. L.R. 291.
(3) Q.R. 11 K.B. 212.
(4) 43 Can. S.C.R. 197.

1914

TOWNSEND v. NORTHERN CROWN BANK.

The insolvent Brethour was not a "wholesale purchaser" of the lumber under said sec. 88(1).

The bank's advances were for past due debts and not authorized by the "Bank Act." See *Bank of Hamilton* v. *Halslead*(1).

Arnoldi K.C. for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the court below.

DAVIES J.—I concur in dismissing this appeal, though I confess with much doubt on the question as to whether the advances made by the bank and for which the security under the "Bank Act" was taken were really *bonâ fide* contemporaneous advances as required by the "Bank Act."

Being in doubt on the point I confirm the judgment appealed from.

DUFF J.—Considering the facts of this case together with the course of the proceedings in the Ontario courts I think the only points requiring discussion are the points raised by the appellant relating to the construction of sec. 88 of the "Bank Act," R.S.C., 1906, ch. 29. These questions arise upon the first (unnumbered) paragraph of that section, which is in the following words:—

88. The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof.

(1) 28 Can. S.C.R. 235.

The loans in question were made upon the security of certain lumber, the property of one Brethour and the first question is whether Brethour was a "wholesale purchaser, or shipper of, or dealer in" these commodities. The evidence shews that Brethour purchased in carload quantities, storing the lumber purchased in his yard, making use of it very largely in his own business which was that of a builder, and selling in comparatively small quantities to the general public. Whether Brethour was strictly a wholesale "dealer" may be open to question. But "wholesale purchaser" is used in contradistinction to "wholesale shipper" and "wholesale dealer," and I think that the circumstances being such as I have mentioned, Brethour is within the intendment of the phrase "wholesale purchaser."

The second question is whether lumber is an article which falls within the phrase "products of * * * the forest" as the words are used in this enactment. I may say at the outset that I have been unable to read the section in the manner in which it is read by the Chief Justice of the Common Pleas. I think the words "products thereof" in the last line are connected both grammatically and by the general sense of the paragraph with the words "such live stock or dead stock" immediately preceding them. Is lumber then a "product of the forest" for the purposes of this section? According to the narrow construction which the appellant asks us to give effect to when pressed to its logical conclusion, timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture. That is almost a *reductio ad absurdum,* and Mr. Laidlaw, of course, did not assume any such untenable position, rather he tried to escape

1914

TOWNSEND v. NORTHERN CROWN BANK.

Duff J.

from it. He did not, as I understood him on the oral argument before us, dispute that what are commonly known as saw-logs would be "products of the forest," within the meaning of the "Bank Act." But why draw the line at the saw-logs? Logs are frequently reduced to lumber at the very place, or at all events, within a short distance of the very place where they are felled, by means of portable saw-mills. The appellant's answer, of course, to this mode of argument is that the line must be drawn somewhere and that if you admit dressed lumber as a "product of the forest" you cannot logically stop short of admitting the articles into which the lumber is further manufactured.

I concur with much that is said as to the difficulty of drawing an abstract line. This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest," and I think they are within the contemplation of the enactment we have to interpret.

I may add a sentence respectfully recording my inability to agree with the decision of the majority in *Molsons Bank* v. *Beaudry* (1).

The appeal should be dismissed with costs.

ANGLIN J.—On the two questions as to the construction of section 88 of the "Bank Act" (R.S.C.

(1) Q.R. 11 K.B. 212.

1906, ch. 29) involved in this appeal I respectfully agree in the conclusions reached in the Appellate Division of the Supreme Court of Ontario.

Sir William Meredith C.J., who tried this action, was of the opinion that

> part of the business which (the insolvent) Brethour carried on was that of a wholesale dealer in lumber.

While, because of the limitations resulting from the fact that the community in which he did business is comparatively small, Brethour's transactions were not as extensive as a wholesale dealer in a large centre of population would naturally be expected to have, the evidence discloses that his purchases were not of a retail character. They were by the carload, and his yard at times held from 200,000 to 300,000 feet of lumber. Most, if not all, of his sales were, no doubt, by retail and it may be that he could not properly be described as a "wholesale dealer in lumber." But the statute uses the word "purchaser" apparently in contradistinction to the word "dealer" and it was, no doubt, intended to cover the case of the man who purchases by wholesale, although he may either himself use the material which he purchases in his business as a contractor, or may dispose of it by retail sale. In my opinion, Brethour was properly held to be a wholesale purchaser of lumber.

While I am, with respect, unable to accept what I understand to have been the view of Meredith C.J., that the words "and the products thereof," which occur in the 5th line of sub-section 1 of section 88, and again in the last line,

> apply to all the articles previously mentioned in the sub-section and, therefore, apply to the products of the forest

and think that, upon their proper grammatical con-

1914

TOWNSEND v. NORTHERN CROWN BANK.

Anglin J.

struction and, read in the light of the context, they relate only to "live stock or dead stock," I am of the opinion that the other words in the sub-section, "products of the forest," are wide enough to include lumber, which is sometimes sawn in a portable saw-mill situate at or near the limits where the trees from which it is made grew and sometimes in a permanent mill situate at some other convenient point. I have fully considered the judgment of the Quebec court of appeal in *Molsons Bank* v. *Beaudry*(1), relied upon by counsel for the appellant. With great respect, I cannot agree with the conclusion there reached. The construction of section 88 which excludes planks or boards because they are not "products of the forest" is, in my opinion, too narrow.

Counsel for the appellant further urged that the evidence established that the debt for which the bank obtained the securities in question was then past due and that the loans for which such securities were taken were, therefore, not within section 88. He stated that this point was taken in the provincial courts. No allusion is made to it either in the judgment of the learned trial judge or in the opinions delivered in the Divisional Court and the Appellate Division, and counsel for the respondent insisted that it was urged for the first time at bar in this court. However that may be, assuming this ground of appeal to be open, it is, I think, sufficiently clear from the copy of the bank account in evidence that the indebtedness in respect of which the bank claims to hold the impeached securities is for advances made at or subsequently to the respective dates at which such securities were taken, and that the loans were made upon such securities.

(1) Q.R. 11 K.B. 212.

I agree with the views expressed by Mulock C.J., as to the re-pledging of the securities when renewal notes were given.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—The trial judge having found that the business which Brethour carried on was that of a wholesale purchaser in lumber and that finding having been confirmed by the Divisional Court and the Appellate Division we should accept it.

The question has been raised by the appellant that that lumber was not a product of the forest within the meaning of section 88 of the "Bank Act" and that no valid security could be given by Brethour to the respondent under that section.

It is contended also by the appellant that the power to pledge products of the forest should reasonably be limited to the original resources and should not be extended to the product of a product.

Section 88, in my view, never contemplated that security should be given on standing lumber, and if there was any doubt as to that we will find the answer in the "Bank Act" of last session which, in section 84, made a special provision authorizing banks to lend money upon the security of standing timber.

That power to the banks to lend money on the security of natural resources has reference specially to the nature or to the volume of the trade carried on by one who gives the security.

In view of the fact that Brethour was a wholesale lumber purchaser, I think the respondent was entitled to receive from him the security in question.

1914

TOWNSEND v. NORTHERN CROWN BANK.

Brodeur J.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Laidlaw.*

Solicitors for the respondents: *Arnoldi & Grierson.*

IRVIN H. HITCHCOCK AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

HIRAM SYKES AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

1913
*Nov. 28;
Dec. 1.

1914
*March 23.

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

Vendor and purchaser—Agreement for sale—Agent to procure purchaser—Agent joining in purchase—Non-disclosure to co-purchaser—Payment of commission—Rescission of contract.

H. was owner of mining land and offered S. a commission of ten per cent. for finding a purchaser thereof. H. afterwards wrote to S. stating that the mine was very rich and urging him to induce some of his friends to join in a syndicate or company to purchase and work it. S., without disclosing his agency, induced W. to take up the matter and they agreed to join in the purchase and divide the profits. A contract was entered into with H. and W. paid $20,000 on account of the purchase price on which S. was paid his commission. Default having been made in the further payments H. brought action claiming possession of the property and the right to retain the amount paid. W. counterclaimed for rescission of the contract and return of the money paid with interest and on the trial swore that he knew nothing of S.'s agency for several months after the contract was signed.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 6), Fitzpatrick C.J. dissenting, that it was the duty of H., on becoming aware that S. was a co-purchaser with W. to satisfy himself that the latter was aware of the agency of S.; and that W. was entitled to the relief asked by his counterclaim.

Held, per Davies and Anglin JJ. (Duff J. contra), that S. by concealing from W. the fact that he was to receive a commission from the vendor was guilty of a fraud for which H. was responsible as agent.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judg-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

(1) 29 Ont. L.R. 6.

1914

HITCHCOCK v. SYKES.

ment of a Divisional Court which affirmed the verdict at the trial in favour of the plaintiffs.

The material facts are stated in the above headnote.

Cline, for the appellants, referred to *Coy* v. *Pommerenke*(1); Lewin on Charges (11 ed.), 1159-60, *Murray* v. *Craig*(2).

Kilmer, for the respondents, cited *Beck* v. *Kantorowicz*(3); *McGuire* v. *Graham*(4); *Grant* v. *Gold Exploration and Development Syndicate*(5).

THE CHIEF JUSTICE (dissenting).—I would allow this appeal with costs.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

DUFF J.—I have come to the conclusion that this appeal ought to be dismissed with costs. The only point requiring discussion, in my judgment, is whether because of the dealings between the Hitchcocks and Sykes the respondent Webster became entitled on discovering those dealings to rescind the agreement for sale. The facts and the law have been very fully discussed in the various judgments delivered in the courts below. I do not think that among the cases cited there is one decision which exactly fits this case. But when the facts are fully seized, it appears to be well within the principle of the decisions upon the authority of which the Court of Appeal rested its judgment in *Grant* v. *Gold Exploration, etc., Syndi-*

(1) 44 Can. S.C.R. 543.
(2) 10 Ont. W.R. 888.
(3) 3 K. & J. 230.
(4) 16 Ont. L.R. 431.
(5) [1900] 1 Q.B. 233.

1914

HITCHCOCK v. SYKES.

Duff J.

cate(1). The essential feature of the case, in my view of it is one which has perhaps not been emphasized as much as its importance would justify. It lies, I think, in the letter of March 29th, 1910, written by W. R. Hitchcock to Sykes. That letter is as follows:—

Cornwall, Ont., March 29, 1910.

Hiram Sykes, Montreal.

Dear Sir,—Enclosed herewith please find map as surveyed and drawn up by Robert B. McKay, M.E., of Cobalt, Ontario. It will give you an idea of the surface work done on the Hitchcock Bros.' silver property, and I may add that since Mr. McKay visited the property in the early part of January last, a large amount of work has been done, principally in stripping veins and trenching on them to a depth from two to eight feet, until native silver, smalltite or nickelite would appear.

LOCATION: The E. ½ of N. ½ Lot 10, Concession 1, Township of Tudhope, consisting of 80 acres, being only about one-half mile from the wharf at the foot of Elk Lake, where all steamboats between Latchford and Elk City may call. The land from the mine to the wharf is level, so that a good wagon road will be inexpensive.

TITLE: The claims were staked by E. H. Hitchcock, and recorded in November, 1909, under his own license. Sufficient work has been done and recorded so that a Crown patent may now be obtained. No option has ever been given on the property, so that the title is clear with E. H. Hitchcock of Elk Lake.

While there is but a few acres of rock shewing above the level ground, I believe the bed rock is not far below the surface of the ground. There appears to be about a dozen well-defined fissure veins running parallel with each other through the exposed rock. We have stripped and blasted out rock on only seven of them and find good shewings of native silver in four of them, as well as smalltite, nickelite and a large quantity of Cobalt bloom in all veins opened. The rock formation is partly Gabro and partly fine diabase. In many places the wall rock between the veins is well mineralized with native leaf silver, Argentile and silver sulphides shew freely in many places.

In all my experience in the Cobalt country I have not seen so many large, rich-looking veins in so small a compass. Every vein worked on has the appearance of widening as depth is obtained. First-class timber in abundance is grown on the property.

Practical mining men from all the surrounding country have been to see the property and praise it most highly. I believe it will prove to be richer than anything in the Elk Lake or Gowganda Districts.

(1) [1900] 1 Q.B. 233.

1914

HITCHCOCK v. SYKES.

Duff J.

We want a syndicate or company to operate it and are agreeable to dispose of 9/10 interests. We must get a substantial payment down of say $20,000 or $25,000, the balance from time to time to suit. As soon as payment is made we will allow the company to start operations as they may see fit. However, a fair percentage of receipts of ore shipped must be placed in bank to secure our final payments.

We have spent a lot of money, and are still spending it and we know we have a genuine silver mine, where silver in large quantities can be bagged without even using a steam plant to mine it.

If you con prevail on any of your friends to join you in a syndicate or company so that mining can be done on a thorough basis early this spring, I feel that the result will be all that you can hope for. You can safely advise your most intimate friend or client to invest their money in this proposition.

Yours truly,

HITCHCOCK BROS.,

per W. R. Hitchcock.

Pursuant to the suggestions contained in this letter, Sykes approached Webster. The result of his negotiations with Webster was an agreement of partnership dated April 7th, 1910, in which they agreed to buy the property in question and to divide the profits equally between them. The other material facts, in my view of them, are that on April 12th the agreement for sale was entered into and the initial payment made, the agreement contemplating the working of the property by the purchasers; that the commission which it was understood Sykes was to receive for procuring a purchaser on the terms mentioned in the letter of March 29th, 1910, was paid to Sykes by the Hitchcocks without the knowledge of Webster, but without any attempt on the part of the Hitchcocks to conceal from Webster the facts touching the commission to be paid to Sykes and without any knowledge or suspicion that Webster was not aware of the facts; that the Hitchcocks were aware that Sykes was a man of no means, but had had some experience as a mining

operator and a promoter of mining companies; that the Hitchcocks were not aware of the agreement of April 10th, but they understood that the purchasers were buying and intended to work the property either temporarily or permanently as a joint venture.

On general principles I must say, with great respect, that it appears to me very clear, indeed, when one keeps in view the terms of the letter of March 29th (the existence of which is, in my view of it, the decisive fact of the case) that a duty rested on the Hitchcocks to inform Webster of the fact that they were paying Sykes a commission.

The relationship into which Webster and Sykes had entered with the knowledge of the Hitchcocks, was one of the class which imposes upon the parties to it reciprocal obligations of good faith and loyalty as regards the common interest in the common venture: *Carter* v. *Horne*(1). Among others these obligations include the duty of fully disclosing to his co-adventurers any interest one of the parties may have which is in fact adverse to the common interest or which may be of such a character as to give rise to an obvious risk of exposing him to a temptation to fall short of the loyalty he owes to that interest. It was visibly Sykes' duty to inform Webster of the arrangement he had made with the Hitchcocks respecting commission, and for the purpose of determining the rights of the parties in this case it must be taken that the Hitchcocks were aware of the existence of that duty. So far we are really on common ground. It is not disputed either that if after becoming aware that Sykes and Webster had formed a partnership for

(1) 1 Equity Abridgment 7.

1914

HITCHCOCK v. SYKES.

Duff J.

the purpose of dealing in mines generally or for the purpose of buying the property in question, the Hitchcocks had approached Sykes and offered to pay him personally a commission upon the purchase of the property by him and his partner, a duty would have rested on the Hitchcocks to disclose this arrangement to Webster. Such a transaction stands, of course, on the same footing as an arrangement by one party to some proposed business to pay the agent of the other party a commission on the completion of the business. The law casts upon the person who deals with the agent in this suspicious and questionable way the burden of seeing that the duty of disclosure is performed at the risk, if it be not performed, of becoming implicated in the agent's culpability.

The principle is not a technical one; and it appears to me to apply to the circumstances of this case for these reasons. As the letter of the 29th of March demonstrates, the Hitchcocks contemplated, when they agreed to pay Sykes a commission for procuring a purchaser that for the purpose of bringing about a sale and thereby earning this commission, he should enter into relations of confidence with other persons with whom he was to become associated as purchaser, of such a character as would impose upon him the duty of disclosing to them his existing relations with the Hitchcocks. It cannot, I think, be successfully contended that there is in principle any substantial relevant distinction between a case of that kind and those cases in which the confidential relationship exists before the arrangement for commission is made. The principle has its justification in the necessity of protecting these confidential relationships and from that point of view there is, in my judgment, no essential distinction between the two classes of cases.

1914

HITCHCOCK v. SYKES.

Duff J.

On this ground, therefore, (and I wish to make it plain that for my part I am deciding this case upon the letter of March 29th) I think a duty of disclosure rested upon the Hitchcocks.

As to the authorities — I have only a word to say upon one of them — *Grant* v. *Gold Exploration, etc., Syndicate* (1).

It is not to be disputed that Lord Justice A. L. Smith puts his judgment on grounds that are not applicable to this case. Neither is it to be disputed that if the findings of fact discoverable in the judgment of Lord Justice Collins are to be considered the basis of his judgment, then that judgment is not conclusive of the present case; moreover, there is this further distinction — it is an important distinction — between the circumstances in that case and this: Govan was not only intended to promote a company, that is to say, to bring a company into existence for the purpose of purchasing the property that Grant had to sell, but he was in fact the managing director of the company and, as such, himself decided upon and actually concluded the purchase out of which the litigation arose. Here it is admitted that Sykes did not act in a representative capacity in deciding upon or concluding the bargain with the Hitchcocks; on the contrary Webster applied his own judgment to the facts and decided for himself.

It may well be doubted, therefore, whether the decision in *Grant* v. *Gold Exploration, etc., Syndicate* (1) can fairly be held to rule the decision in this case. I am inclined to think it does not. On the other hand, while, as I have said, the opinion above indicated seems to be justified by the principle of the decisions

(1) [1900] 1 Q.B. 233.

1914

HITCHCOCK v. SYKES.

Duff J.

on which their Lordships proceeded in *Grant's Case* (1), there are observations in the judgment of Lord Justice Collins which are almost literally applicable to the facts of this case.

On this ground then I should dismiss the appeal, but I do not think I ought to take leave of the case without referring to another contention advanced by Mr. Kilmer. The contention was this: Sykes's conduct in representing himself as a person standing in the same interest with Webster, coupled with the concealment of his existing relations with the Hitchcocks was a fraud, in the carrying out of which he was acting as the agent of the Hitchcocks and in respect of which the Hitchcocks are chargeable as the principals of Sykes. The contention was not raised on the pleadings or in the courts below, or in the respondent's factum, and I am pretty certain, was advanced by Mr. Kilmer out of deference to observations made from the Bench during the argument of Mr. Cline. After considering it, I do not think there is anything in the point, and, if there were, I do not think it would be open at this stage of the proceedings. I refer to it because I think I am in a sense responsible for the discussion of it and with the object of making it clear that I am not proceeding upon any such ground in dismissing the appeal.

It is not, of course, argued that Sykes was the agent of the Hitchcocks for the selling of the property; he had no authority from them as their representative, that is to say, to bind them by any obligation as to the sale of the property. The arrangement between him and the Hitchcocks was that if he pro-

(1) [1900] 1 Q.B. 233.

cured a purchaser, at a price named, prepared to buy the property on terms acceptable to the Hitchcocks (indicated in a general way in the letter of 29th March,) he was to be paid a commission. Generally speaking, an owner of property who agrees to pay a commission to one or more persons for procuring a purchaser does not by such an agreement confer any authority upon such persons to enter into any obligation on his behalf. And, in this case, although it was contemplated that Sykes should enter into partnership arrangements with others, it would be vain to argue from any facts in evidence in this case — indeed, it is obviously not so — that it was contemplated between Hitchcock and Sykes that Sykes in entering into such arrangements was to have authority to act as the Hitchcock's agent and bind them by the obligations which he should profess to undertake with his co-purchasers. While it was contemplated that Sykes should undertake such obligations, it was never intended that he should assume them on behalf of and as the *alter ego* of the Hitchcocks; as there was no authority in fact, so also was there no ostensible authority because, of course, Sykes in all these arrangements professed to act only for himself.

Then as to the authority of Sykes to make representations on behalf of the vendors and as their agent, Sykes had been promised a commission for the introduction of a purchaser, but he was under no duty to try to procure a purchaser; he was not bound to take a single step to that end. It may be, although I should think it a disputable question, that a person having such an arrangement with the vendor would solely in virtue of that arrangement be possessed of implied

1914

HITCHCOCK v. SYKES.

Duff J.

authority to make representations as the agent of the vendor in relation to the description or value of the property. In any case such representations made professedly under the authority of the vendor might, of course, be ratified by him and (if brought to his attention while the contract was still *in fieri*) ratification would be manifested by the vendor's proceeding with the contract. But the misrepresentation complained of was not and in the nature of things could not be made professedly as the representation of the vendor and it was consequently incapable in law of ratification by him. If made without antecedent authority his responsibility for it must rest on some other principle than that of ratification. It seems equally clear that under such an arrangement as that in question whatever authority might be implied by law as to representations touching the description and value of the property, no authority could be implied or apart from special circumstances inferred by which the commission-earner would be entitled to represent himself as disinterested. Whether the circumstances of this case would justify the conclusion that Sykes had a general authority which would extend to that class of acts, must be, I think, a question of fact. If I had to pass upon that question, in this case, I should say there was no such authority. But the question does not arise because if the respondent intended to rest his case upon that ground, he should have done so at a stage of the litigation at which the appellants would have had an opportunity of meeting his allegations under this head. But the difficulties of the contention do not end here. Assuming authority established the respondent must shew that the fraud was *dans locum contractui* that he was influenced by it in whole or in

part to enter into the contract. That again is an allegation which the appellants have had no opportunity to meet. The respondent, it is true, has said, that he would not have purchased, had he known Sykes' relations with Hitchcock. But the evidence was not directed to the issue now sought to be raised and the appellants have never been called upon to answer it, and we can feel no assurance that we have before us all the evidence bearing upon the issue.

It would, therefore, be contrary to the settled practice of this court to permit the respondent to raise the point at this stage.

Therefore, there is nothing in this case to which *respondeat superior* as expounded in the judgment of Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.*(1) and the cases therein referred to, can be applied.

ANGLIN J.—The plaintiffs, vendors of mining property on which $20,000 had been paid on account of the purchase price, $167,000, for default in payment of further instalments of the purchase money claim in this action possession of the lands freed from liens, etc., and assert the right to retain the $20,000 paid as forfeited under a provision of the agreement. The defendants, Sykes and Webster, are the purchasers. Sykes was the vendors' agent for the sale of the property on a 10% commission basis, and he induced Webster to become his co-purchaser without disclosing to him his agency and commission agreement with the vendors. He received $2,000 as commission on the $20,000, which was in fact paid by Webster, who remained unaware of the agency and of the payment of

(1) [1912] A.C. 716.

1914

HITCHCOCK v. SYKES.

Anglin J.

this commission until after this action was brought. Webster counterclaims for rescission of the agreement and the repayment of the $20,000 on the ground that the sale was fraudulent as against him, and for damages.

After reviewing the evidence, Hodgins J.A. summarized it as follows:—

> The fair result of the whole evidence — of which I have extracted only a few of the more important parts — I think is as follows: That the respondents arranged to pay a ten per cent. commission to Sykes to find a purchaser for, or induce his friends to join in purchasing, the mining property; that the respondents agreed that if Sykes purchased himself or induced another to purchase alone or jointly with him, the commission would be paid to Sykes, and in that sense the commission was consciously added to the purchase price; that the respondents knew, before the agreement was signed, that a relationship of partner or joint purchaser existed between Webster and Sykes, and that they were exacting a price from Webster and Sykes that they would not have exacted from Sykes alone; that they did not disclose the fact that they were paying Sykes a commission; and that the appellant did not know of it until September, and until after action brought; and that if he had known it he would have declined to purchase.

The plaintiffs obtained judgment by default against Sykes, who had absconded.

The trial judge upheld the plaintiff's claim and dismissed the counterclaim on the ground that there was no fraud or intentional concealment on the part of the plaintiffs. This judgment was upheld in the Divisional Court, because no "duty was cast on the respondents to disclose * * * to the appellant" that his co-purchaser Sykes was receiving a commission from them on the sale. To hold otherwise, said the learned Chief Justice, would be

> to set up an artificial standard of morals.

From this judgment Middleton J. dissented, holding that "the plaintiffs had been guilty of fraud both in

morals and in law." In the Appellate Division these judgments were reversed, the court holding that Sykes was in fact the agent of his co-purchaser, Webster; that this relationship was known to the plaintiffs; and that such knowledge imposed on them the duty of assuring themselves that Webster was aware of the arrangement under which Sykes was to receive a commission on the sale. Meredith J.A. dissented on grounds similar to those which prevailed in the Divisional Court. He concludes his opinion with this sentence:—

> While willing to be as vicious against vice in any form, as any one can be, I decline to chop off the heads of innocent and useful setting hens on the chance of their really being poisonous serpents.

There is no doubt upon the evidence that Webster was induced to become a purchaser by the persuasion and commendations of Sykes, in whom he placed implicit confidence because he believed their interests to be identical. He has sworn that he would not have purchased had he known that Sykes was in fact the vendors' paid agent.

Sykes was admittedly the plaintiffs' agent for sale. Indeed, it was they who suggested to him that he should prevail on some of his friends to join him in purchasing the property. In the course of his employment by the plaintiffs and to further its purpose he represented to Webster by his conduct, if not in actual words, that his sole interest was that of a co-purchaser with him. He deliberately and fraudulently concealed the fact that he had another and an adverse interest — that he was to receive a commission from the vendors of which the amount would increase in proportion to the purchase price. When the civil responsibility of the principal for fraud and misrepre-

1914

HITCHCOCK v. SYKES.

Anglin J.

sentation of his agent in the course of his employment is taken into account, the present case is, in my opinion, indistinguishable in principle from one where vendors, knowing that it is necessary for a prospective purchaser to rely on the skill and advice of an expert in regard to the property which he contemplates buying and that he intends to do so, recommend to him and induce him to employ for that purpose as an independent man, in whose opinion and advice he can place implicit confidence, a person in their own pay whose remuneration is dependent upon a sale being effected and its quantum on the price obtained, and deliberately refrain from disclosing to him that person's relationship with themselves. Sykes's misrepresentation to Webster as to his true position in regard to the transaction with the plaintiffs and his fraudulent concealment of his commission interest occurred in the course of his principals' business and were, at least in part, for his principal's benefit. That a purchaser who bought under such circumstances in reliance on the advice of the person thus recommended by the vendors and in ignorance of his relations with them, would be entitled, on discovering the facts, to repudiate the transaction is unquestionable. It is not material that Sykes's fraud, since it was committed while he was purporting to act within the scope of his employment, and in the course of the service for which he was engaged, may have been committed in his own interest rather than in that of the plaintiffs. *Lloyd* v. *Grace Smith & Co.*(1). For the fraudulent misrepresentations of their agent the plaintiffs were responsible and on that ground

(1) [1912] A.C. 716.

alone the impeached contract cannot stand. *Milburn* v. *Wilson*(1); 1 Halsbury's L. of E., 211.

I also agree with the view taken in the Appellate Division that, on becoming aware of the relationship between Webster and Sykes, as they admittedly did before the contract for the sale was made, knowing that they were paying a commission to Sykes, that he then stood in a fiduciary relation to his co-purchaser, and that his interest was in conflict with his duty in regard to the disclosure to Webster of his claim to a commission, it was the duty of the vendors to have satisfied themselves that Webster was aware of Sykes's relations with them. It does not matter that when the agreement to pay commission was entered into Sykes and Webster had not yet come together. Before the contract of sale was made the plaintiffs knew that Webster was relying on Sykes in the purchase which he was making. They knew he had sent Sykes to examine and report on the property. They knew, or should have known, that it was, or might be, Sykes's interest to conceal his agency for them from Webster and they should have anticipated that he might have done so; and it was at their peril that they consummated the transaction and paid Sykes his commission without having ascertained that Webster was apprised of the true situation. The principle underlying the decision in *Grant* v. *Gold Exploration and Development Syndicate*(2) covers this case. When the agreement to pay a commission was made in that case the vendor did not know that the agent, Govan, to whom it was promised, stood in a fiduciary relation to the purchasers. But, as Collins L.J. says at p. 247:—

(1) 31 Can. S.C.R. 481. (2) [1900] 1 Q.B. 233.

1914

HITCHCOCK v. SYKES.

Anglin J.

It is, however, quite sufficient to raise the legal question in this case that he (the vendor) became aware before he agreed to sell to the defendants that Govan had been acting for them in bringing about the sale. The facts are, then, that the vendor and the buyers' agent, known to the vendor to be such, agree upon a price to be paid by the purchaser one-tenth of which is to go into the pocket of the buyers' agent.

See also the judgment of Vaughan Williams L.J., at pp. 253-4.

Indeed, while I do not rest my judgment on such a finding, from the facts established it would seem to be a legitimate inference that, when closing the transaction with Webster in the solicitor's office at Cornwall, the Hitchcocks were aware that he was ignorant of the commission to be paid to Sykes and were parties to the concealment of it from him. They knew that the arrangement between Webster and Sykes was that they should become purchasers with equal interests; they knew that Webster was buying in reliance on Sykes's report on the property and for a price which Sykes had fixed with E. H. Hitchcock when he made the inspection; they knew that the $20,000 was being paid by Webster's cheques. Instead of one cheque for $20,000 Webster had brought to Cornwall three marked cheques — one for $15,000, one for $3,000 and one for $2,000 — with a very faint hope, which proved illusory, that at the last moment, he might possibly secure some reduction in the price of the property. When the agreement of purchase was signed in the solicitor's office the Hitchcocks took the three cheques. Nothing was said about the fact that $2,000, the exact amount of one of them, was to go to Sykes for commission. When the party left the solicitor's office to go to the bank Webster dropped off on the way for some unexplained reason. At the bank, instead of

handing over Webster's $2,000 cheque to Sykes, two new cheques, each for $1,000, were drawn and given to Sykes, one being signed by E. H. Hitchcock and the other by W. R. Hitchcock. No receipts were taken from Sykes and the cheques did not state for what they were given. The explanation of this offered by W. R. Hitchcock is that Sykes was in a great hurry to catch a train. Why, if that were the case, Webster's $2,000 cheque was not endorsed and handed over to Sykes either in the solicitor's office or in the bank is not explained. If it was not designed to keep Webster in ignorance as to the commission paid to Sykes, it is difficult to understand why this course was not adopted. There was in fact no such hurry as Hitchcock suggests. Of course, if the $2,000 had been paid to Sykes in the solicitor's office Webster would have known it; if Webster's cheque had been endorsed over to Sykes and put through his bank account Webster might have learned inconveniently soon of the payment of the commission. It seems to me incredible that the Hitchcocks could have believed that Sykes had told Webster of the commission arrangement. There is no suggestion of any reason why, if Webster was aware of it, he should have allowed Sykes to have the whole benefit of the commission, which would result in his paying for the property 10% more than the vendors' actual price — for his one-half share 20% more than Sykes was to pay for his. It is utterly unreasonable to suppose that the Hitchcocks really thought that Webster was consciously entering into a transaction of that kind. That they knew that Sykes was obtaining the commission for his own benefit admits of no doubt. If they thought Webster was ignorant of the commission arrangement (as I think

1914

HITCHCOCK v. SYKES.

Anglin J.

they did) their duty to have informed him of it is indubitable.

But that duty, in my opinion, arose when they obtained knowledge that their paid agent occupied a fiduciary relation in the transaction to his co-purchaser, and failure to discharge it cannot be excused by proving that they believed that Sykes had disclosed the circumstances to Webster. *Grant* v. *Gold Exploration and Development Syndicate*(1), at page 248, *per* Collins L.J.

That Webster is entitled to the relief of rescission is clear on the authority of cases such as *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.*(2). And it is not an answer that the property was good value for the price paid. *Parker* v. *McKenna*(3). The court will not enter on that field of inquiry.

On both these grounds, therefore — because Sykes, as the vendor's agent, was guilty of fraudulent misrepresentation for which they are responsible, and because they paid a commission to Sykes when they knew him to be Webster's trusted adviser and co-purchaser, without ascertaining that Webster knew that this commission was to be paid — I am of the opinion that the defendant Webster is entitled to succeed on his counterclaim.

The mechanics' liens which were registered against the property have been removed. They present no obstacle to the defendant Webster having this relief. The plaintiffs are in possession of the property. I agree with Hodgins J.A., that there is not enough in the correspondence to warrant a finding of waiver by

(1) [1900] 1 Q.B. 233. (2) 10 Ch. App. 515.
(3) 10 Ch. App. 96.

Webster of his right to rescind after he became aware of the facts which gave him that right nor has there been any dealing by him with the property which would amount to ratification of the contract.

In the judgment of the Appellate Division the plaintiffs' rights in regard to protection of the shaft sunk on the property by the defendants, or their assignee, and in regard to the ore taken from it are carefully provided for.

I would dismiss the appeal with costs.

BRODEUR J.—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed.

I was unable to see that the appellants were guilty of fraud in the ordinary sense of the word or that they intended to bribe Sykes when he stipulated a commission in their letter of the 29th of March, 1910.

If I may refer to some judgments rendered in mining cases in this country, I see that it is the habit of some who deal in mining operations to become members of syndicates, to play the part of the broker and to receive from the vendor a commission upon the sale to another member of the syndicate.

> Every business (says Judge Riddell in a case of *Murray* v. *Craig* (1)), has its own methods and its own code of ethics, and while the method of proceeding spoken of looks odd at first sight there is nothing improper in it, if thoroughly understood by all concerned.

But in this case, however, no such method has been proved as being prevalent in the circles of which the parties formed part and we have to apply the law as it applies to all persons.

(1) 10 Ont. W.R. 888.

1914

HITCHCOCK v. SYKES.

Brodeur J.

The principle of law and equity is that an agent or a partner shall make no profit to himself out of his employment other than the amount payable to him by his employer or by the partnership.

That principle is an exceedingly just one calculated to secure the observance of good faith between principal and agent or between partners and to prevent the agent sacrificing the interest of the employer and obtaining gain and advantage for himself.

It was found in this case that Sykes though a partner of Webster and though instructed by the latter to report upon the value of the mining proposition that was offered to them by the appellants was, however, in their pay and was, therefore, interested in having the purchase carried out.

It seems to me that this case is in all respects similar to the case of *Grant* v. *Gold Exploration Development Syndicate*(1), in which it was stated by Mr. Justice Collins that

> if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction impeached by the buyer, who has in fact had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal.

Appeal dismissed with costs.

Solicitors for the appellants: *Maclennan & Cline.*

Solicitors for the respondents: *Kilmer, McAndrew, Irving & Davis.*

(1) [1900] 1 Q.B. 233.

1914

THE WESTERN CANADA POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

*Feb. 9, 10.
*Feb. 23.

AND

PETER VELASKY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Dangerous works—Electric transmission line—Independent contractor — Master and servant — Strengthening poles — Stringing wires—Injury to linesman—Risk of Employment—Responsibility of owner.

The company having become aware that the poles for an electric transmission line erected by them had become insecure employed an independent contractor to strengthen the poles and to string wires upon them. The plaintiff, a linesman employed by the contractor, ascended a pole before it had been secured, without first having ascertained that it was safe for him to do so, in order to string wires upon it. The pole fell while he was at work upon it and he was injured.

Held, reversing the judgment appealed from (18 B.C. Rep. 407) that the accident was the result of the default of the contractor in relation to the work he had undertaken in regard to the strengthening of the poles and, consequently, the owners of the transmission line were not liable for the damages sustained by the plaintiff. *Marney* v. *Scott* ((1899) 1 Q.B. 986); *Indermaur* v. *Dames* (L.R. 2 C.P. 311), and *Lucy* v. *Bawden* ((1914) 2 K.B. 318), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming, by an equal division of opinion, the judgment of Murphy J., at the trial, by which, upon the findings of the jury, judgment had been entered in favour of the plaintiff for $3,200, with costs.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 18 B.C. Rep. 407.

1914

WESTERN CANADA POWER CO. v. VELASKY.

The circumstances of the case are sufficiently stated in the head-note.

Sir C. H. Tupper K.C. for the appellants.
M. A. Macdonald, for the respondent.

THE CHIEF JUSTICE.—In this case the relation of master and servant did not exist between the plaintiff and the defendants.

Lockwood, in whose service the plaintiff was at the time of the accident, was an independent contractor, and to his collateral negligence the injury to the plaintiff is attributable. It is quite true that the contract with the company was to string wires on the poles, and, if limited to that, a great deal might be said in favour of the view urged upon us so strenuously at the argument that the company would be liable as owner in occupation of the pole-line for having invited the workman to enter upon unsafe premises. But here, by his contract, Lockwood, the plaintiff's employer, assumed a duty to examine the poles and to make them safe before attempting to string wires upon them and to his breach of that duty the accident is attributable.

In such circumstances there is no recourse against the company appellant, and the appeal should be allowed with costs.

DAVIES J.—I concur in the allowance of this appeal with costs for the reasons stated by Mr. Justice Anglin.

IDINGTON J.—The respondent was not in any sense the servant of the appellant and hence all that has been said relative to care of him as a workman is beside the question.

There was, in fact, no contractual relation of any kind between appellant and respondent.

Appellant never invited the respondent to the place he calls a dangerous place.

Not until the respondent's master had so fixed the pole that wires could be properly strung upon it was there any permission, much less an invitation, to respondent to touch the pole.

And the respondent as an expert linesman, must have known that when he attempted to string wires on such a pole he was doing that which was sure to prove useless or worse, and that he ought, instead of trying to do so, to have pointed that out to his master.

I need not dwell on the case at length. I fail to see the slightest resemblance in all this to the invitation to stevedores, which was in question in *Marney* v. *Scott*(1), so much relied upon.

The appeal should be allowed with costs.

DUFF J.—The facts of this case can be stated in a sentence or two. The appellants are an electric power company and, in 1911, they erected a line of poles to support their transmission wires, but, before the wires were strung, the appellants became aware that some of the poles were not securely set and they, thereupon, entered into a contract with one Lockwood by which Lockwood agreed both to secure the poles and put the wires in place. The respondent was a linesman in Lockwood's employ and, while engaged in the work of wiring, was thrown to the ground and injured owing to the instability of the pole on which he was working at the time.

The question on this appeal is whether the appellants are answerable for the condition of the pole.

(1) [1899] 1 Q.B. 986.

1914

WESTERN CANADA POWER CO. v. VELASKY.

Duff J.

The respondent says they are answerable on the principle in *Indermaur* v. *Dames*(1). I think this contention cannot be sustained and that the appeal ought to be allowed.

The principle invoked may be stated, I think, in the language of Mr. Justice Atkin, in delivering judgment in *Lucy* v. *Bawden*(2). At page 322, he says:—

> This obligation was expressed in *Indermaur* v. *Dames*(3), *per* Willes J.: "And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Those words are adopted in the judgment of the Exchequer Chamber(4). In *Smith* v. *London and St. Katharine Dock Co.*(5), where the defendants were sued for providing a gangway from dock to ships insufficiently secured whereby the plaintiff, who had business on the ship, was damaged, Bovill C.J. said: "The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap." Then Byles J. said: "there was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it."

And then again, at page 325, he refers to the obligation resting upon the occupier under such circumstances as "an obligation to avoid traps."

It seems to me that this principle can have no application whatever in the circumstances of this case. Where a contractor is engaged, as here, to make safe something that is known to be unsafe, it would be absurd to suggest that, on this principle, the employees of the contractor could hold the occupier responsible for the very condition of affairs which they are employed in rectifying. The principle invoked can have no application where the existence of the danger complained of is one of the ordinary risks

(1) L.R. 2 C.P. 311.
(2) [1914] 2 K.B. 318.
(3) L.R. 1 C.P. 274, at p. 288.
(4) L.R. 2 C.P. 311, at p. 313.
(5) L.R. 3 C.P. 326.

of the particular business which the invitee comes on the premises to do.

Nor can the invitee (whose only invitation is that implied in the fact that he is engaged in the service of a contractor employed by the person who is sought to be charged as occupier) be said to be exposed to a trap for which the occupier is responsible within this principle where the danger arises from the negligent default of his own employer in relation to that which he has contracted to do. The implied invitation must be taken to be given and accepted upon the footing that the invitee knows as well as the occupier the risk of negligence by his own employer or his own fellow-servants, and, as between himself and the occupier, he must be taken to have assumed that risk.

On this short ground I think the appeal should be allowed and the action dismissed.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The plaintiff while engaged as a linesman, employed by a contractor, one Lockwood, in stringing wires, was injured by falling with a pole of the defendant company, which was insecurely planted.

The ground on which he seeks to hold the defendants liable to him is that he went upon their property to string wires by their invitation and that they owed him the duty of having their poles in such a condition that he could safely ascend them for that purpose.

The uncontradicted evidence establishes — and it was admitted at bar — that it was part of Lockwood's undertaking that the defendants, before stringing the wires, should strengthen certain poles, from which the supporting earth had been washed away, one of them

1914

WESTERN CANADA POWER CO. v. VELASKY

Anglin J.

being that with which the plaintiff fell. Lockwood or his employees failed to do this, and the plaintiff's misfortune was due to that failure. The case was not one of an unqualified invitation to the workmen of Lockwood to come upon the defendant's premises involving a representation or holding out on their part that those premises were safe for the purpose for which the invitation was given. The only invitation to the plaintiff, as a workman of Lockwood, was to ascend the pole in question after it had been properly strengthened or secured. Taking this view of the case, two of the learned judges of the Court of Appeal would have set aside the verdict for the plaintiff rendered at the trial. I concur in that conclusion. In the circumstances the defendants owed no duty to the plaintiff in respect of the security of the pole from which he fell.

BRODEUR J.—Velasky, the respondent, was injured by falling from a pole of the appellant company. He was then in the employ of an independent contractor who had undertaken to strengthen that pole. He was entirely under the control of that contractor.

The pole to be made use of by Velasky was unsafe to the knowledge of his master, the contractor, since he had undertaken to repair it. That contractor was then bound to give notice of that fact to his employee. He neglected to do so.

No negligence has been established against the appellants.

When a person employs an independent contractor to do a specified work he does not thereby render himself liable for injuries caused by the sole negligence of such contractor.

1914

WESTERN CANADA POWER CO. v. VELASKY.

Brodeur J.

The action should have been dismissed.

This appeal should be allowed with costs of this court and of the courts below.

Appeal allowed with costs.

Solicitors for the appellants: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Russell, Mowat, Hancox & Farris.*

1914

*Feb. 10.
*Feb. 23.

THE VANCOUVER POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES HOUNSOME (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Tramway company—Construction of works—Independent contractor—Dangerous system—Injury to property—Negligence—Exercise of statutory authority — Correlative duty — Damages — Special release.

A company with statutory authority to construct a tramway acquired a strip of plaintiff's land for its right-of-way, the vendor granting a release for all damages which he might sustain by reason of the construction and operation of the tramway and the severance of his farm. The company let the work to a contractor who, in the construction of the road-bed blasted away a hillside by a method known as "top-lofting" thereby throwing large quantities of rock outside the right-of-way and upon plaintiff's adjoining lands in such a manner as to interfere with his use thereof. This injury could have been avoided by proper precautions.

Held, affirming the judgment appealed from (18 B.C. Rep. 81), Fitzpatrick C.J. *hesitante*, that the company was responsible in damages for the omission of their contractor to take precautions necessary to prevent his blasting operations producing the injury to the plaintiff's lands.

Held, further, that the general language of the release should be so construed as to restrict it to the matters in regard to which it had been granted with reference to the proper exercise of the powers of the company to construct the tramway in question, and that it could not apply to injuries caused through negligence.

Per Duff J. — Where statutory powers respecting the construction of works are being exercised through an independent contractor, the correlative obligation of the beneficiaries of those powers to see that due care is taken to avoid unnecessary injurious consequences to the property of other persons is not discharged when their contractor fails to perform that duty, and they are responsible accordingly. *Hardaker* v. *Idle District Council* ((1896) 1 Q.B. 335), and *Robinson* v. *Beaconsfield Rural Council* ((1911) 2 Ch. 188), referred to.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1914

VANCOUVER POWER CO. v. HOUNSOME.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing in part the judgment of Morrison J., at the trial, and maintaining the plaintiff's claim in so far as it concerned the damages for injury to his lands.

In the circumstances mentioned in the head-note, the learned trial judge dismissed the plaintiff's action in respect of the damages claimed for injury to his lands occasioned by the blasting away of the hillside for the purpose of constructing the company's roadbed on the ground that the injuries were not caused by the company, but were the consequences of the methods followed by an independent contractor. By the judgment now appealed from, the Court of Appeal for British Columbia reversed this decision and maintained the plaintiff's claim for the damages in question.

Ewart K.C. for the appellants.
M. A. Macdonald for the respondent.

THE CHIEF JUSTICE.—I do not wish to enter a formal dissent, because I am not satisfied that, on the pleadings, the point with which I am concerned was properly raised. But I must say that the conclusion I reached at the argument and in which a careful examination of the evidence confirms me is that this is a case of collateral negligence by a contractor and that, if the work of blasting had been carefully proceeded with, no injurious consequences would have resulted to the adjoining proprietor.

It is common knowledge that, in this country, railways and other large undertakings are built by con-

(1) 18 B.C. Rep. 81.

1914

VANCOUVER POWER CO. v. HOUNSOME.

The Chief Justice.

tractors, and that the work of excavation and blasting in connection therewith is carried on over large areas and in thickly populated centres with little inconvenience; such work cannot now be considered *per se* dangerous or of such a character that injury to the property of adjoining owners must be expected to arise in the natural course of its execution. I cannot find in the special circumstances of this case anything to justify the conclusion that the work was one from which mischievous consequences must arise unless preventive measures were adopted, and there was, therefore, no duty on the company to take special precautions. If, as is practically admitted here, there were two ways of carrying on this piece of work, one perfectly safe and the other dangerous, and, if the contractor chose to adopt the latter, the company is not responsible for the consequences.

For the general rule as to the liability of a contractor, see Halsbury, Laws of England, vol: 3, page 315, No. 669, para. 2.

DAVIES J.—I concur in dismissing this appeal.

IDINGTON J.—I think this appeal should be dismissed with costs.

The principle of law illustrated by the cases cited in the judgment of Mr. Justice Irving in the Court of Appeal and applied herein by the learned judge and that court must prevail. Whether stated too broadly or not in any particular case does not dispose of the existence of the principle relied upon or the possibility of its application to any given case. And it seems applicable to the facts in this case. The appellant offered no excuse and probably had none to offer for its conduct in ignoring the principle involved.

1914

VANCOUVER POWER CO. v. HOUNSOME.

Idington J.

The economies involved in the operation of the contractors do not appear to me to have been as alleged only for their own benefit.

The fair inference, in the absence of any evidence to modify such inference, is that it was absolutely necessary for these contractors to adopt the cheap and reckless methods used to save themselves from loss when working within what was possible in that regard, on the basis of prices promised by appellant. Else why should they incur the responsibility for what they as well as appellant might have been called upon to answer for ?

Primâ facie, at least, it is to be so presumed or we should have heard pretty loudly from appellant to the contrary, unless the nature of contractors or human nature, has recently changed.

The condition of things and of work to be done or dealt with by appellant being dangerous the appellant was bound to take some precaution, but apparently took none.

DUFF J.—The appellant company is a company incorporated under the provisions of the British Columbia "Water-Clauses Act," ch. 190, R.S.B.C., 1897, having power *inter alia* to construct certain tramways. The course of one of these tramways being through the respondent's lands, the strip required by the appellant for its right-of-way was purchased from the respondent in June, 1910. At the locality in question the line follows the side of a hill and the construction of the road-bed necessitated the blasting out of the rock of which the hill is formed through the whole width of the right-of-way. The result of this operation as conducted (by the contractor to whom the work

1914

VANCOUVER POWER CO. v. HOUNSOME.

Duff J.

had been let) was that large quantities of rock were thrown upon the plaintiff's property in such a way as to constitute a substantial interference with his enjoyment of it. For this the court below has held the appellant company to be responsible and assessed the damages at $500.

There are two questions: 1st. Was the appellant company responsible for the wrongful act of its contractor? And 2ndly. Is a certain release contained in the deed of conveyance of June, 1910, from the respondent to the appellant company an answer to the respondent's claim?

The points of fact material to the consideration of the first question are: that in letting the contract for the construction of the road-bed the appellant company must have contemplated the use of high explosives for breaking up the rock and (owing to the fact that the blasting was to be done on a hillside immediately adjacent to the respondent's land) they must have known that in the ordinary course of things, unless proper precautions should be taken to prevent it, large quantities of rock would be thrown, as in fact happened, upon the respondent's land. It is not disputed, on the other hand, that by the exercise of proper care the contractors could have avoided the injurious consequences from which the respondent suffered. In these circumstances I can entertain no doubt that the court below rightly held the appellant company answerable for those consequences.

Under the provisions of the "Water-Clauses Consolidation Act" the appellant company had authority to construct and work this tramway. It was entitled, therefore, to make use of all necessary and reasonable measures to accomplish that object. But in

doing so it was under a duty to exercise all proper care in order to avoid doing harm to others in exercising the powers conferred upon it. The company was entitled, of course, to make use of explosives in effecting the necessary excavations for the construction of its right-of-way, and in doing so, as it was acting under statutory authority, it would escape the somewhat stringent rule (in *Rylands* v. *Fletcher*(1)) which, in the absence of such authority, would have determined its responsibility for any injurious consequences arising from the use of such agencies. But while the legislative authority under which it proceeded protects it from the more rigorous rule, there arises out of the grant of that authority a correlative duty which is to employ all proper means and to take all proper care to see that, in the exercise of its powers, it does no unnecessary harm to the property of third persons. In the present case the company was exercising its powers not through its own servants but through the contractors whom it employed to construct its road-bed. That it may properly do; but it does not thereby escape responsibility for the performance of its own duty, the burden of which it necessarily undertakes when it puts in exercise the authority the legislature has conferred upon it. The beneficiary of statutory authority, such as a railway company, cannot appropriate the benefit of the powers with which the legislature has invested it without at the same time assuming full responsibility for the performance of the obligations by which its right to exercise those powers is conditioned. This is very clear law, and there ought to be no necessity for citing authority in support of it. The observations of Lindley L.J., how-

(1) L.R. 3 H.L. 330

1914

VANCOUVER POWER CO. v. HOUNSOME.

Duff J.

ever, in *Hardaker* v. *Idle District Council*(1), at pages 340 and 342, are so apt that I cannot forbear quoting them verbatim:—

> The powers conferred by the "Public Health Act, 1875," on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves, *i.e.*, by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject.
>
> * * * * * * * *
>
> I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under; this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all.

See also *Robinson* v. *Beaconsfield Rural District Council*(2).

That the contractors were exercising the statutory powers of the power company cannot be disputable. Conceive an action brought against them to recover damages for injury caused by the use of dynamite upon this particular section of the line. They could not be successfully charged with responsibility under

(1) [1896] 1 Q.B. 335. (2) [1911] 2 Ch. 188.

the rule in *Rylands* v. *Fletcher*(1); the answer would be that they were exercising statutory powers and were, consequently, only chargeable for negligence under the rule in *Dumphy* v. *Montreal Light, Heat and Power Co.*(2). The power company and the contractors must be presumed to have settled the terms of their bargain on the footing that the contractors, in the executing of their contract, would be entitled to all the protection afforded them by the legislative authority under which the work was being carried out.

Sufficient has been said to dispose of the first point.

The second question ought also, I think, be answered in the sense contended for by the respondent. The words in which the release upon which the appellant company relies are not apt to cover, that is to say, they do not necessarily cover, claims based upon a charge of negligence against the company. They do, doubtless, cover all claims for compensation in respect of the loss suffered by reason of the proper exercise of the appellant company's statutory powers in respect of the construction or working of its tramway. But there is abundance of authority for holding that such general words do not afford an answer to a claim based upon such a breach of duty as that in respect of which the courts below held the appellant company to be liable.

I think the appeal should be dismissed with costs.

ANGLIN J.—The Court of Appeal of British Columbia, reversing Morrison J., awarded to the plaintiff $500 as damages for injury done to his land by contractors, who threw large quantities of rock upon it

(1) L.R. 3 H.L. 330. (2) [1907] A.C. 454.

1914

VANCOUVER POWER CO. v. HOUNSOME.

Anglin J.

while blasting, in the course of constructing the defendant's railway. The defendants seek to have this judgment set aside on two grounds, viz., that these damages are covered by a release given them by the plaintiff, and that what is complained of was a deliberate, wilful and wanton act of independent contractors for which the defendants are not responsible.

The defendants acquired a strip of land through the plaintiff's farm for their right-of-way. The release, which is found in the conveyance of this strip, was given for damages to which the plaintiff might be or become entitled by reason of the taking of this land, the severance of his farm and the construction and operation of the defendant's railway in the ordinary manner and with due care. The general language in which it is couched must be given a construction which will restrict its application to the subject-matter that the parties had in mind when it was executed. Negligence, whether in operation or construction, was something they did not contemplate and against the consequences of which they did not intend to provide. The release does not seem to have been relied upon in the provincial courts as affecting this cause of action. This ground of appeal, in my opinion, fails.

On the other branch the defendant is without a finding that what is complained of was a deliberate, wilful and wanton act of the contractors. And that is not surprising, because, so far as the record discloses, this contention was not made at the trial. It is very questionable whether the evidence sufficiently supports it. Had this defence been pleaded and an issue upon it clearly raised, it is impossible to say what evidence might have been adduced by the plaintiff to

1914

VANCOUVER POWER CO. v. HOUNSOME.

Anglin J.

meet it. He might have shewn by the contractors that what they did was in the ordinary course of blasting operations such as they had undertaken and was not, as now charged, a wanton trespass; or he might have established that the contract under which the work was done contemplated its being done in the manner in which it was. No reference is made to this point in the judgments delivered in the Court of Appeal, which proceeded on the ground that the defendants are responsible for the failure of their contractors to take proper precautions to avoid the doing of injury, which, unless such precautions were taken, was likely to be caused in the execution of the inherently dangerous work that they undertook. If the defendants proposed to contend that this case does not fall within the well-known rule which holds proprietors responsible under such circumstances, because the injury was ascribable not to mere negligent omission, but to a wilful and wanton act of commission by the contractors, they should have alleged that fact specifically in their plea and should have clearly taken that position at the trial. They appear to have done neither. It is too late now to set up such an answer to the plaintiff's claim.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*
Solicitors for the respondent: *Ogilvie & Brown.*

1914

*Feb. 12.
*Feb. 23.

QUONG-WING ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Constitutional law—Criminal law—Legislation respecting Orientals—Chinese places of business—Employment of white females—Statute— 2 *Geo. V. c.* 17 *(Sask.)—"B.N.A. Act,* 1867," *ss.* 91, 92*—Local and private matters — Property and civil rights — Naturalized British subject—Conviction under provincial statute.*

The provisions of the statute of the Province of Saskatchewan, 2 Geo. V. ch. 17, containing a prohibition against the employment of white female labour in places of business and amusement kept or managed by Chinamen, sanctioned by fine and imprisonment, is *intra vires* of the Provincial Legislature. *Union Colliery Co.* v. *Bryden* ([1899] A.C. 580), and *Cunningham* v. *Tomey Homma* ([1903] A.C. 151), referred to.

Per Duff J.—The imposition of penalties for the purpose of enforcing the provisions of a provincial statute does not, in itself, amount to legislation on the subject-matter of criminal law within the meaning of item 27 of the 91st section of the "British North America Act, 1867." *Hodge* v. *The Queen* (9 App. Cas. 117), *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion* ([1896] A.C. 348), and *The Attorney-General of Manitoba* v. *The Manitoba Licence Holders' Association* ([1902] A.C. 73), referred to.

The judgment appealed from (4 West. W.R. 1135) was affirmed, Idington J. dissenting.

(Leave to appeal to the Privy Council refused, 19th May, 1914.)

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), upon a case stated by the police magistrate of the City of Moose Jaw, Sask., upon the conviction by him of the appellant on a charge of employing white females in contravention of the provisions of the Saskatchewan statute, 2 Geo. V. ch. 17.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 4 West. W.R. 1135.

1914

QUONG-WING v. THE KING.

The case stated by the police magistrate was, as follows:—

"In the matter of the Act respecting the employment of female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912, and a certain conviction of Quong Wing thereunder made by W. F. Dunn, police magistrate in and for the City of Moose Jaw, in the Province of Saskatchewan on the twenty-seventh (27th) day of May, 1912, on the information of W. P. Johnson, chief of police in and for the City of Moose Jaw.

"Case stated by W. F. Dunn, police magistrate in and for the City of Moose Jaw under the provisions of the Criminal Code of Canada in that behalf.

"On the twenty-first (21st) day of May, 1912, an information was laid under oath before me by the above-named W. P. Johnson for that the said Quong Wing on the twentieth (20th) day of May, 1912, at the City of Moose Jaw, in the Province of Saskatchewan, he being a Chinaman and the owner, keeper or manager of a place of business, known as the 'C. E. R. Restaurant,' in the City of Moose Jaw, did employ in the said restaurant, as waitresses, two white women, to wit, one Mabel Hopham and one Nellie Lane, contrary to the Act respecting the employment of white female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912. On the twenty-seventh (27th) day of May, 1912, the said charge was duly heard before me, the said information having been first amended by striking out the words 'or manager' and substituting in the place thereof the word 'and' so as to make the information read 'owner and keeper' after which the said information was re-sworn, in the presence of both parties and

1914

QUONG-WING v. THE KING.

after hearing the evidence adduced and the statements of the said W. P. Johnson and Quong Wing and their counsel I found the said Quong Wing guilty of the said offence and convicted him therefor, but, at the request of the counsel for the said Quong Wing I state the following case for the opinion of this honourable court.

"I find on the evidence:—

"1. That the accused Quong Wing was born in China and of Chinese parents.

"2. That the said accused was on the date of the alleged offence a naturalized British subject.

"3. That on the twentieth (20th) day of May, 1912, the said accused was the keeper of a restaurant known as the 'C. E. R. Restaurant' in the City of Moose Jaw, in the Province of Saskatchewan.

"4. That on the said twentieth day of May, 1912, the said accused had in his employ as waitresses in the said restaurant one Mabel Hopham and one Nellie Lane, and that the said Mabel Hopham and Nellie Lane are white women.

"The counsel for the said Quong Wing desires to question the validity of the said conviction on the following grounds:—

"1. That it is erroneous in point of law.

"2. That the said Act, chapter seventeen (17) of the statutes of Saskatchewan, 1912, is *ultra vires*.

"3. That the court had no jurisdiction.

The questions submitted for the judgment of this honourable court being:—

"1. Whether the premises described as being the place in which the alleged white women worked is included in the Act under which the information was laid.

"2. Whether any offence under the said Act is disclosed.

"3. Whether the accused, being a naturalized British subject, is one of the persons prohibited by the Act from employing female labour.

"4. Whether the said Act under which the said information was laid is *ultra vires*.

"5. Whether the conviction was in excess of the jurisdiction of the court."

"Dated at Moose Jaw, this ninth (9th) day of November, A.D. 1912.

(Sgd.) W. F. DUNN,
Police Magistrate in and for
the City of Moose Jaw."

By the judgment now appealed from, the conviction of the appellant was affirmed.

The issues raised on the present appeal are stated in the judgments now reported.

G. F. Henderson K.C. for the appellant.
J. N. Fish K.C. for the respondent.

THE CHIEF JUSTICE.—The appellant, a Chinaman and a naturalized Canadian citizen, was convicted of employing white female servants contrary to the provisions of chapter 17 of the statutes of Saskatchewan, 1912, and, for his defence, he contends that the Act in question is *ultra vires* of the provincial legislature.

It is urged that the aim of the Act is to deprive the defendant and the Chinese generally, whether naturalized or not, of the rights ordinarily enjoyed by the other inhabitants of the Province of Saskatchewan and that the subject-matter of the Act is within the

1914

QUONG-WING v. THE KING.

The Chief Justice.

exclusive legislative authority of the Parliament of Canada.

The Act in question reads as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

2. Any employer guilty of any contravention or violation of this Act, shall, upon summary conviction be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

In terms the section purports merely to regulate places of business and resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan. There are many factory Acts passed by provincial legislatures to fix the age of employment and to provide for proper accommodation for workmen and the convenience of the sexes which are intended not only to safeguard the bodily health, but also the morals of Canadian workers, and I fail to understand the difference in principle between that legislation and this.

It is also undoubted that the legislatures authorize the making by municipalities of disciplinary and police regulations to prevent disorders on Sundays and at night, and in that connection to compel tavern and saloon keepers to close their drinking places at certain hours. Why should those legislatures not have power to enact that women and girls should not be employed in certain industries or in certain places or by a certain class of people? This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls.

The Chinaman is not deprived of the right to employ others, but the classes from which he may select

his employees are limited. In certain factories women or children under a certain age are not permitted to work at all, and, in others, they may not be employed except subject to certain restrictions in the interest of the employee's bodily and moral welfare. The difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of degree, not of kind.

I would dismiss the appeal with costs.

DAVIES J.—The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects. If the language of Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council in *Union Colliery Company of British Columbia* v. *Bryden* (1) was to be accepted as the correct interpretation of the law defining the powers of the Dominion Parliament to legislate on the subject-matter of "naturalization and aliens" assigned to it by item 25 of section 91 of the "British North America Act, 1867," I would feel some difficulty in upholding the legislation now under review. Lord Watson there said, at page 586:—

> But section 91, sub-section 25, might, possibly, be construed as conferring that power in case of naturalized aliens after naturalization. The subject of "naturalization" seems, *primâ facie*, to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization"

(1) [1899] A.C. 580.

1914

QUONG-WING v. THE KING.

Davies J.

was intended to bear, as it occurs in section 91, sub-section 25. But it seems clear that the expression "aliens," occurring in that clause, refers to and, at least, includes all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in section 4 of the provincial Act, were, probably, meant to denote, and they certainly include every adult Chinaman who has not been naturalized.

And, at page 587:—

> But the leading feature of the enactments consists in this — that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.
>
> Their Lordships see no reason to doubt that, by virtue of section 91, sub-section 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the "Coal Mines Regulation Act," in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

If the

> exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada

is vested in the Dominion Parliament by sub-section 25 of section 91 of the "British North America Act, 1867," it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham* v. *Tomey Homma*(1) the Judicial Committee modified the views of the construction of sub-section 25 of section 91 stated in the Union Colliery decision. Their Lordships say, at pages 156-157:—

(1) [1903] A.C. 151.

Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province ? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. *The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization.* It, undoubtedly, reserves these subjects for the exclusive jurisdiction of the Dominion— that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question *as to what consequences shall follow from either* is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Reading the *Union Colliery Case*(1), therefore, as explained in this later case, and accepting their Lordships' interpretation of sub-section 25 of section 91, that

its language does not purport to deal with the consequences of either alienage or naturalization,

and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires,* however harshly it may bear upon Chinamen, *naturalized or not,* residing in the province. There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away al-

(1) [1899] A.C. 580.

1914

QUONG-WING v. THE KING.

Davies J.

together. There is nothing in the "British North America Act" which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the power of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery Case*(1) were, as stated by the Judicial Committee, in the later case of *Tomey Homma*(2),

> not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that

(1) [1899] A.C. 580. (2) [1903] A.C. 151, at p. 157.

1914

QUONG-WING v. THE KING.

Davies J.

protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries* v. *Bryden*(1).

The right to employ white women in any capacity or in any class of business is a civil right, and legislation upon that subject is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bonâ fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one and that it does not cease to operate because a Chinaman becomes naturalized. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the Judicial Committee in the case of *The Union Colliery Company* v. *Bryden*(1).

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliations. It was

(1) [1899] A.C. 580.

1914

QUONG-WING v. THE KING.

Davies J.

against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The Legislature of Saskatchewan, by chapter 17 of the statutes of 1912, intituled "An Act to prevent the Employment of Female Labour in certain capacities" enacted as follows:

> 1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any *Japanese*, Chinaman *or other Oriental person*

which is followed by a penal clause under which appellant has been convicted. That conviction has been maintained by the Supreme Court of Saskatchewan in a judgment from which the learned Chief Justice of that court dissented.

The first question raised is whether or not the appellant, who is admitted to have been born in China, of Chinese parents, but was at the time of the alleged offence a naturalized British subject, falls within the Act. It is quite clear that the term "any Chinaman" may, in the plain, ordinary sense of the words, be so construed as to include naturalized British subjects. It is, to my mind, equally clear that, having regard to many considerations, to some of which I am about to advert, a proper and effective meaning may

be given to this term without extending it to cover the naturalized British subject.

The Act, by its title, refers to female labour and then proceeds to deal with only the case of white women.

In truth, its evident purpose is to curtail or restrict the rights of Chinamen.

In view of the provisions of the "Naturalization Act," under and pursuant to which the appellant, presumably, has become a naturalized British subject, one must have the gravest doubt if it ever was intended to apply such legislation to one so naturalized.

The "Naturalization Act," in force long before and at the time of the creation of the Province of Saskatchewan, and ever since, provided by section 4 for aliens acquiring and holding real and personal property, and by section 24, as follows:—

> 24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

These enactments rest upon the class No. 25 of the classification of subjects assigned, by section 91 of the "British North America Act, 1867," to the exclusive jurisdiction of the Dominion Parliament, and which reads as follows: "Naturalization and Aliens." The political rights given any one, whether naturalized or natural-born British subjects, may in many respects be limited and varied by the legislation of a province, even if discriminating in favour of one section or class as against another. Some political rights

1914

QUONG-WING v. THE KING.

Idington J.

or limitations thereof may be obviously beyond the power of such legislature. But the "other rights, powers and privileges" (if meaning anything) of natural-born British subjects to be shared by naturalized British subjects, do not so clearly fall within the powers of the legislatures to discriminate with regard to as between classes or sections of the community.

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.

For example, is it competent for a legislature to create a system of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.

Again, it may also be well argued that, within the exclusive powers given to the Dominion Parliament over the subject of naturalization and aliens, there is implied the power to guarantee to all naturalized subjects that equality of freedom and opportunity to which I have adverted. And I ask, has it not done so by the foregoing provision of the "Naturalization Act"?

It is quite clear that, if the Dominion Government so desire, it can, by the use of the veto power given it over all local provincial legislation insist upon the preservation of this equality of freedom and opportunity.

1914

QUONG-WING v. THE KING.

Idington J.

It is equally clear that a casual consideration of this Saskatchewan Act might not arrest the attention of those whose duty it is to consider and determine whether or not any provincial Act should be vetoed. It might well be that, in regard to such an Act respecting aliens, those discharging the duty relative to the veto power might let it go for what it might be worth, knowing that, as to them, Parliament could later intervene; whereas other considerations might arise as to naturalized subjects and the duty to protect those naturalized be overlooked by reason of the general term used.

It may be that the guarantee which I incline to think is implied in the "Naturalization Act" covers the ground. If so, there is then in this Act that which, as applied to the appellant (a naturalized subject) is *ultra vires* the legislature.

If so, this conviction falls to the ground. Much stress is laid, on the one hand, upon the expression of opinion in the judgment of the Judicial Committee of the Privy Council in the case of *The Union Colliery Co.* v. *Bryden*(1), and, on the other hand, in that in the judgment of the same court in the case of *Cunningham* v. *Tomey Homma*(2).

I may observe that a decision is only binding for that which is necessary to the decision of the case and add that, perhaps, neither expression of opinion now relied upon by the respective parties hereto was actually necessary for the determination of the case. Perhaps neither decision, in itself, can be said to be conclusive by way of governing the questions to be resolved herein. But of the two the former, certainly, so far as one can gather from the report, touches more

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

1914

QUONG-WING v. THE KING.

Idington J.

nearly or directly the point involved in the present inquiry.

Of course, such opinions, even if *obiter dicta,* are entitled to that weight to be given such eminent authority. What was clearly decided in the first case was that such comprehensive language as used in the regulation in question and, I rather think, aimed chiefly at alien Chinamen, was *ultra vires,* and, in the other, that the political right to vote was something within the express power of the legislature to give or withhold or restrict as it should see fit. This latter point in no way touches what is raised herein.

With the very greatest respect, I submit that the *obiter dictum,* relative to the limitations of the power existent in the Dominion Parliament by virtue of the assignment to it of paramount legislative authority over the subject of "naturalization and aliens" never was intended to be treated or taken in the sense now sought to be attributed to it, and, if bearing such implication, that it is not maintainable.

Canada, for example, is deeply interested as a whole and always has been in the colonization of its waste lands by aliens expecting to become British subjects, and surely the power over naturalization must involve in its exercise many considerations relative to the future status of such people as invited to go there and accept the guarantees and inducements offered them. To define and forever determine beyond the power of any legislature to alter the status of such people and measure out their rights by that enjoyed by the native-born seems to me a power implied in the power over "naturalization and aliens." Many incidental powers have, as something implied in the other powers, contained in the same category, been

held as attached thereto or to be used as part thereof with less excuse for the implication of incidental power there in question than would be involved in going a good deal further than I suggest in the execution of this power over "naturalization and aliens" the Dominion Parliament may go.

Some of these guarantees might depend on conventions with other powers, and I should hesitate to hamper the exercise of the power by any such limitations thereon as a provincial legislature might think fit to impose.

That power must be treated as the other powers categorically assigned to Parliament by section 91 of the "British North America Act, 1867," in a wide and statesmanlike fashion.

All these considerations have, in a measure, been observed in the provisions of the "Naturalization Act," and in framing the provision I have quoted and other like provisions.

No one can, as of right, become naturalized. He must reside for three years in this country and thus become known to those who have to aid in his qualifying himself by shewing that he is of good character. Unless and until he fulfil these conditions he cannot come within the class to which appellant belongs.

The appellant having, under the "Naturalization Act" (as I think fair to infer) become a British subject, he has presumably been certified to as a man of good character and enjoying the assurance, conveyed in section thereof which I have quoted, of equal treatment with other British subjects, I shall not willingly impute an intention to the legislature to violate that assurance by this legislation specially aimed at his

1914

QUONG-WING v. THE KING.

Idington J.

fellow-countrymen in origin. Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to find it founded upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

Having regard to all the foregoing considerations and the further consideration that this is a penal statute and, therefore, to be read and construed according to the principle applicable to such like statutes, I think this is one of the relatively few instances in which we can depart from the cardinal rule of interpreting all documents, including statutes, according to the plain ordinary reading of the language used, and, with Bowen L.J., in *Wandsworth Board of Works* v. *United Telephone Co.*(1), ask ourselves if these words so read are capable of two constructions and, if so, say:—

> It is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers.

Or say, with Keating J., in *Boon* v. *Howard* (in 1874) (2), at page 308:—

> If the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail.

Other like cases are collected in Hardcastle (3 ed.), at pages 174 *et seq.*

Looked at from this point of view I am constrained to think that this Act must be construed as applicable only to those Chinamen who have not become naturalized British subjects, and is not applicable to the appellant who has become such.

(1) 13 Q.B.D. 904. (2) L.R. 9 C.P. 277.

Whether it is *ultra vires* or *intra vires* the alien Chinamen is a question with which, in this view, I have nothing to do.

Yet, in deference to the argument put forward in way of so interpreting the "British North America Act" that the reservation to Parliament at the end of section 91 of the powers enumerated in said section 91 must apply only in its limitation to item number 16 of section 92, instead of as usually construed, so far as necessary to each and all of the enumerated powers given by that section, I may be permitted to say that I wholly dissent from the view put forward. I look upon the powers given Parliament in the twenty-nine enumerated classes set forth in section 91, so far as necessary to give efficacy thereto, as paramount to anything contained elsewhere as in section 92.

Subject thereto, and some other special powers given Parliament, the powers given the legislatures are exclusive and cannot be infringed upon or restricted save by the veto power. There is, however, the possibility of legislation by a legislature being held good until Parliament asserts its powers in conflict therewith.

Until this relation of the powers respectively given Parliament and the legislatures and their order of priority and superiority is thoroughly comprehended and acted upon, there is sure to be confusion in working the system and that confusion invites and induces still greater confusion when the place of the residual power has to be fixed and the relation thereof to these considered.

The maintenance of the warehouse receipts given banks by virtue of the "Bank Act," as against local legislation resting upon authority over property and

1914

QUONG-WING v. THE KING.

Idington J.

civil rights, as held in *Tennant* v. *The Union Bank of Canada*(1) illustrates how unfounded is the argument put forward. And the case of the *Grand Trunk Railway Company* v. *The Attorney-General of Canada* (2), relative to the power of a railway company to contract itself out of the provision of the "Railway Act" prohibiting such a contract with its employees, is another illustration of how the law of a province, quite good till Parliament asserted its power, by virtue of section 91, sub-section 29, must bend before such assertion of superior power.

The fact that Parliament has, in regard to naturalization, intervened, has much weight with me in reaching the conclusion I have as a reason why the legislature must not be presumed to have decided to ignore what is enacted by Parliament.

I am by no means to be held as deciding the effect of that legislation by Parliament. All I say, in way of deciding herein, is that until, in such case, the legislature makes it clear that it intended to question the effect of that legislation, I need go no further than say it has not clearly expressed its intention to assert and exercise such a doubtful right.

It is an attempt to cover and classify by an ambiguous term the case of a man who is in truth and fact what the term used clearly implies, and may return home any day, with that of a man who may have bid good-bye forever to his native land, induced to do so by the assurances offered him. I may add that we are not instructed as to the exact relation between China and Great Britain in regard to the position of the appellant, and, for the present purpose, that is immaterial, but I can conceive of further considera-

(1) [1894] A.C. 31. (2) [1907]A.C. 65.

1914

QUONG-WING v. THE KING.

Idington J.

tions of this sort of legislation rendering more full information necessary than this case does.

And, if the like term "Chinaman," as used here and in *The Union Colliery Co.* v. *Bryden*(1), is to be read as extending to such, when naturalized British subjects, then the decision therein must bind us herein.

I think, therefore, that this appeal should be allowed with costs.

DUFF J.—The first question to be considered is a question of jurisdiction which was raised during the course of the argument. The appeal comes before us by leave, under section 37(*c*), but an order made under that provision does not conclude the question of jurisdiction which arises here. Section 36, sub-section "*b*," provides in express terms that there shall be "no appeal in a criminal case except as provided in the Criminal Code." In the judgments of three members of the court in *Re McNutt*(2), the word "criminal," as it appears in section 39, sub-section "*c*" (and it is obviously used in the same sense in sub-section "*a*," section 36) was construed in the broad sense as applying to proceedings for the punishment of offences under provincial penal enactments, which, if passed by a legislature exercising authority unrestricted as to subject-matter would, according to the general principles, be classified as criminal law. See pages 261, 267 and 286.

If these views correctly interpret the word "criminal" in section 39(*c*), it would follow, I think, that the appeal in the present case comes within the prohibitions of section 36(*b*), and is incompetent.

For reasons, however, which I gave in full *In re*

(1) [1899] A.C. 580. (2) 47 Can. S.C.R. 259.

1914

QUONG-WING v. THE KING.

Duff J.

McNutt(1), I think the phrases "criminal case" and "criminal charge" in these provisions of the "Supreme Court Act" must be read in the narrow sense there indicated, and in my view the prohibitions contained in sub-sections "*a*" and "*b*," of section 36, have no application to judgments in proceedings under provincial penal statutes.

The statute in question came into force on the 1st of May, 1912, and is in the following words:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any *Japanese*, Chinaman *or other Oriental person*.

2. Any employer guilty of any contravention or violation of this Act shall, upon summary conviction, be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

3. This Act shall come into force on the first of May, 1912.

On the 27th of May, 1912, the appellant, who was a restaurant keeper, was convicted by the police magistrate of Moose Jaw of the offence of employing white female servants in contravention of the provisions of this Act. On the 11th of January, 1913, the Act was amended by striking out the italicized words in the last two lines of section 1, its application being thereby limited to "Chinamen."

The appellant, at the time of the alleged offence, had been naturalized under the naturalization laws of Canada.

The first question for consideration, which is the substantial question on the appeal, is whether, assuming that this statute is not in conflict with any Act passed by the Parliament of Canada, it is within

(1) 47 Can. S.C.R. 259.

the scope of the legislative powers of the Province of Saskatchewan.

It might plausibly be contended that it is legislation in relation to any one of these three classes of subjects: "local undertakings," section 92 ("B.N.A. Act"), item 10, or "property and civil rights" within Saskatchewan, section 92(13), or "matters merely local or private" in Saskatchewan, section 92(16). For the purposes of this judgment it may be assumed that the words "any restaurant, laundry or other place of business or amusement" are not in this enactment descriptive of "local works or undertakings" within the meaning of section 92(10); and I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it is to abate or prevent a "local evil" and that considerations similar to those which influenced the minds of the Judicial Committee in *The Attorney-General of Manitoba* v. *The Manitoba Licence-Holders' Association*(1), lead to the conclusion that the Act ought to be regarded as enacted under section 92(16), "matters merely local or private within the province," rather than under section 92 (13), "property and civil rights within the province." There can be no doubt that, *primâ facie,* legislation prohibiting the employment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the "local and provincial point of view" may fall within the domain of the authority conferred upon the provinces by section 92(16). Such legislation stands upon precisely the same footing in relation to the respective powers of

(1) [1902] A.C. 73.

1914

QUONG-WING v. THE KING.

Duff J.

the provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to.

The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in section 91 of the "British North America Act, 1867," by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *The Queen*(1), and in the *Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(2) as well as in the *Attorney-General of Manitoba* v. *The Manitoba Licence-Holders' Association*(3), already mentioned, established that the provinces may, under section 92(16) of the "British North America Act, 1867," suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92(15).

The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by section 91 (25), "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend. This is said to be shewn by the decision of the Privy Council in *The Union Colliery Co.* v. *Bryden* (4).

(1) 9 App. Cas. 117.
(2) [1896] A.C. 348.
(3) [1902] A.C. 73.
(4) [1899] A.C. 580.

1914

QUONG-WING v. THE KING.

Duff J.

I think that, on the proper construction of this Act (and this appears to me to be the decisive point), it applies to persons of the races mentioned without regard to nationality. According to the common understanding of the words "Japanese, Chinaman or other Oriental person," they would embrace persons otherwise answering the description who, as being born in British territory (Singapore, Hong Kong, Victoria or Vancouver, for instance), are natural born subjects of His Majesty equally with persons of other nationalities. The terms Chinaman and Chinese, as generally used in Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance. The "Chinese Immigration Act," for example, R.S.C., 1906, ch. 95 (sec. 2 (*d*) and sec. 7) particularly illustrates this; and the judgment of Mr. Justice Martin, *In re "The Coal Mines Regulation Act"*(1), at pages 421 and 428, gives other illustrations. Indeed, the presence of the phrase "other Oriental persons" seems to make it clear, even if there could otherwise have been any doubt upon the point, that the legislature is not dealing with these classes of persons according to nationality, but as persons of a certain origin or persons having certain common characteristics and habits sufficiently indicated by the language used. *Primâ facie,* therefore, the Act is not an Act dealing with aliens or with naturalized subjects as such. It seems also impossible to say that the Act is, in its practical operation, limited to aliens and naturalized subjects. From the figures given by the census of 1911 it appears that, while the total Chinese population of the three west-

(1) 10 B.C. Rep. 408.

1914

QUONG-WING v. THE KING.

Duff J.

ern provinces was about 22,000, there were about 1,700 persons born in Canada classed as Chinese, nearly all of whom would be found in those provinces; and these, of course, are natural born subjects of His Majesty. There are at this moment in Western Canada, moreover, considerable numbers of people unquestionably embraced within the description "Oriental persons" who have come to this country from other parts of His Majesty's territorial dominions and as regards nationality stand in the same category. The Act would (giving its words their usual meaning) apply to all these; and there can be no sound reason for suggesting that they can, consistently with the objects of the enactment, be excluded from the field of its operation.

The appellant's attack is really based upon a certain interpretation of the decision of their Lordships of the Judicial Committee in *The Union Colliery Co.* v. *Bryden*(1). Lord Watson, in delivering their Lordships' judgment, at page 587, said:—

> But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia. * * *
>
> They are also of opinion that the whole pith and substance of the enactments or section 4 of the "Coal Mines Regulation Act," in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

Of the legislation before us it would be impossible to say that "it has and can have no application except to "Orientals" who are aliens or naturalized subjects," as I have already pointed out. It seems equally im-

(1) [1899] A.C. 580.

possible to affirm that it establishes any rule or regulation at all comparable to regulations of the character described by His Lordship, viz.,

> that these aliens or naturalized subjects shall not work or be allowed to work in certain industries,

and, lastly, it would be going quite beyond what is warranted by anything like a fair reading of the statute before us to say of it that

> it establishes no rule or regulation except a rule or regulation laying a prohibition upon aliens or naturalized subjects.

Orientals are not prohibited in terms from carrying on any establishment of the kind mentioned. Nor is there any ground for supposing that the effect of the prohibition created by the statute will be to prevent such persons carrying on any such business. It would require some evidence of it to convince me that the right and opportunity to employ white women is, in any business sense, a necessary condition for the effective carrying on by Orientals of restaurants and laundries and like establishments in the Western provinces of Canada. Neither is there any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood.

There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly local situation. In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can

1914

QUONG-WING v. THE KING.

Duff J.

without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. And, in view of all this, I think, with great respect, it is quite impossible to apply with justice to this enactment the observation of Lord Watson in the *Bryden Case*(1), that "the whole pith and substance of it is that it establishes a prohibition affecting" Orientals. For these reasons, I think, apart altogether from the decision in *Cunningham* v. *Tomey Homma*(2), to which I am about to refer, that the question of the legality of this statute is not ruled by the decision in *Bryden's Case*(1).

I think, however, that in applying *Bryden's Case* (1) we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*(2). The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *primâ facie* within the scope of the powers conferred by section 92(1), they proceeded to examine the ques-

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

tion whether, according to the true construction of section 91(25), the subject-matter of it really fell within the subject of "aliens and naturalization"; and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article.

At pages 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—

> If the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other. but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with and, indeed, contradictory of certain passages in Lord Watson's judgment in *Bryden's Case*(1), which passages, it is contended, give the true ground of the decision in that case and, consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's Case*(2), at page 157. It is as follows:—

> That case depended upon totally different grounds. This Board, dealing with the particular facts of the case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

1914

QUONG-WING v. THE KING.

Duff J.

the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

That is an interpretation of *Bryden's Case*(1) which it appears to me to be our duty to accept.

It should not be forgotten that the very eminent judges (Lord Halsbury, Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley), constituting the Board which heard the appeal in *Cunningham's Case*(2), had that case before them for something like six months after it had been very fully argued by Mr. Blake against the provincial view; and, in delivering the considered judgment of the Board, Lord Halsbury, as we have seen, examines and sums up the effect of the decision in *Bryden's Case*(1), which the courts in British Columbia had believed themselves to be following in passing upon *Cunningham's Case*(2). In these circumstances, whatever might otherwise have been one's view of their Lordships' judgment in *Bryden Case*(1), we should not be entitled to adopt and act upon a view as to the construction of item 25 of section 91 ("B.N.A. Act"), which was distinctly and categorically rejected in the later judgment.

There is one more point to be noted. Section 24 of the "Naturalization Act," ch. 77, of the Revised Statutes of Canada, 1906, provides as follows:—

24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject within Canada, with this qualification that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

1914

QUONG-WING v. THE KING.

Duff J.

the laws thereof, or in pursuance of a treaty or convention to that effect.

It is unnecessary to consider whether or not this section goes beyond the powers of the Dominion in respect of the subject of naturalization, or whether "the rights, powers and privileges" referred to therein ought to be construed as meaning those only which are implied by the "protection" that is referred to as the correlative of allegiance in the passage above quoted from the judgment of the Judicial Committee in *Cunningham's Case*(1). This much seems clear: The section cannot fairly be construed as conferring upon persons naturalized under the provisions of the "Naturalization Act," a status in which they are exempt from the operation of laws passed by a provincial legislature in relation to the subjects of section 92 of the "British North America Act, 1867," and applying to native-born subjects of His Majesty in like manner as to naturalized subjects and aliens. If the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under section 91 (25); and it seems equally impossible to say that this legislation deprives any Oriental, who is a naturalized subject, of any of "the rights, powers and privileges" which an Oriental, who is a native-born British subject, is allowed to exercise or retain.

ANGLIN J. agreed with Davies J.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Henderson, Greene & Herridge.*

Solicitor for the respondent: *T. A. Colclough.*

(1) [1903] A.C. 151.

1914

*Feb. 10, 11.
*Feb. 23.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ELIZABETH TURNER, AND MARGARET TRAWFORD, GEORGE TRAWFORD AND MIRIAM TRAWFORD, BY ELIZABETH TURNER, THEIR NEXT FRIEND (PLAINTIFFS) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Practice — Action by dependents — B.C. "Families Compensation Act"—Release by deceased—Defence to action—Repudiation—Fraud—Setting aside release—Personal representative—Right of action—Return of money paid—Limitation of action—General statutory provision—Carriers—Private Act—B.C. "Consolidated Railway Coy.'s Act"—Statute—R.S.B.C., 1911, *ch.* 82—*"Lord Campbell's Act"*—(*B.C.*) 59 *Vict., ch.* 55, *sec.* 60.

Where a release by the deceased is relied upon by the defendants in an action for damages by his dependents, under the provisions of the "Families Compensation Act," R.S.B.C., 1911, ch. 82, the plaintiffs may take exception to the release on the ground that it was fraudulently procured, although the personal representative of the deceased has not been made a party to the action.

The judgment appealed from (18 B.C. Rep. 132) was affirmed.

Such an exception may be entertained by a court of equity notwithstanding that the money paid as consideration for the release is neither tendered back to the defendants nor brought into court to abide the issue of the action. *Lee* v. *Lancashire and Yorkshire Rway. Co.* (6 Ch. App. 527); *Read* v. *Great Eastern Rway. Co.* (L.R. 3 Q.B. 555); *Robinson* v. *Canadian Pacific Rway. Co.* ((1892) A.C. 481); *Rideal* v. *Great Western Rway. Co.* (1 F. & F. 706); *Clough* v. *London and North Western*

*PRESENT: — Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Rway. Co. (L.R. 7 Ex. 26); *Seward* v. *The "Vera Cruz"* (10 App. Cas. 59); *Pym* v. *Great Northern Rway. Co.* (2 B. & S. 759; 4 B. & S. 396); *Williams* v. *Mersey Docks and Harbour Board* ((1905), 1 K.B. 804); *Erdman* v. *Walkerton* (20 Ont. App. R. 444), and *Johnson* v. *Grand Trunk Rway. Co.* (21 Ont. App. R. 408), referred to.

By section 60 of the "Consolidated Railway Company's Act" (B.C.), 59 Vict., ch. 55, actions for damage or injury sustained by reason of a tramway or railway, or the works or operations of the company, are subject to a limitation of six months.

Held, that the limitation thus provided for the protection of a private corporation had not the effect of altering the general limitation of twelve months provided by the fifth section of the "Families Compensation Act," R.S.B.C., 1911, ch. 82. *Green* v. *British Columbia Electric Rway. Co.* (12 B.C. Rep. 199); *Canadian Northern Rway. Co.* v. *Robinson* (43 Can. S.C.R. 387); *Zimmer* v. *Grand Trunk Rway. Co.* (19 Ont. App. R. 693); *Markey* v. *Tolworth Joint Isolation Hospital District* ((1900) 2 K.B. 454), and *Williams* v. *Mersey Dock and Harbour Board* ((1905) 1 K.B. 804), referred to.

Per Duff J.—Section 60 of the "Consolidated Railway Company's Act," (B.C.) 59 Vict. ch. 55, has no application to an action brought against the company for breach of duty as a carrier. *Sayers* v. *British Columbia Electric Rway. Co.* (12 B.C. Rep. 102) referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Murphy J., at the trial(2), and directing that a new trial should be had between the parties.

The action was brought, under the "Families Compensation Act," R.S.B.C., 1911, ch. 82, by the widow and children of the late George Trawford, deceased, to recover damages for his death, which was alleged to have been caused through the negligence of the company while he was travelling as a passenger on their tramway. As a defence to the action, the company set up a release executed by the deceased before

(1) 18 B.C. Rep. 132, *sub nom. Trawford* v. *B.C. Electric Rway. Co.*

(2) 2 West. W.R. 661.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

his death discharging them from all claims which he then had against the company on account of the injuries he had sustained or which, in future, his heirs, executors, administrators or assigns might have, in consequence of such injuries. The release was granted in consideration of the sum of $1,000, which was paid to deceased by the company at the time the release was executed. The answer by the plaintiffs was that the release had been obtained through fraud and misrepresentations, but they did not offer to return the money which had been paid to deceased by the company nor did they bring it into court. The personal representative of the deceased was not a party to the action. The trial judge took the case from the jury and dismissed the action because the plaintiffs had not tendered back the money nor deposited the amount in court to abide the result of the trial. This judgment was reversed by the Court of Appeal for British Columbia and a new trial was ordered.

Ewart K.C. for the appellants. The plaintiffs were not entitled to attack the release given by the deceased, upon the ground of misrepresentation and undue influence—(*a*) in the absence of any election to repudiate the settlement made by the deceased, either by him personally or by his legal representative: (*b*) in the absence of restitution by the deceased or his legal representative of the money paid by the company. We also contend that the plaintiffs' claim is barred by lapse of time.

The plaintiffs' contention is that their right of action is separate and distinct from that to which the deceased was entitled. In view of the English authorities this assertion is untenable. *Read* v. *Great Eastern*

Railway Co.(1); *Griffiths* v. *Earl of Dudley*(2); *Williams* v. *Mersey Docks and Harbour Board*(3).

The alleged misrepresentation and undue influence, no matter how amply proved, do not make null or void the settlement entered into by the parties. They render it voidable only. Until election to rescind it is made, it is valid and binding. Election can be made only by the deceased or by his legal personal representative. Kerr on Fraud (1910), page 9; *Deposit and General Life Ins. Co.* v. *Ayscough*(4). A contract tainted with fraud remains valid until it is rescinded. *Reese River Silver Mining Co.* v. *Smith*(5). There being no suggestion of any election prior to the commencement of the action, the settlement was, at that time, valid and binding; the rights of the parties must be regarded as of that date. We rely upon *Lee* v. *Lancashire and Yorkshire Railway Co.*(6); *Foss* v. *Harbottle*(7); *Clinch* v. *Financial Corporation*(8); *Bank of Toronto* v. *Cobourg, Peterborough and Marmora Railway Co.*(9); *Knight* v. *Bowyer*(10), and *Greenstreet* v. *Paris*(11).

The plaintiffs' cause of action is barred by section 60 of the "Consolidated Railway Company's Act" (B.C.), 59 Vict. ch. 55. On this point we refer to *Williams* v. *Mersey Docks and Harbour Board*(3); *Markey* v. *Tolworth Joint Isolation Hospital District Board*(12); *Kent County Council* v. *Folkstone Corporation*(13); *City and South London Railway Co.*

(1) L.R. 3 Q.B. 555.
(2) 9 Q.B.D. 357.
(3) [1905] 1 K.B. 804.
(4) 2 Jur. N.S. 812.
(5) L.R. 4 H.L. 64, at p. 73.
(6) 6 Ch. App. 527.
(7) 2 Hare 461.
(8) L.R. 5 Eq. 450, at p. 482.
(9) 10 O.R. 376.
(10) 23 Beav. 609.
(11) 21 Gr. 229.
(12) (1900) 2 Q.B. 454.
(13) (1905) 1 K.B. 620.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

v. *London County Council*(1); *Barker* v. *Edger*(2); *Esquimalt Waterworks Co.* v. *City of Victoria*(3); *British Columbia Electric Railway Co.* v. *Stewart*(4).

W. Hart-McHarg for the respondents. The "Families Compensation Act" of British Columbia is legislation to provide for the compensation of the families of persons killed by accident and creates an entirely new cause of action of which the person injured cannot deprive them. See *Kenrick & Co.* v. *Lawrence & Co.*(5), at page 104, *per* Wills J. The person injured cannot make a settlement in regard to his injuries, binding on his family, without the family's consent. We refer also to *Pym* v. *Great Northern Railway Co.*(6); *Seward* v. *The "Vera Cruz"* (7); *Blake* v. *Midland Railway Co.*(8); *The "George and Richard"*(9).

It would appear that the legislation of British Columbia was intended to meet the difficulties arising under "Lord Campbell's Act," where there might be a hostile executor, and to provide that, in a suit by the dependents, they should have all the rights and powers of the personal representative. They are, consequently, entitled to attack the release. *Stewart* v. *Great Western Railway Co.*(10); *Hirschfeld* v. *London, Brighton and South Coast Railway*(11); *Johnson* v. *Grand Trunk Railway Co.*(12).

As to the effect of section 60 of the defendant com-

(1) [1891] 2 Q.B. 513.
(2) [1898] A.C. 748.
(3) [1907] A.C. 499.
(4) [1913] A.C. 816.
(5) 25 Q.B.D. 99.
(6) 2 B. & S. 759; 4. B. & S. 396.
(7) 10 App. Cas. 59.
(8) 18 Q.B. 93.
(9) 3 Ad. & Ecc. 466.
(10) 2 DeG. J. & S. 319.
(11) 2 Q.B.D. 1.
(12) 25 O.R. 64; 21 Ont. App. R. 408.

pany's Act in regard to limitation of plaintiffs' right of action, we refer to *Zimmer* v. *Grand Trunk Railway Co.*(1); *Green* v. *British Columbia Electric Railway Co.*(2); *McDonald* v. *British Columbia Electric Railway Co.*(3). In the English cases relied upon by the appellants it is to be noted that the "Public Authorities Act" there in question is an Act for the protection of public authorities, whereas the defendant company's Act is a private Act only. See *Parker* v. *London County Council*(4), *per* Channell J., at page 504. It is submitted also that an injury to a passenger on the company's tramway does not come within the proper construction of the words used in section 60 of the Act. See *Carpue* v. *London and Brighton Railway Co.*(5); *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Railway Co.*(6); *Sayers* v. *British Columbia Electric Railway Co.*(7); *Canadian Northern Railway Co.* v. *Anderson*(8), and *Cie. pour l'Éclairage au Gaz de St. Hyacinthe* v. *Cie. des Pouvoirs Hydrauliques de St. Hyacinthe*(9), *per* Strong C.J., at page 173.

It is submitted that the plaintiffs have an entirely new cause of action irrespective of anything that the deceased may have done; that they have all the powers an executor or administrator would have had in so far as concerns their present action; that it is not necessary for them to bring a separate action to have the release set aside, and that they are under no obligation to tender back the money paid in considera-

(1) 19 Ont. App. R. 693.
(2) 12 B.C. Rep. 199.
(3) 16 B.C. Rep. 386.
(4) (1904) 2 K.B. 501.
(5) 5 Q.B. 747.
(6) 10 Ont. L.R. 419.
(7) 12 B.C. Rep. 102.
(8) 45 Can. S.C.R. 355.
(9) 25 Can. S.C.R. 168.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

The Chief Justice.

tion of the release nor to bring it into court to abide the issue of their action.

THE CHIEF JUSTICE.—The statute of British Columbia gives the dependent, on the death of the injured party, a right of action against the person who has caused the wrong, if, at the time of his death, the deceased had a subsisting enforceable claim. The cause of that action is the *injuria* or prejudice resulting to the dependent from the wrongful act. In one sense it is a new action, but the condition subject to which that right of action may be exercised being that the deceased did not receive indemnity or satisfaction during his lifetime, to that extent and in that aspect, it is a representative or derivative action. If, therefore, the action of the dependent is met by the plea of satisfaction based upon a release, that plea being destructive of his right, the dependent should be able to meet it by denying the existence of such release or by alleging that it was obtained by fraud, and that, in the latter case, the deceased did not receive a real or tangible indemnity or satisfaction for the offence or quasi-offence in question. It may well be that it will be necessary to have all the parties to the release, or their representatives, before the court on that incidental issue, but, if that be necessary, then I am satisfied that the resources of the British Columbia "Procedure Act" will be found quite sufficient to enable that to be done.

I have no hesitation in saying that it would be a cruel injustice to deny the dependent an opportunity to set up and make good the allegation of fraud against a plea of satisfaction which, if upheld, is a complete bar to his other action.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

The Chief Justice.

For the reasons given by Mr. Justice Anglin, I am of opinion that the company cannot set up as a defence to this action the plea of prescription (59 Vict. (B.C.) ch. 55, sec. 60).

The appeal should be dismissed with costs.

DAVIES J.—This was an action brought by the widow and children of George Trawford who, in his lifetime, was injured by an accident on the defendants' railway. He died of his injuries on the 22nd of February, 1910. Prior to his decease, the company claimed that he had made a settlement with them for all claims in connection with the accident and that he had given them a release of all such claims. The company pleaded this settlement and release and the plaintiffs replied that it was obtained by wilful misrepresentation and fraud.

The trial judge dismissed the action on the grounds: First, that it could not lie without the money paid for the release being brought into court as a condition of setting it aside; and, secondly, that these plaintiffs, not suing in a representative capacity, cannot bring an action to set aside the release.

The Court of Appeal set aside this judgment and ordered a new trial. I agree with the judgment of the Court of Appeal and, for the reasons given by them, which I do not think it necessary to re-state at any length.

I cannot accept the contention of Mr. McHarg that the action under "Lord Campbell's Act" is an entirely independent one which cannot be affected by any release granted by the injured party in his lifetime. I think the authorities shew that a *bonâ fide* settlement may be made between the parties during the lifetime

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Davies J.

of the injured party and that, where this is reached and the injured party obtains satisfaction and grants a release of all his claims, apart from fraud, no action accrues to his widow and childen after his death. In order to give them such a right of action the injured party must himself possess it at the time of his death. If a settlement has been made between the injured party and a release obtained from him by fraud, that would not deprive him of his right of action. I see no reason whatever why, in such a case, the statutory representatives and beneficiaries of the injured man who had died should not have the right to bring their action and set up the fraud. It was conceded by Mr. Ewart that the executor, if he sued, would have that right, and I am unable to follow the reasoning that the parties for whose benefit he had the right to sue, and who themselves had a statutory right to sue in their own names in the event of the executor not doing so, should not have the same right as the executor is conceded to have in case he brought the action.

I think these dependents and beneficiaries are, under the statute, the legal personal representatives of the deceased in respect of everything necessary to assert their rights under the statute.

It surely must be so or Mr. McHarg's contention must be sustained that the statutory action is one entirely and absolutely independent and not open to be defeated by any settlement made in his lifetime by the injured party.

The authorities are adverse to that contention which, if accepted, would practically result in the company causing the injuries being mulct in damages twice over for the same wrongful act.

But, that being so, I cannot accept the contention

that the statutory rights of the widow and children can be defeated by a fraudulent release and that, in the event of the executor of the deceased declining to sue, their statutory action is defeated by a fraudulent release which they cannot attack.

Then, Mr. Ewart relied strongly upon the applicability to such a case as this of the limitation upon actions brought against the company contained in the "Consolidated Railway Company's Act," section 60.

I have reached the conclusion that this contention of Mr. Ewart cannot be sustained.

The Act under which the plaintiffs sue, commonly known as "Lord Campbell's Act," created, it is true, a new cause of action. That cause of action is given for the benefit of the dependents of the deceased, not solely because of the injuries he received, but because he died possessed of a good cause of action in respect of those injuries. In order to recover in this statutory action, not only in the words of the statute must

the death of a person have been caused by the wrongful act, neglect or default

of the defendant, but such wrongful act, neglect or default must be such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof. And so I agree, under the authorities, that, if the party injured had received satisfaction in his lifetime either by a voluntary settlement with the person liable or by recovery of damages in court or otherwise, the statutory action created in favour of the dependents of the deceased person would not arise.

This special Act of Lord Campbell, creating a special cause of action arising by reason of the death

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Davies J.

of the person injured in consequence of such injuries, provides that such action must be

> commenced within *twelve* calendar months *after the death of such deceased person.*

The limitation clause in the company's Act, of 1906, provides that

> all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company shall be commenced within *six months* next after the time when such supposed damage is sustained.

I do not think such a general clause can be held to repeal the special limitation clause of "Lord Campbell's Act," the action under which arises not alone as a consequence of the damages sustained by reason of the railway or the works or operations of the company, but by reason of the death of the injured person having, at the time of his death, a good cause of action. I agree with the court of British Columbia, in *Green* v. *British Columbia Electric Co.*(1), that a special Act creating a special cause of action and making special provisions as to the time within which it is to be brought is not repealed by a general limitation clause passed for the benefit of a private corporation. A technical construction of the two limitation clauses which could produce such a result would bar very many actions of dependent widows and children who may not have been guilty of any neglect or delay in asserting their statutory rights which only arise on and because of the death of the uncompensated injured party. Many such deaths of injured parties may not take place within six months of the injury received and, as to all these cases, the maintenance of such a

(1) 12 B.C. Rep. 199.

contention would be tantamount to a repeal of the Act.

The general limitation in the company's Act has reference only to

> actions or suits for indemnity for damage or injury sustained by reason of the railway or the works or operations of the company,

and such action would arise as soon as the injury was sustained.

But the damages sought to be recovered in this action only arise as and when death follows from the injuries and may be more than six months after such injuries.

Then, the appellants submit that, even if fraud was proved, the alleged settlement and release would not necessarily be null and void, but voidable only, and could only become void on the election of the deceased or his personal representatives. The important question Mr. Ewart suggested is not whether they have a right to sue for injuries sustained by the deceased, but whether they have a right to elect to rescind an agreement made by him.

Substantially, the submission of the company is that, assuming the alleged settlement to have been a fraudulent one, the company cannot be restrained from setting it up as against the claim of the plaintiffs, there not having been rescission made in his lifetime by the injured man or by his executor after his death. It seems to me the proposition contains its own refutation as it amounts to saying that a fraudulent release can be set up as a bar to defeat the statutory claim of the widow and children.

I have no doubt that such an unjust and inequitable result cannot be supported and that the Court of Appeal in so holding was right.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Davies J.

For the purpose of maintaining their statutory right of action the widow and children of an injured person who is dead may be considered as the statutory representatives of such party, and, as such, they have a right to attack a release obtained from him in his lifetime and which is being set up as a bar to their actions on the ground that it is fraudulent. The High Court, having the jurisdiction formerly exercised by the Court of Chancery, in the words of Sir William James L.J., in *Lee* v. *Lancashire and Yorkshire Railway Co.*(1),—

> should not relinquish its jurisdiction to deal with a case of fraud, but should say that the company was not to be entitled to use at all, for any purpose or under any circumstances, the document which has been obtained in that way.

The question what, if any, portion of the money paid to the injured party in his lifetime might be set off against the claim of the widow and children seems to me one which must, in each case, be left to the court and jury trying the case. It may well be that the amount so paid was solely for the actual medical and other expenses incurred by the injured party and for damages for the pain and suffering he endured, and for the actual loss of his time while injured, none of which would be recoverable in the action brought by the widow and children. In such a case, no part of such moneys should either be returned to the defendants or allowed for in estimating the pecuniary damages these statutory claimants were entitled to recover. In other cases, the moneys paid might be taken into consideration, in whole or in part, in estimating the damages, the test being whether or not they were recoverable in the statutory action. In each

(1) 6 Ch. App. 527, at p. 531.

case it must be left to the court or the jury assessing the damages to determine on the facts as proved.

It seems to me that this must be the proper course to be followed. If not, Mr. Ewart's argument must prevail that the statutory action, when brought by the widow and children on their own behalf, may be defeated by the plea and proof of a release which could be shewn by them to be a fraudulent one, or Mr. McHarg's position must be accepted that the statutory action was an entirely new and independent one, which could not be satisfied or discharged by any release given by the injured party.

In my judgment, neither contention should prevail, but the course I have suggested should be followed, which would ensure justice to all parties.

The appeal should, in my opinion, be dismissed with costs.

IDINGTON J. — Two questions are raised on this appeal. The first is whether or not the family of a man who has died under such circumstances as would give them a right of action founded upon "Lord Campbell's Act" against the appellant are, by virtue thereof, entitled to disregard a release alleged to have been obtained from deceased by fraud, or are, notwithstanding the fraud, barred thereby from any action.

The next question is whether or not the limitations in one of the company's Acts, to which I will refer at length, has created a bar to the action.

The answer to the first question must depend upon the construction of the Act upon which the action is founded and without which there can be no action by the respondents.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Idington J.

The action must be founded upon and within the following terms of the Act.

That whensoever the death of a person shall be caused by the wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensured) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

I must ask to be permitted to pass by much learning, heretofore and in this case, expended upon efforts to determine the knotty questions of whether it is or is not a new action or only one that the deceased had or might, but for his death, have had, yet enlarged, by the results of his death, in its consequences upon the pecuniary fortunes, or deprivation of pecuniary fortune, thereby wrought in and upon the welfare of the members of the family concerned.

I must read the language of this statute according to its plain ordinary meaning, and, in doing so, I discard no authority binding upon this court. There is no dispute that, but for the alleged release (or the statutory limitation relied upon), the respondents, by virtue of what happened, had become entitled to bring this action. And the whole controversy turns upon whether or not the release, even if obtained by fraud, must stand as a bar to the action. And that depends on the meaning to be given to the words

then * * * the person who would have been liable if death had not ensued shall be liable to an action for damages in respect thereof.

It is clear that a person who had, either in anticipation of such an accident clearly accepted the risk and consequences or has wrought his own destruction or certainly contributed thereto by his own acts causing the injury and damages, may, by his agreement,

acts or conduct have thus deprived his family of any chance of invoking this statute to support an action against others, though culpable in relation to the cause of death.

I will, for argument's sake, assume that by a release duly executed and covering the accident and the personal consequences to the husband himself, or the father of a family so stricken, he so releasing would have no action, and, hence, his wife and family would have no right of action.

But, if that release was obtained by fraud and, hence, was liable to be effectively repudiated by the deceased, I am unable to comprehend how or why the existence of that which was no barrier in the way of liability to him can be set up as a barrier in the way of those given by this statute an action to recover in case of any existing liability to him not that which he could have recovered for, but that which they are declared entitled to recover for as their own, by way of compensation for their pecuniary loss, as the Act has been held to mean.

It is said that a fraudulent transaction is not absolutely void, but only voidable, and that, in case the deceased has not repudiated the fraudulent release, it stands good. This is very plausible, but also very sophistical.

The inherent right of deceased to bring an action if he so willed, and not his willing it should or should not be brought, is the test which the fair meaning of the language furnishes. It is the liability of the appellant to be so called upon that is the condition precedent to the right of action of respondents. And the answer is that, if he was capable of bringing or had

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Idington J.

any right, notwithstanding what had transpired, to bring an action, then the family can.

Their right, in my view, no more depends upon the expression of his will or that of his representatives than upon the expression of the will of any one else.

Some propositions of law were made in argument relative to the necessity for re-payment by one defrauded, either before or concurrently with his repudiation in order to make it effective.

I entirely dissent from such or any like sweeping proposition in relation to the effective termination of the validity of a transaction induced by fraud.

Its repudiation terminates its validity. There may be an infinite variety of circumstances which may induce a court of justice to impose or not impose terms upon one pursuing his right after such repudiation.

From the grossest kind of wilful deceit down to the case of a dubious form of misrepresentation inducing an unfair dealing, or mere mistake, the variety or complexity of what may or may not be imposed in such cases is so almost infinite that I will not attempt to discriminate herein, where I have not the facts before me, to enable me to do so if I could. All I need say here is that finding the right to repudiate existed in deceased, then the right of respondents to insist that, in fact, the deceased could have so repudiated leaves the path open to respondents to proceed with the action given by this statute.

Whether the doing so may be clogged with such conditions as a court would have imposed upon him must depend upon the development of the facts surrounding the giving of the release.

It may well be that the money he got was in the

way of compensating him for his inability or lessened ability to maintain his family, and, in such case, be properly considered in this case, or it may be that the payment had no relation to any such thing, but merely that personal to himself by way of expenses and for his personal sufferings, when it might be something which did not concern the pecuniary claims of respondents which are alone in question in the action.

I must refrain from doing more than to illustrate here what I have concluded is the nature of the right of action respondents have under the peculiar circumstances in question herein.

I agree with the Court of Appeal that the respondents are entitled to proceed with the action, unless barred by the limitations in the statute which the appellant relies upon and which reads as follows:—

> All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

I do not think this statute of limitation applies to the claim made by the respondents. I have so frequently had to point out that a statute of limitation must, in order to be applicable to any given case, be clearly shewn to have been intended to cover the case in respect of which it is invoked, that I do not deem it necessary to repeat my views at length here.

Every word in the section I have just quoted can be given a plain, ordinary meaning without straining

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Idington J.

them to repeal this Act *pro tanto.* I can hardly imagine any legislature ever intended to repeal any part of the Act upon which respondents' action is founded, and, least of all, by such means as by use of such an enactment as this.

Of course, if the legislation could not be given a clear, sensible meaning without involving repeal of the Act in question, it must stand repealed. We are not driven to any such alternative or subterfuge. The limitation in the "Railway Act" involved in the action in question in the case of the *Canadian Northern Railway Co.* v. *Robinson*(1) is somewhat analogous, and we did not find the limitation there claimed applicable, though much like this, and the Judicial Committee of the Privy Council refused to disturb the ruling.

The English authorities relied on are the result of considerations that are not open to the appellant and to the application in its favour of the clause in question.

On the other hand, a great body of judicial interpretation in this country relative to this very section of the Act and similar Acts, and their bearing upon the Act upon which respondents rest their claim, is ranged against the ground taken by appellants, and, no doubt, has been acted upon for years in this country.

Hence, I do not think, unless imperatively driven to put another view forth, we should disturb what seems so long settled.

The appeal should be dismissed with costs.

(1) 43 Can. S.C.R. 387.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Duff J.

DUFF J. — The first ground of this appeal is that the action is barred by section 60 of the Act under which the appellants' railway is operated. That section is as follows:—

All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

In this connection there are two points: First, whether this action, which charges the appellants with causing the death of the late George Trawford, a passenger on their railway (through negligent default in their duty as carriers), is within the contemplation of this provision. That point was dealt with in *Sayers* v. *The British Columbia Electric Co.*(1), and I think it is unnecessary for me to do more than to say that, having re-considered the question, I see no reason to alter the view which was given effect to in that case.

The other point arises in this way. The respondents contend that, assuming section 60 to apply to an action charging default by the appellants in respect of their duty as carriers of passengers, the dependents of Trawford can, notwithstanding that section, bring their action within the limit of one year fixed by "Lord Campbell's Act." That point also has been dealt with by the courts in British Columbia in *Green* v. *The British Columbia Electric Co.* (2). I was a party to the judgment of the Chief

(1) 12 B.C. Rep. 102.

(2) 12 B.C. Rep. 159.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Duff J.

Justice in that case, in which the opinion was expressed and acted upon that section 60 does not apply to actions brought under "Lord Campbell's Act." I think that view is right, and for the reasons then given.

The principal ground upon which counsel for the appellants contends that the action ought to be dismissed is that the deceased George Trawford, before his death, entered into a contract with the appellants whereby, in consideration of certain sums of money (which were paid), he agreed to release the appellants from all claims for damages in respect of the negligence charged in this action; that this release has never been set aside or repudiated by Trawford or by his legal personal representatives, and that, according to the settled law as to the nature and conditions of the right of action created by "Lord Campbell's Act," the subsistence of this release presents an insuperable obstacle to the respondents' success in this action. "Lord Campbell's Act" created a new cause of action, but, with full acknowledgments for the able argument addressed to us by counsel for the respondents upon the point, I think it must be taken as settled, for this court at all events, that it is a condition of the right of action which the statute confers upon the dependents that the victim should himself have been entitled to maintain an action, if he had lived. As Blackburn J. puts it in *Read* v. *Great Eastern Railway Co.*(1),

> the intention of the enactment was that the death of the person injured should not free the wrongdoer from an action,

or, to use the words of Lush J., in the same case,

> the intention of the statute is to enable representatives of the person injured to recover in a case where the maxim *actio personalis*, etc., would have applied.

(1) L.R. 3 Q.B. 555.

Read's Case(1) was decided forty-six years ago, and the decision seems to have been treated as sound law by Lord Watson, who delivered the judgment of the Judicial Committee in *Robinson* v. *The Canadian Pacific Railway Co.*(2), at page 487. If, therefore, the appellants had proved at the trial that the deceased George Trawford had entered into a contract whereby, for good consideration, he had agreed to release all his claims in respect of the negligence complained of in this action, and the consideration had been paid, and the matter had ended there, that would constitute a complete defence against the respondents' claim. But, in answer to this defence, the respondents allege that the settlement relied upon was obtained by fraudulent misrepresentations and undue influence, and at a time when the deceased Trawford was ill and without legal advice. At the trial, the learned trial judge permitted the appellants to prove the execution of the document—it is not under seal—by Trawford, which is in the following terms:—

> I, George Trawford, do hereby declare, for the sum of $1,000 and doctor's and hospital expenses to date, which I acknowledge to have received on the execution hereof, I hereby release and acquit and forever discharge the B.C. Electric from all claims which I, my heirs, executors or administrators and assigns now have, or may in future have, by virtue of an accident happening to me on the 10th November, 1909, * * * whereby I sustained personal injuries, without acknowledgment on their part of any liability whatever, and I further declare that said release has been read to me and I fully understand its contents.
>
> (Signed) GEORGE E. TRAWFORD.
>
> (Before two witnesses.)

The learned trial judge refused to allow the respondents to shew the circumstances under which this document was obtained, and, treating it as a con-

(1) L.R. 3 Q.B. 555. (2) (1892) A.C. 481.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Duff J.

clusive answer to the respondents' claim, dismissed their action. It seems, however, quite clear to me that if it should appear from the evidence—it is, of course, a question of fact—that Trawford really did agree with the appellants to accept the sum mentioned in full satisfaction of all claims to compensation which he might have in respect of all injuries arising from the negligence in question, but that his assent, although a real assent, was obtained by fraud or by an unconscientious abuse of the opportunity which his situation afforded the appellants, then the respondents would be entitled to say in this action that as Trawford, if he had lived, could have maintained an action against the appellants (notwithstanding the existence of the agreement thus procured), so they, likewise, are not debarred by it from claiming compensation under "Lord Campbell's Act." On the other hand, if it should appear that, in fact, Trawford did not assent, that "his mind did not go with" that which appears upon the document, to use the language of Erle C.J., in *Rideal* v. *The Great Western Railway Co.*(1), so that there never was an agreement, then, although the appellants should be acquitted of fraud, the respondents would be equally entitled, on the same principle, to maintain their action. As to the rights of the appellants arising out of the fact that moneys were paid to Trawford—that is a question which, to some extent, depends upon the facts as developed at the trial. In either of the supposititious cases above suggested, if Trawford himself had been suing, while it seems clear that, in the first case at all events, it would not have been

(1) 1 F. & F. 706.

necessary for him to bring or offer to bring the money into court, [*Clough* v. *London and North-Western Railway Co.*(1)], yet, in my opinion, the defendants would have been entitled to rely upon the document as a binding receipt for the amount in fact paid as a payment on account of the compensation to which Trawford was justly entitled. On the other hand, if it should appear that Trawford had been led to believe, by the artifices of the appellants, that this document was something other than it, in truth, was, and that the receipt he was giving was a receipt for damages only suffered down to the time when the receipt was given, then Trawford would have been entitled to maintain an action for subsequent damages without bringing the amount paid into account; for the appellants would be estopped by their conduct from alleging that the receipt was other than that which they pretended it was. In the last mentioned case, the respondents, in my judgment, would be entitled to have the amount of their compensation estimated without reference to the moneys paid. In either of the other two cases, I think the respondents' action must be subject to the same incidents as Trawford's action would have been, if he had lived—to this extent, at all events, that the appellants are entitled to have the amount paid brought into account.

The substance of Mr. Ewart's contention at this point is that the agreement relied upon can only, at worst, be a voidable agreement which stands and must be given effect to until it is repudiated by the legal personal representatives of Trawford. It occurs to one at once that this contention is open to the obser-

(1) L.R. 7 Ex. 26.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Duff J.

vation that the respondents have not had an opportunity of raising, before the proper tribunal, the question whether or not there ever was an agreement such as that alleged. But, let us assume that such an agreement was really entered into, that is to say, that the mind of Trawford was really brought to the point of assenting to such a settlement as that evidenced by the document produced; and let us also assume that the respondents are in a position to shew that this agreement was brought about by fraud or in such circumstances of unfairness as would have entitled Trawford to rescind it. It follows (I repeat) that Trawford, in his lifetime (there being no suggestion that there was any conduct of his which would have precluded him from repudiating the arrangement), could have maintained an action against the appellants in respect of the negligence upon which the present action is based. That being so, the condition of the statutory right of action is satisfied; the case is, indeed, within the express words of the statute—the death of Trawford having been "caused by wrongful act, neglect or default," and the act, neglect or default being such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

The only criticism Mr. Ewart attempts to make upon this application of the very words of the statute itself is this:—He argues that to permit the action to proceed might be unjust to the estate of Trawford whose legal personal representatives might desire that the settlement should stand. But the only possible interest the estate could have would be to retain the benefit of that which it had received, and if justice should require that the benefit should be

restored without detriment to the estate, or, in other words, at the cost of the dependents, it is for these to say whether or not they will pursue their remedy at such a price. If there is any reason to suppose that the interests of the estate are really involved, there can be no difficulty adding as a party defendant an administrator *ad litem* to keep an eye on these interests.

It might easily happen, of course, that the interests of the estate and the interests of the dependents should be far from identical, and it may very fairly be argued that the Act does not contemplate the estate being called upon to set aside a settlement for the benefit of the dependents at the cost of giving up the advantages the deceased had derived from the settlement. But, on the other hand, I see no reason to doubt that it would be within the authority, if not the duty, of the executor (the interests of the estate being properly protected) to take the necessary proceedings on behalf of the dependents, including the impeaching of any fraudulent settlement; and, if the executor refused to act or if there were no executor, I can see no reason for holding that the right of action vested in the dependents in such circumstances does not *ipso jure* include as one of its incidents this same right to impeach a fraudulent settlement. That seems a reasonable implication when one bears in mind that the object of the statute was to afford a way of escape from the injustice which often attended the application of the principle *actio personalis,* etc., according to the settled doctrine of the courts.

ANGLIN J. — The chief question in this case is whether the plaintiffs, suing under "Lord Campbell's

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Anglin J.

Act," are debarred from maintaining their action by a release of his claim against the defendants arising out of his injuries, given by the injured man, since deceased, in consideration of a payment of $1,000 made to him. In answer to the plea of this release, the plaintiffs reply that it was procured by fraud of the defendants, and is, therefore, not available to them as a defence. The defendants contend that, until the release is set aside, it is binding, and that only the personal representatives of the deceased can take proceedings to set it aside. The plaintiffs, on the other hand, maintain that the issue as to the validity of the release can be raised by them in this action and without the presence of the personal representatives. They also contend that the release, even if unimpeachable, is not a bar to their recovery, because their right of action under "Lord Campbell's Act" is new and independent and not a statutory continuance of the right of action which the injured man had. On the last point, compare *Read* v. *The Great Eastern Railway Co.*(1); *Seward* v. *The "Vera Cruz"*(2), at pages 67 and 70; *Pym* v. *The Great Northern Railway Co.*(3); *Robinson* v. *The Canadian Pacific Railway Co.*(4); and *Williams* v. *Mersey Docks and Harbour Board* (5).

I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation. If, on a proper construction of "Lord

(1) L.R. 3 Q.B. 555.
(2) 10 App. Cas. 59.
(3) 2 B. & S. 759; 4 B. & S. 396.
(4) (1892), A.C. 481
(5) (1905), 1 K.B. 804.

Campbell's Act," it is a condition of the plaintiffs' right of action that the deceased shall have had, at the time of his death, a subsisting and enforceable cause of action against the defendants, as I think the English authorities establish, a release binding on the deceased would seem to present a very formidable—I think an insurmountable—obstacle to the plaintiffs' recovery. It has, however, been the view of some eminent judges that the existence of a cause of action in the deceased, enforceable by him up to the time of his death, is not made a condition of the right of action given to his wife and others by "Lord Campbell's Act." See *Erdman* v. *Town of Walkerton* (1), at page 456, *per* Burton J.A.

But, if the release pleaded by the defendants is voidable for fraud, it did not bind the deceased man. The defendants remained liable to him up to the moment of his death, and, in an action brought by him against the company, if they had pleaded the release, its validity could have been questioned and determined. *Johnson* v. *The Grand Trunk Railway Co.* (2). Apart from the objection that they do not sufficiently represent the deceased, I see no reason why the plaintiffs may not raise and require the determination in this action of the question as to the validity of the release set up by the defendants. That, I think, is the proper practice under modern procedure.

There is, no doubt, some anomaly in permitting the validity of a contract made by a dead man to be impugned in the absence of his personal representative. But, having regard to the nature of the right of action conferred on the wife and other benefic-

(1) 20 Ont. App. R. 444. (2) 21 Ont. App. R. 408.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Anglin J.

iaries by "Lord Campbell's Act," and to the conditions upon which that right is given, I think it essential to "advancing the remedy" which the statute was designed to afford that these beneficiaries should have the same right to attack a release, such as that relied upon, so far as it presents an obstacle to their maintaining their statutory action, as the deceased himself would have had if surviving. Otherwise "the person who would have been liable if death had not ensued" would not be "liable to an action for damages, notwithstanding the death of the person injured," although the statute declares that he shall be so liable. 9 & 10 Vict. (Imp.) ch. XCIII.

The release being impeached for fraud, the court, in the administration of equity, does not require that the money paid by the defendants should be refunded or brought into court as a condition precedent to the right of repudiation being asserted. Equity may be done in the action by deducting the whole of the money already paid by the company, or such part of it, if any, as may be deemed proper, from any verdict which the plaintiffs may recover.

On this branch of the appeal I would, for these reasons, affirm the judgment of the Court of Appeal.

I am also of the opinion that the company cannot set up as a defence to this action section 60 of ch. 55, of 59 Vict. (B.C.), which gives it the benefit of a period of limitation of six months from the doing or committing of such damage, in all actions or suits for indemnity for

> any damage or injury sustained by reason of the tramway or railway or the works or operations of the company.

The plaintiffs maintain that a claim for damages for personal injuries sustained in a railway accident

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Anglin J.

is not within the purview of that provision. While inclining very strongly to that view, I do not rest my judgment upon it, because I am satisfied that the section invoked is not available as a defence in an action under "Lord Campbell's Act." The Ontario Court of Appeal, in *Zimmer* v. *The Grand Trunk Railway Co.*(1), held that a similar limitation provision did not affect rights of action conferred by "Lord Campbell's Act." It would be supererogatory to do more than express my respectful concurrence in the opinions there delivered by Hagarty C.J.O., and by Burton and Maclennan JJ.A., on this point. I would merely add that, if applicable to actions under "Lord Campbell's Act," the provision relied upon by the appellants would entirely cut out the right of action specifically given to the widow and other beneficiaries by the amendment of 27 & 28 Vict. (Imp.) ch. XCV., in all cases where there is an executor of the deceased or an administrator to his estate, because in such cases the right of the beneficiaries to sue arises only after the expiry of six calendar months from the death of the injured person. That cannot have been intended. See, too, *Green* v. *British Columbia Electric Railway Co.*(2).

Two English cases are cited by the appellants in support of their contention that the period of limitation given by the statute which they invoke applies to this action, rather than the period of twelve months from the death specified in "Lord Campbell's Act." They are *Markey* v. *Tolworth Joint Isolation Hospital District Board*(3), and *Williams* v. *Mersey Docks and Harbour Board*(4).

(1) 19 Ont. App. R. 693.
(2) 12 B.C. Rep. 199.
(3) (1900), 2 K.B. 454.
(4) (1905), 1 K.B. 804.

1914

BRITISH COLUMBIA ELECTRIC RWAY. CO. v. TURNER.

Anglin J.

Unless the former decision is to be distinguished on the grounds that the Act there invoked was a public Act, whereas that in question here is a private Act, and that the English statute was enacted for the protection of public authorities and officials, whereas that before us is for the protection of a private corporation, it would seem to be in point. But it is an opinion of a Divisional Court by which we are not bound, and, if it be not distinguishable from the case at bar, I respectfully decline to follow it.

Williams v. *Mersey Docks and Harbour Board*(1), which is a decision of the English Court of Appeal, is clearly distinguishable on the ground that, at the time of his death, the right of action of the injured person had been barred by the limitation provision of the "Public Authorities Protection Act." The existence of a cause of action against the defendants by the deceased at the time of his death was there held to be a condition of the right of action conferred by "Lord Campbell's Act." Here the injured man, admittedly, had a cause of action against the defendants at the time of his death, unless it had been extinguished by the accord and satisfaction evidenced by the release pleaded, of which the validity is in question.

The appeal, in my opinion, fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondents: *Abbott, Hart-McHarg, Duncan & Rennie.*

(1) (1905) 1 K.B. 804.

HIS MAJESTY THE KING (PLAINTIFF) ..... APPELLANT;

AND

DAVID TANCRÈDE TRUDEL AND ARTHUR PAQUIN (DEFENDANTS) ..... RESPONDENTS.

1913
*Nov. 14.

1914
*March 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of lands—Estimating compensation—Prospective value—Evidence.

In expropriations of lands for public purposes, under the 198th section of the "Railway Act," R.S.C. 1906, ch. 37, as authorized by section 15 of the "National Transcontinental Railway Act," 3 Edw. VII. ch. 71, the estimation of compensation to be awarded to the owners of the lands should be made according to the value of the lands to such owners at the date of expropriation. The prospective potentialities of the lands should be taken into account, but it is only the existing value of such advantages at the date of expropriation that falls to be determined. *In re Lucas and the Chesterfield Gas and Water Board* ((1909), 1 K.B. 16), and *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste*, (30 Times L.R. 293), followed.

Per Duff J.—The opinions of witnesses to the effect that certain values would be assigned to expropriated lands upon a comparison of those lands with other lands in the vicinity for which selling prices might be estimated in a vague way cannot be deemed evidence sufficient to establish values for the expropriated lands.

(Leave to appeal to the Privy Council was refused, 20th May, 1914.)

APPEAL from the judgment of the Exchequer Court of Canada which awarded the defendants, respondents, the sum of $18,203.72, as compensation and indemnity for the expropriation of their lands taken, under the provisions of the "National Transcontin-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

THE KING v. TRUDEL.

ental Railway Act," 3 Edw. VII., ch. 71, and section 198 of the "Railway Act," R.S.C., 1906, ch. 37, for the purposes of the National Transcontinental Railway.

The circumstances of the case and the issues on the present appeal are stated in the judgments now reported.

G. G. Stuart K.C. and *Alfred Désy* for the appellant.

Belcourt K.C. and *Guillet K.C.* for the respondents.

THE CHIEF JUSTICE.—In this case, His Majesty, upon the information of His Attorney-General, asks that the compensation due the respondents for certain lands taken for the right-of-way of the National Transcontinental Railway be ascertained.

The tract of land expropriated contains sixteen acres and a fraction and forms part of lots Nos. 26, 27, 28, 29 and 30 in the Township of Mailhiot, County Champlain, Province of Quebec; the amount offered as compensation by the Crown is $3,280.51, the amount claimed by the respondents is $43,688.94, and the amount of the award below is $18,203.72 with interest.

The total area of the five lots traversed by the line of railway, and out of which the sixteen acres in question were taken, is about 914 acres. These lots were acquired from the Crown between the year 1881 and 1903 for $274.20. The respondents purchased them for $3,211.25 in 1910 and 1911.

The line of railway was first located across the property in question in 1905 and it was subdivided into building lots several years afterwards.

In July, 1908, formal notice of expropriation was

1914

THE KING
v.
TRUDEL.

The Chief Justice.

given. The question to be determined is the value of the land at the time the property was taken by the Crown.

In a very recent case, the *Cedar Rapids Manufacturing and Power Company* v. *Lacoste*(1), at page 294, their Lordships said:—

> The law of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*(2), where Lord Justices Vaughan Williams and Moulton deal with the whole subject exhaustively and accurately.
>
> For the present purpose, it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

And their Lordships add further:—

> That price must be tested by the imaginary market which would have ruled had the land been exposed for sale (at the time notice of expropriation was given).

In railway expropriation cases, section 198 of the Act provides:—

> The arbitrators or the sole arbitrator in deciding on such value or compensation, shall take into consideration the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands. 3 Edw. VII. ch. 58, sec. 161.

It is common ground that the lots in question are totally unfit for agricultural purposes and their bare value is very trifling. The respondents, however, con-

(1) 30 Times L.R. 293.

(2) [1909] 1 K.B. 16.

1914

THE KING v. TRUDEL.

The Chief Justice.

tend that they are in large part well adapted for building sites, hence their claim that they should be dealt with as building lots. The value of the property for that purpose depends upon the law of supply and demand. The evidence is not, it is quite true, very satisfactory, but it establishes beyond all doubt, in my opinion, that in view of the quantity of land available, the needs of the relatively sparse population and the prospect of future industrial development, the amount awarded is out of all proportion to the present value of the land or to any advantage which it has or is at all likely to possess for many years to come.

The total population of LaTuque in 1905 was under 1,000. It increased to two thousand in 1908 and to four thousand in 1912. Any future increase depends admittedly upon the further development of a water-power which is in the immediate neighbourhood of the land taken. In 1911, or thereabouts, a pulp-mill was built which, when completed, will employ five or six hundred people. That is the only local industry permanently established and the possibility of further development is very remote. There is no reasonable prospect that other industries will be established there in the near future. LaTuque is the western terminus of a branch line of the Lake Saint John Railway built to serve the purposes of the pulp-mill and it is traversed by the National Transcontinental Railway, but it does not appear that any material addition to the population has resulted, or is likely to result, from the existence of those roads; on the contrary, there is some evidence produced by the respondents to shew that, by reason of the construction of the railway bridge across the river the development of the water-power has been retarded, if not permanently pre-

vented, so that, on the whole, there is a very poor prospect of anything like a fair demand for building lots.

The next question is: What is the area of the land available to satisfy any demand that may reasonably be expected to arise? In addition to the 914 acres owned by the respondents there is available and open for purchase the large area, owned by the Stuart and Tessier Syndicate, more favourably situated as regards the water-power and the pulp-mill and, therefore, more attractive for places of residence for those engaged in that industry. That property has this additional advantage that the church, the convent, the school and the railway stations are all built upon it.

In these circumstances I find evidence that there is no considerable demand for building lots — the floating population engaged at the mill and in connection with the railways in process of construction is not likely to reside permanently in LaTuque, and the area available is far in excess of the demand. It is impossible, in my opinion, to say that, if, at the time the land was expropriated, it had been put up for sale, it could have been sold for building purposes, and, if sold at public auction in the open market, it would not have brought anything like the price awarded by the judge of the Exchequer Court.

It is quite true that there is evidence of the sale of some lots at six cents a foot, but I am not satisfied that these sales represent anything like the value realizable at an open, honest sale.

In any event, in 1908, barely three per cent. of the lots located were sold and there were in all ten to twenty small houses built on them.

If one compares the prices at which the property held by the Stuart and Tessier Syndicate was sold,

1914

THE KING v. TRUDEL.

The Chief Justice.

we get, I think, the only reliable evidence of value on which a satisfactory conclusion can be reached. That syndicate sold, on the 30th of January, 1908, 19 acres for $2,850, on the 20th December of the same year three acres and a fraction for $477; on the 11th of November, 1910, thirty-two acres for $4,914.60. As I have already said, these are the prices realized in the open market for land more advantageously situated than that of the respondents. On the whole, I am satisfied that the indemnity offered by the Crown was not only fair, but generous. The respondents will be recouped the whole of their original outlay and they will still have available for sale, as building lots, over 930 acres. If their previsions are realized they will have a very handsome profit out of the balance of their lands, due, no doubt, to some extent, to the existence of the National Transcontinental Railway.

Much reliance was placed upon the evidence of witness Bourgeois. Here is what he says:—

Q. Voulez-vous dire quelle était la valeur de ces terrains en mille neuf cent huit?

R. La valeur de ces terrains-là, ils avaient acquis plus de valeur parce que c'était une site de ville.

Q. Combien est-ce que ça valait dans le temps à l'arpent ?

R. Pour moi, ça ne valait pas absolument grand'chose.

Q. Donnez-nous donc un chiffre, donnez-nous donc ce que ça valait pour vous; c'est ce que nous voulons savoir.

R. Ah— ça valait . . . je ne sais pas comment les lots se vendaient. Je n'ai pas demandé combien ça se vendait, ni, quelle était la valeur de ce terrain-là à l'arpent au mois de juillet mil neuf cent huit.

PAR LE COMMISSAIRE:—

Si vous n'êtes pas capable répondre, dites-le.

R. Je préfère ne pas répondre que de lancer des chiffres sans être capable de les appuyer.

Q. Voulez-vous nous dire quel était le maximum de la valeur de ces terrains-là au mois de juillet mil neuf cent huit, au meilleur de votre connaissance?

R. Pour moi, personnellement, ça valait trois à quatre cents piastres de l'arpent.

1914

THE KING v. TRUDEL.

The Chief Justice.

I do not think that such evidence can be taken into consideration in the face of that given by Tessier, Scott and others.

I would allow the appeal with costs on the ground that the amount offered by the Crown was full compensation for the land taken.

IDINGTON J.—This is a most unsatisfactory case. The judgment seems to have some evidence to support it. Indeed, there can be found evidence in the case to support almost any conceivable judgment.

Yet the result seems apt to shock the ordinary man if allowing his stock of common knowledge to be brought to bear upon the evidence. It is the market price which must govern.

To say that the market price for a block of ninety-three lots, not to be selected by way of picking them out, but by virtue of an arbitrary line drawn directly across a survey of over two thousand such lots cut out of a recent wilderness to form part of a future city, must be measured by the prices got for isolated sales of a few single lots a year, spread over a period of years, seems to me unsound.

Yet something like this seems the process of reasoning adopted, default evidence having been directed to the purchase or possible purchase of such large blocks as is involved herein.

There is only one instance given in this survey of such way of looking at the matter and that is of an alleged offer for twenty lots which was refused and it affords no fair comparison with the block here in question. That block seems to have been compact and may have presented exceptional advantages which this does

1914

THE KING v. TRUDEL.

Idington J.

not, stretching over a long space of some possibly well-situated, and of others ill-situated.

If, as seems likely, the whole survey is on the average no better or worse than this block in question, then it is worth four hundred thousand dollars.

I imagine, if valued for purposes, for example say of succession duties, those concerned would be much surprised if asked to pay on such basis as adopted.

By comparison of this with sales made by a syndicate of a neighbouring block the price seems grossly excessive. And allowing most liberally for special collateral advantages possibly entering into that transaction, the price fixed here seems yet greatly excessive.

If there had happened to be an active market for these lots in respondent's survey, even if at excessive prices as result of temporary speculation when appellant's plan of expropriation declared, there would have been more ground for accepting such sales as a guide.

If we estimate the whole survey as worth even only a hundred thousand, instead of four hundred thousand dollars, the interest and taxes would eat up all the proceeds of sales and shew it was monstrous folly to expect to realize a profit by holding at similar prices and awaiting the building of the future city that might, in half a century hence, warrant such prices.

On the evidence before us, I do not think respondents have supplied a foundation for claiming any sum beyond that tendered by the Crown.

I would allow the appeal with costs.

DUFF J.—This appeal arises out of an information exhibited in the Exchequer Court under the "Expropriation Act." The lands in question comprise about

1914

THE KING v. TRUDEL.

Duff J.

sixteen acres in LaTuque, which is now a small town, on the River St. Maurice in the Province of Quebec. The lands were required for the way of the National Transcontinental Railway, and, a plan and description having been filed on the 2nd of July, 1908, it is with reference to that date that the compensation and damages are to be ascertained. The defendants advanced a claim for compensation and damages at the rate of six cents per square foot, the Government having tendered the sum of $3,280.51. The learned trial judge allowed the defendants for compensation and damages two and one-half cents per square foot — $18,203.72 in the aggregate. The Crown appeals.

I have come to the conclusion that the amount allowed by the learned trial judge is excessive, but that the amount tendered by the Crown was insufficient. At the time in question — July, 1908 — the terminus of the Quebec and Lake St. John Railway, which had been in operation for a year, was in the locality now the Town of LaTuque. The locality had also been for some time the centre of supply distribution in connection with the construction of the National Transcontinental Railway. There were, it appears, some twenty or thirty houses in the vicinity of the property in question and there were some two thousand people — mostly living in tents — a transient population brought there largely, if not exclusively, in connection with the construction of the railway. There were no other industries then established. But there was a water-power on the River St. Maurice which had been acquired by the Quebec, St. Maurice and St. John Industrial Company, and arrangements had been made for the development of it, which subsequently took place, and for the establishment of a pulp-mill,

1914

THE KING v. TRUDEL.

Duff J.

which was afterwards erected and is now in operation. The locality had already attracted the attention of speculators as the probable site of a future town, and, in 1907, a syndicate (referred to throughout the evidence as "the syndicate") had purchased a considerable tract of land which lies immediately to the north of the defendants' property. The defendants' lands, which comprised parts of lots 26, 27, 28, 29 and 30 of the Township of Malhiot, were granted by the Crown at various times, between 1881 and 1903, the prices paid amounting in the aggregate to $274.20. The defendants acquired lots 29 and 30 in June, 1910, for $2,000, and lots 26, 27 and 28 in the following year for $1,211.25; the total areas comprised within the five lots amounted to 914 acres. The strip which has been taken for the purposes of the railway is worthless for agricultural purposes and is capable of being used economically only as affording sites for building. In 1907, it had been surveyed and laid off in small building lots of about 50 by 200 feet. The learned judge has held that these lots had a market value which he puts at 2½ cents per square foot, including in this, however, an allowance for the injurious affection of other parts of the defendants' lands not included in the part expropriated.

I think the learned judge has fallen into some misapprehension in appreciating the evidence offered in support of the defendants' claim. The principle of compensation is, of course, well settled. It is stated very clearly in the following passage from the judgment of Moulton L.J. in *Re Lucas and Chesterfield Gas and Water Board*(1), at page 29:—

> The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner

(1) (1909) 1 K.B. 16.

receives for the land he gives up their equivalent, *i.e.*, that which they were worth to him in money. His property is, therefore, not diminished in amount, but, to that extent, it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser.

Where future advantages are in question, the principle to be applied is that expounded by Lord Dunedin in the *Cedar Rapids Case*(1). His Lordship says, at page 294:—

> For the present purpose it was sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking—not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The point to be determined, therefore, in this case is:—How much was the property worth to its owners in July, 1908, taking into account the possibilities of future use, but estimating those possibilities at their value as of that date? In considering this question it may be observed one is not entitled to exclude any value arising from the advent of the National Transcontinental Railway in so far as that should be due to causes affecting lands in the locality generally and not these lands specially. (Section 198 of the "Railway Act.") Now, first, I think it is abundantly clear from the evidence that, in July, 1908, there was not a market for the property (as building lots) which the defendants had subdivided into lots and of which the strip in question formed a part. There is evidence of thirteen sales prior to that date. There is evidence also that the sum of $4,000 had been offered for twenty lots, situated a short distance from the line of the railway, but, on the other hand, there was available for building sites a large area of land owned by

(1) 30 Times L.R. 293.

1914

THE KING v. TRUDEL.

Duff J.

the "Syndicate" and various points yet remained to be settled to determine the comparative advantages of different localities. The expected population, as pointed out, would be largely an industrial population, and experience seems to shew that such a population usually establishes itself in the vicinity of the church, the school and the shops. Until these localities should be identified it was not to be expected that lots would be purchased in great numbers for building purposes. How is one, then, to ascertain what this land was worth in money to the owners of it at that time ? One can only figure to one's self an imaginary purchaser in touch with all the circumstances and considering the investment of money in the purchase of land in LaTuque for the purpose of re-selling it. What, to the mind of such a purchaser, would have been a fair and reasonable price (*i.e.,* a price justifiable in the eyes of a prudent investor) to pay for this property ? Now, the evidence offered on behalf of the defendants, with the exception of the evidence shewing actual sales and the offers to which I have referred, seems to be of very little value indeed, for the purpose of determining such a question. For the presupposition on which all this evidence appears to be based is the fallacious assumption expressed in the following passage in the testimony of the Reverend E. Corbeil:—

Q. Les terrains indiqués au plan?

R. En autant que dans une paroisse il y a une connaissance publique que telle terre vaut telle somme et que telle autre terre vaut telle autre somme, il y a un marché dans la paroisse, or, je sais d'après l'estimé public ce que les lots valent et je peux le dire.

The evidence of this witness and of witnesses of the same class as to value is given with reference to this loose conventional standard — if standard it can be called.

The witnesses, in a word, are not dealing with the question of what price this sixteen acres would bring or what this sixteen acres was actually worth to the owners in money; but the price which, according to the public talk in the locality, would be assigned to these lots upon a comparison with the supposed value of other lots. That is not of much assistance in view of the facts that the number of actual purchasers was so small, that the actual demand for lots for building purposes was so limited, and that the population was of the transient character that marked the population of LaTuque in July, 1908. Moreover, the prices actually paid by the defendants themselves, in 1910, afford a strong reason for thinking that this evidence does not afford any really trustworthy guide. On the other hand, there is some ground for thinking that the prices paid to the "Syndicate" by the Commissioners do not represent the full value of the land purchased and there is evidence given by one of the witnesses, called and put forward by the Crown as a competent person to pass upon the value of the property, that this property could have been sold at a price of from $300 to $400 an acre. This evidence, taken together with the prices paid and offered to the defendants for particular lots or groups of lots justifies one, I think, in holding that the defendants ought to be compensated at the rate of $400 per acre — this sum to include all damages.

ANGLIN J.—The disposition of this case is by no means free from difficulties. The parties are very far apart in their appreciation of the value of the expropriated property and they differ radically as to the proper basis of valuation. They agree that it is the

1914

THE KING v. TRUDEL.

Anglin J.

market value of the land taken at the date of the expropriation which is to be allowed: but there is the widest possible divergence of views and opinions as to what that market value was and as to how it should be estimated.

It is common ground that as agricultural land the property is worth little or nothing. Its value is derived entirely from the proximity of two railways and the location of the works of the Quebec and St. Maurice Industrial Company. In July, 1908, when the expropriation took place, no railway had yet been constructed into LaTuque, but the Lake St. John Railway was in course of construction and the location of the right-of-way and the situation of its terminal station were known. The water-power now used by the Quebec and St. Maurice Iudustrial Company had already been acquired by it; the approximate location of its works was well understood; but no actual work of construction was done until October, 1909. The advent of the Transcontinental Railway itself was a practical certainty (*James* v. *Ontario and Quebec Railway Co.*(1)). These facts, no doubt, gave the defendants' land a substantial value; but it was a value wholly prospective. In considering what should be the amount of compensation, these potentialities must be taken into account as such and, whatever market value they had then given to the lands expropriated must be allowed for. The owners are entitled to be treated as if bargaining with a purchaser in the market. *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste et al.* (2). Of anything which a far-seeing purchaser would take into account in estimating what he should pay for

(1) 15 Ont. App. R. 1. (2) 30 Times L.R. 293.

the property (subject to the provisions of section 198 of the "Railway Act") the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation. 6 Halsbury, Laws of England, pages 36-39. No doubt, the possibilities to which I have referred were, at least to some extent, taken into account in fixing the price when the defendants bought their property; and what they paid for it, not very long before the date of the expropriation, is a material element for consideration in determining the compensation they should receive. *In re Fitzpatrick and New Liskeard*(1).

The Rev. Curé Corbeil says that, at one time, it was expected that the parish church would be built on the defendants' property. If that expectation had been realized, the probability of their being able to dispose of a large part of their lands as building lots would have been much greater. But the site for the church was changed, probably before July, 1908, although the precise date of the change is not made clear in the evidence.

For the defendants, five disinterested witnesses pledged their oaths that the defendants' land was saleable in July, 1908, as building lots at four cents per square foot, corner lots being worth six cents per square foot.

For the Crown, four witnesses — of whom one had comparatively slight means of knowledge and another would appear to have been not wholly disinterested —deposed that the value of the lands should be estimated by the acre, and placed it at $150 per acre. Another Crown witness, Ritchie, declined to put a

(1) 13 Ont. W.R. 806.

1914

THE KING v. TRUDEL.

Anglin J.

value on the land expropriated, and still another, Benjamin Bourgeois, city engineer of Three Rivers, when pressed by counsel for the Crown, valued it at $300 to $400 per acre. No doubt, large areas almost in the immediate neighbourhood were sold to the Transcontinental Railway and to the Quebec and St. Maurice Industrial Company at $150 an acre, but special advantages resulting to other adjacent properties of the vendors probably influenced them in making these sales. Before July, 1908, other neighbouring proprietors had sold some building lots at $200 and $300 a piece. The defendants themselves had actually sold thirteen lots at similar figures and they had refused an offer of $4,000, or four cents per square foot, for twenty lots, because corner lots were included for which they were asking six cents per square foot. But this was when it was expected that the church would be built on the defendants' property and there was much speculation as to the site of the station, shops, etc., of the Transcontinental Railway itself.

In 1908, the Municipality of LaTuque did not exist. There were some fifteen houses on the lower level and ten or twelve on the upper level. The first municipal election was held in 1909.

Taking all these facts into account and weighing all the evidence, I am convinced that, at the time of the expropriation, it was not fairly to be expected that the defendants could dispose of the ninety-three lots, or of any considerable number of them, as lots for building or other purposes, within a reasonable period of time. There was not a market for them as lots and they cannot properly be said to have had a market value as such. On the other hand, taking all the facts and potentialities into consideration, I am

disposed to think that the figure named by Bourgeois, a Crown witness, viz., $400 per acre, approximately represents the value of this land on an acreage basis — and that, I think, is the true basis on which their value should be estimated. If anything, $400 an acre is, perhaps, a little beyond the actual value. I allow something for compulsory purchase.

Having regard to the provisions of section 198 of the "Railway Act," I think that any damage occasioned to the adjacent lands of the defendants by the construction of the Transcontinental Railway has been offset by the special advantages which these lands have derived from the immediate proximity of it. This was the opinion of the Rev. Curé Corbeil, a chief witness for the defendants.

Although always loath to interfere with the assessment of compensation in such cases by the judge of first instance, I feel compelled, for these reasons, to reduce the award in the present instance from $18,203.72 to $6,686.40. The Crown should have its costs of appeal.

BRODEUR J. agreed with the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *Alfred Desy.*
Solicitors for the respondents: *Belcourt, Ritchie & Chevrier.*

1914

*Feb. 3, 4.
*March 2.

GEORGE DAYNES (PLAINTIFF).....APPELLANT;

AND

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Practice—Rejection of evidence—Memorandum by witness—Withdrawing case from jury—New trial—Negligence—Operation of tramway—"Block and Staff" system—Disregard of rules—Defective system.

On the trial of a case it is permissible for a witness to consult a copy of a memorandum respecting circumstances attending the occurrence of an accident, which was made by himself at the time, in order to refresh his memory. The refusal of the trial judge to permit him to do so is ground for ordering a new trial.

The trial judge is not justified in withdrawing a case from the jury on the ground that the evidence establishes contributory negligence on the part of a plaintiff unless no other conclusion can be drawn from it.

A motorman in the defendants' employ was injured in a collision with the car ahead of that upon which he was performing his work. The company's operation rules provided that cars operated in the same direction, as "double-headers," unless block signals were in use, should be kept at least five minutes apart, except in closing up at stations; also that, when the view ahead was obscured, cars should be kept under such control that they might be stopped within the range of vision, but the rule was not enforced. The plaintiff, one of the company's motormen, on a foggy night, ran his car into the rear of another car standing at the station he was entering, and sustained injuries for which he claimed damages, alleging a defective system. The defence set up contributory negligence on the part of the motorman, but made no allusion to the breach of these regulations. A judgment, entered on the verdict of the jury in favour of the plaintiff, was set aside by the Court of Appeal on the ground that the injury had resulted in consequence of the plaintiff's disregard of the rules.

---

*PRESENT: —Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

DAYNES
v.
BRITISH
COLUMBIA
ELECTRIC
RWAY. CO.

Held, that as the rules had not been enforced by the defendants nor set up in their pleadings they could not be relied upon in support of the charge of contributory negligence.

Judgment appealed from (17 B.C. Rep. 498) reversed and a new trial ordered.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment entered by Hunter C.J., on the findings of the jury at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note.

S. S. Taylor K.C. for the appellant.
Ewart K.C. for the respondents.

THE CHIEF JUSTICE. — I concur in the judgment ordering a new trial.

IDINGTON J. — I think this appeal should be allowed with costs, save so far as the costs incidental to the appeal may have been increased by reason of the appeal seeking to resist the granting of a new trial. It does not seem to me a case where the rule applicable to divided success can be applied.

The rule invoked by the judgment of the learned Chief Justice of the Court of Appeal does not seem to me to have had any statutory support binding the company and its employees to observe same.

And on the evidence, the rules, which are put forward as binding the appellant do not seem to have been adopted by the company. Indeed, they seem to have been so ignored by the management of the com-

(1) 17 B.C. Rep. 498.

1914

DAYNES v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Idington J.

pany in the running of the cars in question, that respondent cannot now rely on same as binding appellant and other employees.

The defence set up by the pleading and particulars given thereunder makes no allusion to the breach of any such rules by respondent. The case before us, therefore, does not permit of any such defence save in so far as the rules themselves be conformable with good practice according to the recognized system of the management of the company in running the cars in question.

The case must be tried according to the recognized system or practice of the company in that regard and the duty which the law imposes on any such company to adopt reasonable methods of safety and, upon any one occupying such a position in the service as appellant did, to take due care in avoiding negligence so far as he reasonably could in accordance with the requirements of such a service and the discharge of his duties thereunder.

It would seem from what transpired at the trial as if the company's management looked upon the exchange of staffs carried by crossing cars as a sort of block system and in itself thus excluding the application of the rule invoked.

There is evidence to support the verdict and no such clear, unconflicting evidence to sustain the charge of contributory negligence as the proximate cause of the accident as would entitle a judge to withdraw the case from the jury and dismiss the action.

However, I, with great respect, think the learned trial judge erred in rejecting the evidence tendered during the examination of the witness McCutcheon, and see no escape from directing a new trial.

1914

DAYNES v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

Under the circumstances I cannot say that there has been no miscarriage of justice resulting from such misdirection.

The costs of the trial should abide the event of the new trial.

DUFF J.—I think Mr. Taylor has succeeded in establishing his contention that rule 91 which was so much relied upon in the court below, was not observed by the company in the operation of the line in question. The rule in its nature seems to be one impossible to apply in its entirety to a line operated as this was. Rule 210 shews that this system required, and, indeed, it is the very basis of the system, that all trains shall move either by time-table or pursuant to special written orders. Admittedly there was no time-table, and if there were written orders they were apparently exceptional. The defence based upon the rule was obviously an afterthought. It was not set up in the pleadings and appears to have occurred to nobody until counsel for the respondents began to examine the book of rules which was put in evidence by counsel for the appellant. The question of substance appears to be whether the jury could reasonably reject the defence set up in the pleadings, and insisted on at the trial, viz., that the appellant cannot be acquitted of contributory negligence in approaching Strathcona Station without having his car under better control. I have carefully considered all the circumstances bearing upon this point. The point is a doubtful one, but on the whole I think the view of the learned Chief Justice, before whom the case was tried, is the better view, and that it was proper that the jury should be asked to pass upon the question.

1913

DAYNES v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

I do not enter into the evidence in detail because I concur with the opinion expressed by two of the learned judges of the Court of Appeal that the evidence of McCutcheon was improperly rejected and that on that ground there ought to be a new trial. As to the costs I think the appellant is entitled to the costs in this court, and the respondents should be entitled to the costs of the appeal to the Court of Appeal. The costs of the former trial should abide the result of the new trial.

ANGLIN J.—The jury was fully justified in finding that the defendants were guilty of gross negligence because of their defective system, or utter lack of system, in the operation of their railway. With great respect, the earlier part of rule 91, for breach of which the majority of the learned judges of the Court of Appeal have found the plaintiff to have been guilty of contributory negligence, cannot, in my opinion, be invoked by the defendants. The particulars of contributory negligence delivered by them make no allusion to this breach of rules. The evidence shews that rule 91 was not enforced in the practice of the company. Indeed, the methods adopted in operating their railway would seem to have made it impracticable to carry out that rule in so far as it relates to keeping trains five minutes apart. The necessary means were not provided. I rather think that if disposing of this case as a trial judge sitting without a jury I would not improbably take the view of the learned Chief Justice of the Court of Appeal that the proximate cause of the accident in which the plaintiff was injured was his own failure to have his car, when coming into Strathcona Station, under proper control,

having regard to his expectation that the preceding car, the "Cloverdale," might still be stopping at that station, to the fact that the night was dark and foggy, the range of vision being only from eight to twenty feet at the point in question, and to the requirement of rule 91 (which, though not capable of being enforced in practice in other respects, is, in this particular merely an expression of an obligation entailed by common prudence in entering a station where it is not unlikely that another car is standing) that

> when the view is obscured by curves, fog, storms or other causes, they (trains) must be kept under such control that they may be stopped within the range of vision.

But in so dealing with the case I would be discharging the functions of a jury. I cannot say that the evidence bearing on the issue of contributory negligence is not susceptible of another view, or that any other conclusion than that reached by the learned Chief Justice would be so clearly unreasonable that it would be perverse. I am, therefore, unable to agree in the judgment of the Court of Appeal dismissing this action, which was necessarily based on the opinion that it should have been withdrawn by the trial judge from the jury. *Primâ facie* an issue of contributory negligence is for the jury and the case must be very clear when a trial judge is justified in taking it from them on the ground that contributory negligence has been so conclusively established that no jury could reasonably find otherwise.

But the verdict cannot be reinstated. I agree with Martin and Irving JJ.A., that the evidence of McCutcheon was improperly rejected. In order to refresh his memory he was entitled to look at the copy

1914

DAYNES v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

of his notes, which he was prepared to verify as having been made by himself from the original which was a transcript of his stenographic report of the interview between the plaintiff and the defendant's superintendent. His evidence would have borne directly on the main issues and it is impossible to say that its rejection did not materially affect the determination of those issues. There must be a new trial.

BRODEUR J.—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stocton & Smith.*

Solicitors for the respondents: *McPhillips & Wood.*

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } APPELLANTS.

AND

THE GRAND TRUNK RAILWAY COMPANY ..... } RESPONDENTS.

1914

*March 10.
*March 23.

(MYRTLE BRIDGE CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways — Crossing lines — Overhead bridges — Contract for maintenance—Future traffic.

A railway company wishing to cross the line of another contracted with the latter for four crossings, three by an overhead bridge and one by a subway under a bridge of the other company. The contract contained this provision: "The said several crossings * * shall all be maintained at the cost of the Ontario Company (junior road), and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company (senior road)." The said bridges were to be constructed according to plans and specifications settled and approved by the chief engineer of the senior road, and if the junior failed to maintain them to the satisfaction of said chief engineer the senior could cause the necessary work to be done at the cost of the other company.

Held, that the obligation of the junior road was not merely to keep the crossings in good and sufficient repair in the condition they were in when the contract was made, but they could, at any time, be ordered by the Railway Board to make them fit for the heavier traffic caused by the increased business of the senior road.

CASE stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada on the question of law raised by the parties.

The following is the case stated by the Board, omitting the portions not material on this appeal:—

*PRESENT:—Idington, Duff, Anglin and Brodeur JJ.

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

1. For the purpose of the construction of the Ontario and Quebec Railway Company's line (now controlled by appellants), that company entered into an agreement with the Midland Railway Company (controlled by respondents) providing for four crossings of the line of that company, three of which, under the agreement, were to be effected by means of structures built over the line of the Midland, and one (the crossing now in question), by a structure carrying the Midland track over the line of the Ontario and Quebec Railway.

2. The following is a true copy of said agreement:—

"This deed made this twenty-first day of February, in the year of Our Lord, 1883.

"By and between:

"The Midland Railway of Canada, hereinafter called the Midland Company, of the first part, and

"The Ontario and Quebec Railway Company, hereinafter called the Ontario Company, of the second part.

"Whereas the Ontario Company propose with their line to cross the lines of the Midland Company at the points and in the manner following, that is to say:

* * * *

"The Whitby section by an undercrossing at or near Myrtle station.

* * * *

"And whereas the Ontario Company desire the Midland Company to assent to the said respective crossings, and the Midland Company is willing to do so, but only upon and subject to the terms and conditions hereinafter expressed, and the performance of which forms the consideration for the said consent.

"Therefore, this deed witnesseth that in this deed

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

the words 'The Ontario Company' shall mean the party hereto of the first part, and the words 'the Midland Company' shall mean the party hereto of the second part.

"That in consideration of the premises and of the covenants and agreements hereinafter contained on the part of the Ontario Company to be by the Ontario Company observed, kept, and performed, they, the Midland Company, have and by these presents do grant unto the Ontario Company, their successors and assigns forever, the easements, rights, and privileges of crossing with their railway the lines of the Midland Company as follows, that is to say:—

* * * *

"4. At Myrtle, on the Whitby and Port Perry section of the Midland Company's line, by an undercrossing.

* * * *

"With respect to the said undercrossing of the Midland Company's Whitby section or line, it is expressly covenanted and agreed that the Ontario Company shall prepare and submit to the chief engineer of the Midland Company the detailed plans and specifications for the work to be done.

"That these plans and the specifications for the work shall, before the work is commenced, be settled and approved by the said chief engineer of the Midland Company, and when approved by him shall be signed by him, and his signature shall be the only evidence receivable of his said approval.

"That the whole of the material used in the work of every kind, and the workmanship, shall be in accordance with the plans and specifications, so after the execution of these presents to be settled, agreed

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

upon, and signed, and shall be done to the entire satisfaction of the said chief engineer of the Midland Company.

* * * *

"That the said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company; and against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Company shall and will save the Midland Company harmless.

"That, if at any time the Ontario Company fail or neglect to maintain the said crossings respectively to the satisfaction of the chief engineer for the time being of the Midland Company, the said last-mentioned company may cause such repairs to be made, or said maintenance to be done, as by their said chief engineer may be deemed necessary, and the cost of so doing shall, on the account therefor, certified by the said chief engineer of the Midland Company, being presented, be paid in cash."

* * * *

4. The Canadian Pacific Railway Company, in operating a steam shovel used in making betterments in its line, damaged the bridge carrying the Midland line over its tracks (the crossing in question), and on February 6th, 1913, made application to the Board for its approval of temporary false work to support the bridge.

5. The Grand Trunk Railway Company (owning and operating the Midland Railway), then made application to the Board for an order directing the

Canadian Pacific Railway Company, at its expense, to reconstruct, in accordance with stress sheet, dated 5th March, 1913, and submitted therewith, and thereafter maintain in a good and proper condition of repair, the bridge in question (which provides the undercrossing referred to in the agreement), so that the same shall be safe for the passage thereover of the traffic on the Grand Trunk Railway. It is on this application that Order No. 19298 has been made by the Board.

6. Under the ordinary practice of the Board, the Canadian Pacific Railway, as the junior line, would have to provide a bridge sufficient for the present proper and reasonable requirements of the Grand Trunk, as ordered by the Board.

7. The crossing in question having, however, been constructed under the above agreement, and not under the Board's order, the issue between the parties is determined by the agreement.

The question reserved at the request of the Canadian Pacific Railway Company for determination by the Supreme Court of Canada is:—

Whether or not, under the agreement, the obligations of the Canadian Pacific Railway Company are confined to maintaining the bridge as originally constructed, irrespective of the increased requirements of traffic carried on the Grand Trunk Railway.

8. Should the opinion of the said Court be that the liability of the Canadian Pacific Railway Company is so limited the Grand Trunk Railway Company will pay to the Canadian Pacific Railway Company the sum of Two Thousand Two Hundred and Fifty Dollars ($2,250), the additional cost of a bridge

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

to carry the increased load, and one-eighth of the annual cost of up-keep.

* * * *

W. N. Tilley, for the appellants.

Lafluer K.C. and *Chisholm K.C.* for the respondents.

IDINGTON J.—The dispute in question herein turns upon the construction of the following clause in the agreement between the respective predecessors in title of the parties hereto.

> That the said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company; and against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Company shall and will save the Midland Company harmless.

It is the crossing that is to be maintained and evidently in perpetuity. To interpret the word "maintained" (a word of varying and doubtful import) as used here we must look at the scope and purpose of the whole agreement, and bear in mind the relation of the parties to each other, and why and how that came about. We must also bear in mind that the parties must have observed and known in 1883 (what every person having to do with railway building and maintenance then knew so well) that there was a continuous tendency to increase the load and consequent strain put upon such structures as this, and we must, therefore, assume that they anticipated the possibility of reconstruction to meet such emergency.

When we bear all these things in mind, I think we must conclude that the party covenanting became bound to provide against each and all such emergen-

cies and undertook with the other to bear whatever expenses were necessary to maintain the crossing in such manner as to enable that other safely to pass over with such load as at the time and occasion of its doing so might reasonably be used in the course of its business.

I do not think that the reference made to the manner in which other crossings were to be then executed can determine anything relative to this, or that the manner in which this one was to be constructed or the method by which the temporary agreement for executing the work was specified, can have anything to do with the matter now arising.

The parties were very properly trying in an amicable manner to produce by such details being inserted in the agreement what would suit the then time and occasion and be satisfactory for use for a reasonable length of time at least.

The time seems to have come, after thirty years of development, that the structure is no longer adapted for the service now demanded.

Of course, we have nothing to do with the facts relative to the necessity. All that we have to do is to assume that such a necessity has arisen by reason of the increased requirements of respondent's traffic, and determine whether or not the agreement is to be interpreted and construed as an undertaking against such possible necessity.

I think it is to be so interpreted and construed, and that the submission must be answered accordingly.

I do not see any provision made for the costs of this appeal. Of course, if there is none or understand-

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Duff J.

ing relative thereto, the usual rule of costs being borne by the unsuccessful party will have to prevail.

DUFF J.—There were two observations in the able argument of Mr. Tilley which I fully accept: First, that in construing an agreement of this character one should be cautious in taking for granted that the circumstances immediately surrounding the transaction give the clue to all the considerations by which the contracting parties were actuated; and exceedingly cautious also in allowing such circumstances to suggest ambiguity in clauses not otherwise difficult to construe. Second, the agreement ought to be construed as a whole—in the sense that one ought not to assume that an apparently leading provision is an overruling provision. The terms of the agreement are as follows:—

This deed made this twenty-first day of February, in the year of Our Lord, 1883.

By and between:

The Midland Railway of Canada, hereinafter called the Midland Company, of the first part, and

The Ontario and Quebec Railway Company, hereinafter called the Ontario Company, of the second part.

Whereas the Ontario Company propose with their line to cross the lines of the Midland company at the points and in the manner following, that is to say:

The Grand Junction section of the said Midland Company's railway by an overhead bridge or crossing at or near Crookston.

The Nipissing section by an overhead bridge or crossing at or near Agincourt.

The Whitby section by an undercrossing at or near Myrtle station.

On the Midland section of the Midland Company's lines near Bethany, by an overhead bridge or crossing.

And whereas the Ontario Company desire the Midland Company to assent to the said respective crossings, and the Midland Company is willing to do so, but only upon and subject to the following terms and conditions hereinafter expressed, and the performance of which forms the consideration for the said consent.

Therefore, this deed witnesseth that in this deed the words "The

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Duff J.

Ontario Company" shall mean the party hereto of the first part, and the words "The Midland Company" shall mean the party hereto of the second part.

That, in consideration of the premises and of the covenants and agreements hereinafter contained on the part of the Ontario Company to be by the Ontario Company observed, kept and performed, they, the Midland Company, have and by these presents do grant unto the Ontario Company, their successors and assigns forever, the easements, rights, and privileges of crossing with their railway the lines of the Midland Company as follows, that is to say:—

1. At or near Crookston on the Grand Junction section of the Midland Railway of Canada by a bridge or overhead crossing, and the space between the abutments in the clear shall be sixty feet measured on the line of the Ontario Company.

2. On the Nipissing section of the Midland Railway, at or near Agincourt, by a bridge or overhead crossing, and the space between the abutments in the clear shall be seventy feet measured on the line of the Ontario Company.

3. At or near Bethany, on the Midland section of the Midland Railway of Canada, by a bridge or overhead crossing, having the space between the abutments in the clear of thirty-seven feet, measured on the line of the Ontario Company.

4. At Myrtle, on the Whitby and Port Perry section of the Midland Company's line, by an undercrossing.

That each of the said several overhead crossings shall be made by a good substantial bridge on the plan and such material and workmanship as the Midland Company's chief engineer shall require and approve.

That each of the said bridges shall be well and substantially built, and shall have a space in each case in the clear for the purposes of the Midland Company as the Midland Company's chief engineer shall require and approve.

That each of the said bridges shall be well and substantially built, and shall have a space in each case in the clear for the purposes of the Midland Company, of the number of feet above expressed, and in each case shall be erected, kept, and at all times hereafter maintained in a good and sufficient state of repair and at such a height above the Midland Company's line of rails as shall secure at least seven feet clear above the highest of any freight cars now or hereafter passing over the Midland Company's said lines, respectively, as provided in the statutes in that behalf, now in force, or which may hereafter be passed by competent authority in that behalf, and this shall be done at the cost and charges of the said the Ontario company.

That every means shall be used to protect the Midland Company's line or premises from injury or damage from the said bridges, and from any car, engine or other machinery which may use or pass over the said bridges respectively.

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Duff J.

That the said bridges or overhead crossings respectively shall be so protected and so maintained at the costs and charges of the Ontario Company that nothing can or may fall through from any of them upon the line of the Midland Company over which they severally are erected; and that the Ontario Company, in all the above respects, will use and exercise due care and diligence.

With respect to the said undercrossing of the Midland Company's Whitby section or line, it is expressly covenanted and agreed that the Ontario Company shall prepare and submit to the chief engineer of the Midland Company the detailed plans and specifications for the work to be done.

That these plans and the specifications for the work shall, before the work is commenced, be settled and approved by the said chief engineer of the Midland Company, and when approved by him shall be signed by him, and his signature shall be the only evidence receivable of his said approval.

That the whole of the material used in the work of every kind, and the workmanship, shall be in accordance with the plans and specifications so after the execution of these presents to be settled, agreed upon, and signed, and shall be done to the entire satisfaction of the said chief engineer of the Midland Company.

That, while the work is in progress, the instructions and directions of the said Midland Company's said chief engineer shall be observed, and the work shall be so managed and carried on as not to interfere with or interrupt or endanger the traffic, trains, or property of the Midland Company in passing on their said line.

That the said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company, and against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Company shall and will save the Midland Company harmless.

That, if at any time the Ontario Company fail or neglect to maintain the said crossings respectively to the satisfaction of the chief engineer for the time being of the Midland Company, the said last-mentioned company may cause such repairs to be made, or said maintenance to be done, as by their said chief engineer may be deemed necessary, and the cost of so doing shall, on the account therefor, certified by the said chief engineer of the Midland Company, being presented, be paid in cash.

That in doing the work of building such crossings, respectively, no impediment or interruption to the traffic of the Midland Company shall take place, and the whole of said work shall be done under the orders, and subject to the orders and control of the chief engineer of the said Midland Company.

Each of the said parties hereto covenants with the other to observe, abide by, and perform the above agreement in all respects according to the spirit, true intent, and meaning thereof.

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Duff J.

In Witness Whereof the said parties hereto have to these presents set their corporate seal on the day and year first above written.

Signed, sealed and delivered in the presence of

For the Midland Railway of Canada,
(Sgd.) GEO. A. COX, *President.* [L.S.]
H. W. NANTON, *Secretary-Treasurer.*

For the Ontario and Quebec Railway Company,
(Sgd.) EDWARD B. OSLER, *President.* [L.S.]

The principal point made by Mr. Tilley in support of the appeal is that, (as the undercrossing at Myrtle was to be constructed conformably to plans and specifications "settled and approved" by the chief engineer of the Midland Company, and "to his entire satisfaction,") the whole duty of the Ontario Company was to maintain the undercrossing and keep it in sufficient repair and in a "good and safe state," as it was when it was passed on by that officer. That, no doubt, is a possible construction. But it is not by any means the only construction. The specific provisions with respect to the Myrtle crossing may without difficulty be read as establishing simply a condition precedent to the right of the Ontario company to cross the line of the Midland Company at that place and not as limiting, in relation to that crossing, the subject-matter of the general provision of the contract requiring the Ontario Company to maintain all the crossings "in a good and safe state so as in no way to endanger the property of the Midland Company." I think the latter is the preferable view, because, observing strictly the cautions above indicated, (as I think they ought to be observed in construing this agreement,) both parties must be presumed to have acted in view of the probability, as the learned Chief Commissioner remarks, of the load being increased from time to time; and it is manifestly improbable that the

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Duff J.

Ontario Company could have intended that the chief engineer of the Midland Company should be under a duty to his principals requiring him to insist that the initial design and construction of the undercrossing should be sufficient to provide for any increase of load that might take place in the future; and such, obviously, would be the effect of the construction the appellants as successors to the Ontario Company now contend for. I think the more satisfactory reading of the provision last referred to is to construe the words

> shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company

as stipulating for maintenance according to a varying standard sufficient to permit the safe passage of traffic as the conditions of traffic over the Midland Company's line might from time to time require. I concur in the view of the majority of the Board of Railway Commissioners as expressed in the judgment of the learned Chief Commissioner.

ANGLIN J.—In my opinion the scope and character of the obligation of maintenance assumed by the appellants under the agreement of the 21st February, 1883, in respect of the crossing at Myrtle, as well as the other crossings with which that instrument deals, is to be found in the provision that

> said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company.

This clause entailed in respect of the other crossings, where the right-of-way of the Ontario and Quebec Railway Company is carried over the Midland Railway, the duty of maintaining bridges adequate to bear

any increased weight of the rolling stock which the Ontario and Quebec Railway Company or its lessees might see fit to use in the future; it entailed a corresponding obligation to provide and maintain a bridge at Myrtle sufficient to carry in safety such rolling stock as the Grand Trunk Railway Co. might, in meeting the requirements of future traffic, find it economically necessary or advantageous to employ on its railway. Apart from agreement there can be little doubt that the Grand Trunk Railway Co., as senior road, could have obtained an order imposing this obligation on the Ontario and Quebec Railway Company when it sought the right of crossing. It is most improbable that it was the intention of the parties by their agreement to deprive the Grand Trunk Railway Company of any benefit which it might derive from its seniority. There is nothing to indicate an intention to abandon any such advantage. Read in the light of the circumstances under which it was entered into, I think the agreement makes sufficiently clear the obligation to which the Board of Railway Commissioners have held the appellants to be subject.

The appeal should be dismissed with costs.

BRODEUR J.—The right of one railway company to cross the track of another is as undoubted as its right to cross the land of the original owner. The senior road is then entitled as the original owner to proper compensation. In this case the right to cross was secured by the junior road undertaking to maintain the four crossings mentioned in the agreement,

in a good and safe state, and so as in no way to endanger the property, fixed or movable

of the senior road.

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Brodeur J.

No compensation in money or otherwise was stipulated.

All those four crossings were high level. In three cases subways were to be used by the senior road and in the other case the subway was to be used by the junior road. Four bridges then were to be constructed and maintained by the junior road.

The appellant, the Canadian Pacific Railway Co., is the successor in title of the junior road and the senior road is represented by the Grand Trunk Railway Co.

It is pretty clear by the provisions of the contract that the parties contemplated not only the then existing requirements of the traffic, but also the reasonable improvements consistent with the good administration of a railway.

Heavier engines and trains having required the laying of stronger bridges, the Canadian Pacific Railway Co. proceeded to build them at the three crossings where their track was passing above the Grand Trunk Railway Co. But having refused to give a similar strength to the bridge that was utilized by the Grand Trunk Railway Co., the Canadian Pacific Railway Co. was ordered by the Railway Commission to do it.

The obligation of the junior road is to see that the crossings should always be kept in such a way that the property of the senior should never be endangered, and even in the case where the subways were utilized by the Grand Trunk Railway Co. the Canadian Pacific Railway Co. is bound to change its height if the alterations made in the size of the cars required it. The contracting parties had not in view then only the present, but also the future, and they thought that the provision of the contract was sufficiently

clear to cover stronger bridges if the necessities of the traffic required it.

"Maintenance" would in the ordinary sense mean "keep in repair"; but it must vary according to the instrument in which it is found and the circumstances in which it has been used.

It was decided in the case of *Sevenoaks, Maidstone and Tunbridge Railway Co.* v. *London, Chatham and Dover Railway Co.*(1), that

under power to maintain a railway and works, *reasonable improvements, consistent with the purpose* of the undertaking, are included.

Mr. Justice Killam in construing a contract between the Intercolonial Railway and the Grand Trunk Railway Co. said:—

It appears to me, therefore, that the term "maintenance" *was not limited to keeping the railway and works in the condition in which they were when the contract was made;* and that there was no implied condition that the railway was then in a thorough working condition for the purpose of the future traffic; and *it appears to me that the parties must also have contemplated that these changes would be constantly going on, and that they were going on at the very time the contract was made—as the evidence shewed to have been* the fact, to the knowledge of a number of officials of the Intercolonial Railway. And it must also have been within the contemplation of the parties *that the company should not wait until a portion of the line or some structure or appliance connected with it was wholly unfit for use before repairing, replacing or improving it.* In a work of this kind it is necessary to anticipate and to prepare in advance, in order that it may be kept in a thorough efficient working condition. *The cost of anything reasonably required for this purpose appears to me to be part of the cost of maintenance to which the Crown is bound to contribute.*

Among the authorities cited in support of this opinion, Mr. Justice Killam cites the case of *The Leek Improvement Commissioners* v. *Justices of the County*

(1) 11 Ch. D. 625.

1914

CANADIAN PACIFIC RWAY. CO. v. GRAND TRUNK RWAY. CO.

Brodeur J.

of Stafford(1), in which Lord Esher said, at page 796:—

> It might be that if owing to the increasing traffic it became necessary to use harder stone than had been used previously to repair such a road, so as to provide a better macadamized road to meet the requirements of the traffic, the highway authority in so doing would only be maintaining the road.

We have a very recent case decided by the Court of Appeal in England, on the 28th of January last, *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.*(2), bearing on the question at issue in this case. By an Act passed in 1791, a company was empowered and directed to make bridges to carry highways over a certain canal. The Act provided that all such bridges should from time to time be *supported, maintained* and kept in sufficient repair by the company. It was held

> that the company was under the obligation to *repair the bridges according to the standard* of the traffic requirements of the present day.

These authorities are conclusive and, in my opinion as to the provisions of the contract, the circumstance of the case, where a junior road obtains the use of a senior road without any compensation, the fact that a railway company has no right to cross the track of another so as to impair the exercise of its franchise shews that the Grand Trunk Railway Co. had the right to require that the bridges should be of such a character as to properly carry on its business.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *E. W. Beatty.*
Solicitor for the respondents: *W. H. Biggar.*

(1) 20 Q.B.D. 794. (2) 30 Times L.R. 273.

GAULT BROTHERS, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE EDWARD WINTER, ASSIGNEE OF FRANKLIN & NIXON (PLAINTIFF) ..... } RESPONDENT.

1914

*Feb. 6, 9.
*March 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Bill of sale—Mortgage—Registration—Affidavit—Verification—B.C. "Bills of Sale Act," 5 Edw. VII., c. 8, s. 7.

The defendants rendered financial aid to F. & N. enabling them to purchase the stock-in-trade in the possession of a dealer in Vancouver, including also a quantity of goods ordered by him, but not then delivered, a payment on account being made in cash advanced by the defendants and the balance by four promissory notes, in deferred payments, which the defendants indorsed. At the same time new stock to the amount of $2,700 was purchased by F. & N. from the defendants which was afterwards delivered to them. A bill of sale by way of chattel mortgage was then given by F. & N. to the defendants for the advances so made and to secure them against liability on the indorsements, the proviso for redemption being on payment of the amounts mentioned and also for all goods thereafter supplied by the defendants to F. & N. during the continuance of the security. The bill of sale was registered with an affidavit by the acting-manager of the defendants, at Vancouver, who therein described himself as "secretary" of the company, which office was also held by him. The affidavit stated that the bill of sale was made *bonâ fide* for valuable consideration, namely, the amounts therein mentioned, and other considerations therein set forth, but it did not state that the grantors were justly and truly indebted to the grantees in such sums. About two years later, F. & N. made an assignment for the benefit of creditors to the plaintiff and, on the same day, after the execution of the assignment, but before the assignee had taken possession, the appellants entered into posses-

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

GAULT BROS., LTD. v. WINTER.

sion of F. & N.'s stock-in-trade by virtue of the bill of sale and refused delivery to the assignee. In an action by the assignee for a declaration that the bill of sale was void as against him and the creditors and to recover possession of the stock-in-trade, *Held*, that the registration of the bill of sale was not effective against the assignee or the creditors as it had not been verified in conformity with the provisions of the British Columbia "Bills of Sale Act," 5 Edw. VII., ch. 8, sec. 7. In regard to the goods supplied after the execution of the bill of sale, the onus was upon the defendants to shew that there were such goods in the possession of the mortgagors at the time of the assignment for the benefit of creditors.

Judgment appealed from (18 B.C. Rep. 487) affirmed.

Per Duff J. (Idington, J. *dubitante*).—The affidavit of *bona fides* required by section 7 of the British Columbia "Bills of Sale Act," 5 Edw. VII., ch. 8, may be made by the secretary of a company who, at the time he makes such affidavit, is also *de facto* manager of the company's business.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Clement J., at the trial, maintaining the plaintiff's action with costs.

The questions in issue on this appeal are set out in the judgments now reported.

Sir Charles Hibbert Tupper K.C. for the appellants.

M. A. MacDonald K.C. for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

IDINGTON, J.—Franklin & Nixon without any substantial means of any sort arranged with appellant, a wholesale merchant company, and one Horner, carrying on business in Vancouver, to buy that business and stock in trade therein, to be paid as to half by cash advanced by appellant and as to other half by their promissory notes indorsed by appellant.

(1) 18 B.C. Rep. 487.

It was the opportunity of selling goods that moved the appellant to entertain the proposal, and concurrent with its assenting thereto and carrying out the main purchase, a stock of new goods to the amount of $2,700 was selected and set aside in its warehouse ready to be shipped upon completion of the bill of sale now in question which was to be the security for the re-payment of said sum of $2,700 as well as for the re-payment of the money advanced and for indemnity against the indorsement for the balance of purchase of Horner's stock in trade.

Besides this new goods purchase of $2,700 there was at the same time a pretty substantial item of goods ordered by Horner elsewhere and taken over by the new firm for which appellant indorsed and looked to the bill of sale to indemnify it. Then there were goods to be supplied from time to time by the appellant to be secured by the same bill of sale.

Franklin & Nixon became insolvent, and on the 27th October, 1909, made an assignment to respondent under the provisions of the "Creditors' Trust Deed Act," 1901, and, when he went to take possession, he was met by some one who refused to give possession, claiming to represent appellant and hold the goods by virtue of said bill of sale.

It is stated in evidence and not denied that the taking possession by the appellant was after the execution of the assignment. The respondent then instituted this suit to have said bill of sale set aside and declared null and void (as against respondent as assignee representing the creditors) by reason of its infringing the provisions of the "Bills of Sales Act" of 1905, and being so declared in such cases as therein provided.

1914

GAULT BROS., LTD. v. WINTER.

Idington J.

The respondent, amongst other grounds taken, set up the following provision of section 7, sub-section 1, requiring that a bill of sale set forth the true consideration

> for which the bill of sale was given otherwise such bill of sale as against all assignees, receivers or trustees of the estate and effects of the person whose chattels, or any of them, are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person, etc., * * * shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession, or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be. * * *

I agree with the learned trial judge that on the facts above outlined "the true consideration" has not been set forth as required by this bill of sale. Indeed, I find it difficult to see how it can be said otherwise.

I cannot agree with the view which the learned trial judge has taken of the case of *Ex parte Popplewell; In re Storey*(1), as bearing upon the omission of the $2,700 purchase and sale of new goods or the Horner guarantee.

These transactions do not seem to me in any sense such collateral transactions as was the premium given in the *Storey Case*(1) to induce the mortgagee to refrain from registering the instrument.

In this case the transactions in question were clearly part of what the bill of sale was made to secure and by the terms thereof would be swept in under the general provisions for redemption.

(1) 21 Ch. D. 73.

The object of the legislation now in question was to enable creditors and others concerned to ascertain with reasonable accuracy, from a reading of the instrument, the extent and nature of the encumbrance.

This document failed sadly in executing such purpose of the legislature. Those goods covered by these transactions were, on the facts shewn, comprised within the very terms of the description used in the document, but the facts were so hidden away from the observation of any one interested searching this instrument, that he could never suspect such to be the case.

Indeed, the recitals in the document and statements therein, were calculated to mislead the closest observer.

It seems to me that these omissions were serious offences against the clear policy and plain meaning of the statute and render this bill of sale null and void as against the respondent,

so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given.

When we read this nullifying part of the clause attentively, it clearly destroys all pretension not only to those goods which formed part of the stock in trade bought from Horner and the omitted transactions, but also any

property in or right *to the possession of any chattels comprised in the bill of sale.*

I think, therefore, the elaborate argument to bring the other goods resulting from later sales and deliver-

1914

GAULT BROS., LTD. v. WINTER.

Idington J.

ies to the mortgagors within the class of cases where a bill of sale or chattel mortgage is of such a nature as to render it impossible to conform with the statute and, therefore, outside the statute falls to the ground.

I cannot say that, under the very comprehensive nature of the language used, these later deliveries are not comprised in the bill of sale and in the nullification of the statute.

Indeed, it is of the essence of the claim made to the possession of these goods that they are "comprised in the bill of sale" and assuredly they were sold to the mortgagors and were found to be in their "possession, or apparent possession," at or after the execution of the assignment.

In short, under this statute, however much it may be possible to find cases of transactions which as a whole may be outside the statute and, therefore, not nullified by it, the doctrine thus involved will not help where there is a bill of sale which in its substantial parts is within the statute and a claim is made to a right of property or possession which by the express language of the nullifying part of the section we have to deal with is made null and void.

If the term "personal chattels" given by the Act a specific statutory interpretation, had been repeated in this nullifying part of the section or the general scope of the statute rendered it imperative to read the word "chattels" as if "personal chattels," then the argument put forward might have had some force. Note also the provision covers possession "at or after the" execution of the assignments.

Moreover, the facts in this case and the frame of the instrument in question shew just that kind of

abuse which a careful draftsman seeking to promote the remedy adopted for the evil aimed at in the legislation in question should be expected to strike at in or by the comprehensive language I have quoted.

The appellant's factum quotes a number of cases decided on the English Acts relative to bills of sale. None of them meet or even touch upon the interpretation of section 8 of the English "Bills of Sale Act" of 1878, corresponding to section 7, sub-section 8.

They are in fact chiefly upon the English Act, as amended by the Act of 1882, which repeals sections 8 and 20 and possibly, by implication, some other sections of the Act of 1878.

The amendments made in 1882 are in the direction of making the very abuse before us impossible by making the clauses substituted more direct and clearly operative.

If, however, the interpretation and construction I adopt is to be adhered to it would be pretty effective. It might be so severe as to be undesirable.

As the Act is amended this becomes, except in a few cases, purely academic. But even if my interpretation be not well founded I agree in the view taken by Mr. Justice Clement as to the onus of proof resting upon the appellant in presenting any claim to enforce the possible equitable right the appellant might have on another view of its rights.

The possession which the insolvents had passed by operation of law to the respondent as assignee and the duty of appellant was to have prosecuted its claim accordingly and that would in due order have involved the appellant proving its right to recover the goods.

Of course, if appellant had got possession before the assignment an entirely different state of things

1914

GAULT BROS., LTD. v. WINTER.

Idington J.

might have arisen to which different principles would have been so applicable.

Moreover, counsel who appeared for appellant before Mr. Justice Clement seemed to be quite willing at one stage to abide by his ruling whatever it might be in this regard of onus of proof if only granted a special reference enabling appellant to make good its claim as it had not.

The referee was bound by the direction of the learned judge and appellant cannot complain of his reporting the fact that there was no evidence to support its claim. And as it seems to be, under all the circumstances, nothing but a mere matter of procedure that is involved where no violence had been done to natural justice, I doubt if we are not bound by the jurisprudence of this court to refrain from interfering even if so disposed as to this point.

See the collection of authorities in note to the Revised Statutes of Canada, 1906, ch. 139, page 2328 (annotated edition).

I agree with the conclusion reached by the Court of Appeal relative to the affidavit. It may have been necessary to make affidavits to meet both branches of the section, but evidently it was necessary to have verified the indebtedness.

I need not, however, pursue this inquiry further for that which was most obviously needed was discarded.

And as to the capacity of the appellant's officer to make the affidavit I much doubt his right to make it.

The appeal should be dismissed with costs.

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

DUFF J.—The controversy on this appeal is between the appellants, Gault Bros., as mortgagees under a bill of sale by way of chattel mortgage, dated the 20th day of September, 1907, executed by Arthur Albert Franklin and Thos. W. H. Nixon, carrying on business in the firm name of Franklin & Nixon and George Ed. Winter, assignee for the benefit of creditors of Franklin & Nixon under a general assignment executed on the 27th of October, 1909. Gault Bros. are wholesale merchants in Montreal. Before the bill of sale just referred to was given Franklin & Nixon conceived the idea of purchasing the business of one Horner, including his stock of goods, who had been for some years carrying on business in Vancouver. It was arranged between Gault Bros. and Franklin & Nixon that Gault Bros. should supply the necessary cash and financial support to enable Franklin & Nixon to carry out this purchase. Accordingly, Franklin & Nixon became the purchasers for a certain price, of which about $9,000 was to be paid in cash advanced by Gault Bros., and an equal sum was to be paid in deferred payments of four equal instalments for which promissory notes were to be given indorsed by Gault Bros. This transaction was carried out and, as security for Gault Bros., the bill of sale above referred to was executed.

The dispute between the parties is whether certain goods which were in the possession of Franklin & Nixon at the time of the execution of the general assignment are validly charged by the instrumentality of the bill of sale with the mortgagors' obligation to Gault Bros., or whether on the contrary, they belong to the unencumbered assets of the grantors and are at the disposition of the assignee

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

for the discharge of the liabilities generally. There is no dispute that the property in controversy falls within the description of the mortgaged property in the bill of sale; or that as between the parties to the instrument prior to the execution of the assignment for the general benefit of the creditors the provisions of the bill of sale applied to this property or that all the powers of the bill of sale were exercisable in respect of it by the mortgagee. The assignee contends, and effect has been given to this contention in the court below, that certain provisions of the "Bills of Sale Act," 1905, essential to the valid registration of an instrument such as this were not complied with by the mortgagees and that the result of this want of legally effective registration is to invalidate the mortgage as against the assignee with respect, at all events, to all goods which were the property of the mortgagors at the time of the execution of the mortgage; and as regards after-acquired property if the mortgage be legally effective in respect of such property, the mortgagees must fail even as to that, because there is no evidence by which the court can identify the after-acquired property and segregate it from the general mass.

There are three statutory requirements the absence of which it is contended vitiates the registration of this mortgage; the first of the requirements being that bills of sale shall set forth the "true consideration" for which they are given as provided by section 7(1), and the second and third of which are two of the requirements said to be exacted by sub-section 8 of section 7 of the Act referred to. As to two of these three requirements, I entertain no doubt that the provisions of the Act have been sufficiently observed. I

postpone the discussion of them until I have dealt with another of the objections which appears to me to have been made good and to which I feel it my duty to give effect. That objection is founded on sub-section 8 of section 7 and, before stating it, it will be convenient to quote that sub-section in full and also two of the provisions of the bill of sale to which it will be necessary to give attention in order to make the point of the objection perfectly clear. Sub-section 8 of section 7 is as follows:—

(8) Every bill of sale shall further be accompanied by an affidavit by the grantee, or one of several grantees, his or their agent, that the assignment is *bonâ fide* for valuable consideration and that the consideration is duly set forth in the bill of sale, and that it is not for the purpose of enabling the grantor to hold the goods mentioned therein as against the creditors of the grantor; or in the case of security for a debt, that the grantor is justly and truly indebted to the grantee in the sum therein mentioned, and for the express purpose of securing the payment of money justly due or accruing due; and in all cases that the bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of the grantor, or of preventing the creditors of said grantor from obtaining payment of any claim against him; and said affidavit shall be filed along with said bill of sale, otherwise the registration of the bill of sale shall be void. This sub-section shall not apply to the bills of sale mentioned in section 5.

The stipulations of the bill of sale which it is necessary to consider are as follows; the first being contained in the proviso for redemption following the habendum:—

PROVIDED always and these presents are upon this express condition that if the said parties of the first part, their executors and administrators, do and shall well and truly pay or cause to be paid unto the parties of the second part or their assigns, the full sum of $9,483.86 with interest for the same at the rate of 7% per annum from the date hereof by periodical payments to the entire and uncontrolled satisfaction of the parties of the second part or in one sum at any time on demand of the parties of the second part, and do and shall pay or cause to be paid the aforesaid promissory notes at maturity or any and all renewal and renewals thereof and all interest in respect thereof and pay, indemnify and save harmless the

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

said parties of the second part from all loss, costs, charges, damages, or expenses in respect of the said notes or any renewal thereof and do and shall pay all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuance of this security punctually when the same shall become payable according to the terms of credit given by the parties of the second part to the parties of the first part, and do and shall repay on demand all advances of money made by the parties of the second part to the parties of the first part during the continuance of these presents.

* * * * *

AND THE SAID PARTIES of the first part do hereby jointly and severally, for themselves, their executors and administrators, covenant, promise and agree to and with the said parties of the second part and their assigns that they the said parties of the first part, their executors or administrators or some one of them, shall and will well and truly pay or cause to be paid to their assigns the said several sums of money in the above proviso mentioned with interest for the same as aforesaid on the days and times and in the manner above limited for the payment thereof; and will pay or cause to be paid the said promissory notes or renewal or renewals thereof as aforesaid and all interest and incidental expenses to accrue thereon and indemnify the said parties of the second part from all costs, charges, damages and expenses in respect thereof and all other sums of money which may or shall be secured hereby at any time and from time to time.

In order to make the point quite clear, it is necessary also to quote the affidavit filed with the bill of sale which is as follows:—

I, Charles T. McHattie, of Vancouver, British Columbia, Secretary-Treasurer of the grantee in the annexed bill of sale marked A named make oath and say:—

That I am the Secretary-Treasurer of the grantee company and am authorized to make this affidavit on their behalf.

That the assignment contained in the said bill of sale is *bonâ fide* for valuable consideration, namely, $9,483.86 and the other considerations set forth in the said bill of sale and that the consideration is duly set forth in the said bill of sale and that it is not for the purpose of enabling the grantors to hold the goods mentioned therein as against creditors of the said grantors.

That the said bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of

the grantors or of preventing the creditors of the said grantors from obtaining payment of any claim against them.

SWORN before me at Vancouver, British Columbia, this 21st day of September, A.D. 1907.
H. W. C. BOAK.

C. T. MCHATTIE.

The objection I am now considering is this: It is said that the bill of sale in question constitutes a "security for a debt" within the meaning of sub-section 8 and that the affidavit accompanying the bill of sale in intended or professed compliance with that sub-section does not contain the statement that the grantor is justly and truly indebted to the grantee in the sum therein mentioned; and it is contended that in the case of such a security the affidavit in order to comply with the sub-section must contain such a statement or the equivalent of it.

The points to be considered are first whether this bill of sale is a security for a debt within the meaning of this provision, and secondly, assuming that to be so, whether on the true construction of this enactment it is essential that the affidavit of *bona fides* should contain the statement that the grantor is "justly and truly indebted to the grantee" in the sum mentioned as the debt to be secured.

I confess that on the first point I do not entertain any doubt. I think that where a bill of sale is given as security for money which is owing, but payable at a future date (*debitum in præsenti, solvendum in futuro*), then it is to that extent a "security for a debt" within the meaning of this provision and I think that is shewn by the words "securing payment of moneys justly due or accruing due," which follow. I think, moreover, where by a bill of sale property

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

is assigned as security for a debt, in the sense just indicated, that it is none the less a security for a debt within this enactment because it contains additional provisions which in themselves would constitute a bill of sale, but would not constitute such a security.

The next point is a point with which I have had a great deal of difficulty, and the conclusion I have reached, in a sense adverse to the contention of the appellants, is one that I have come to with hesitation and, I must say, with much regret in view of the fact that the result is to defeat a perfectly honest and legitimate business transaction.

The question is, as I have already said, whether in the case of a bill of sale given as a security for a debt this sub-section requires that the statement above quoted or its equivalent shall appear in the affidavit of *bona fides*. Now, the difficulties of construing this sub-section are not inconsiderable. But it seems clear enough that one admissible construction, if you regard only the verbal structure of it, is to treat the second branch as providing in one particular an alternative form of affidavit which, in the case of securities for debt, the mortgagee may at his election adopt in preference to the general form which is provided for in the earlier part of the sub-section; and I am inclined to think that is the more natural way of reading the clause as it stands. On the other hand the sub-section is capable of being read as requiring in the second branch a particular averment which is imperative in the case mentioned. After much reflection, I am convinced, however, that in construing this provision one must have regard to the legislation as it stood at the time of the passing of this Act, which is mainly a consolidating statute, and I find that under

the law as it then stood in case of mortgages of this description an affidavit in the form indicated in the branch of the sub-section we are considering was essential and imperative. The rule requiring a specific averment under oath by the mortgagee of the indebtedness of the mortgagor in these cases was a rule adopted for the protection of the public; and if, in consequence of a change of policy, mortgagees in such cases were to be given the right to adopt the more general form of averment that the consideration had been truly stated (as sufficient for the protection of the public) one does not see why the more specific form should not have been altogether done away with. Reading the sub-section in light of the legislation then existing and the manifest object of it, I am forced to the conclusion that the appellants' construction must be rejected.

On this ground, with very great regret as I have said, I conclude that the appellant must fail in respect of all property which as being the personal chattels of the grantors at the time the mortgage was executed within the definition of the "Bills of Sale Act" would be affected by the provisions of that Act. We may perhaps venture to hope, however, that the case may be the subject of consideration elsewhere; and I think I ought to express my opinion upon the other points involved.

The two remaining objections directly based upon the "Bills of Sale Act" are first, that the bill of sale does not, as required by section 7, sub-section 1, set forth the "true consideration" for which it was given, and secondly, that the affidavit accompanying the bill of sale, was not made by the appellants or their agents as provided by sub-section 8 of section 7.

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

The second objection may be disposed of very shortly. Mr. McHattie, who made the affidavit, described himself as the "secretary" of the company. At the time the affidavit was made, and at the time the bill of sale was taken, he was in point of fact exercising the powers of manager of the company. He was, indeed, *de facto* manager of the company. There can be no doubt that the taking of the security was within the scope of his duty as acting manager. It follows that he was within the meaning of section 7 of the Act "manager" * * * or other officers of the company authorized for" the purpose of making the affidavit.

As to the objection that the consideration for which the bill of sale was given is not truly set forth, this objection is grounded upon the contention that, in order to comply with the statutory direction, two transactions ought to have been recited which are omitted. The two transactions are these: 1. In the month of September, 1907, Mr. Campbell, a buyer for Franklin & Nixon, purchased $2,700 worth of goods from Gault Bros. on behalf of Franklin & Nixon. These goods were purchased in anticipation of the arrangement between Gault Bros. and Franklin & Nixon, which afterwards was carried to completion, including, of course, the bill of sale. In the ordinary course, the goods would not be delivered until after the time when it was anticipated that these arrangements would be completed and the evidence is quite clear that if anything had happened to prevent these being carried out the goods would not have been sent forward and this would have been quite in accordance with the intention of the parties. The purchase was unquestionably a conditional purchase which was not to become legally effective until after the contem-

plated arrangements were consummated. The other transaction was this:—Horner, whose business Franklin & Nixon were purchasing, had ordered goods which had not come into stock (with the exception of some that arrived on the very date, the 20th of September) when the bill of sale was executed. Horner was, of course, under an obligation to take these goods and pay for them. These goods would, of course, according to the general intention of the parties, which was, that Horner's business was to be transferred to Franklin & Nixon, be received by the latter and paid for by them, but Horner evidently required some more satisfactory assurance, that his obligations to the sellers would be met; and the matter was arranged by Gault Bros. guaranteeing payment of the goods.

Neither of these transactions is specifically referred to in the bill of sale, and it is said that the failure to recite them makes the description of the consideration so imperfect as to constitute a violation of the provision of section 7(1). The trial judge rejected this contention which seems, however, to have been accepted and acted upon by Mr. Justice Irving in the Court of Appeal.

I think the contention involves a misapprehension of the effect of the word "consideration" in sub-section 1. That word might, according to context and subject-matter, be, of course, read in a very large sense embracing acts and motives leading up to and influencing more or less directly the transaction in relation to which it is employed. That, I think, is not the sense in which the term ought to be interpreted here. It is used, I think, in the strict legal sense; and construing it in the strict legal sense, the "true con-

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

sideration" for which the bill of sale was given must, I think, be taken to mean that which passed to the grantor or that which was suffered by the grantee as the consideration in point of law for the assuring to the grantee of an interest, *in præsenti* or *in futuro*, in the property to which the bill of sale applies where that is the nature of the instrument or for the vesting in the grantee of some power or authority in respect of the property affected where the instrument is in the nature of a licence or power of attorney. Construing the word "consideration" in this way it seems to me that this bill of sale presents no difficulty. The proviso for redemption above quoted shews that the property to which the document relates is charged with the payment of

> all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuation of this security.

If the goods purchased in September are to be regarded as "goods supplied during the continuance of this security," and I can see no reason why they should not be so regarded, I am unable to follow the argument that the consideration for the charge thereby created is not truly stated, the consideration being measured by the value as determined by the price of the goods supplied.

In view of some observations that have been made I think I ought to add this:—Nobody reading the recitals of this bill of sale could fail to observe that the general intention was to provide security, first for the repayment of the cash advanced by the mortgagees, next, in respect of the mortgagees' guarantees in connection with the purchase, and thirdly, for pay-

ment of the price of goods supplied by the mortgagees. I think that any business man being made acquainted with the fact that such was the general intention of the parties to the instrument would not be surprised to find that the instrument was to stand as security for the price of the goods included in what has been referred to as the September sale. On the contrary, he would be very much surprised indeed to find that it was not so. Whether you look at this instrument from the point of view of the practical man, not a lawyer, or from the point of view of the lawyer there appears to be nothing in it, which as regards this transaction can fairly be described as misleading.

As to the other transaction. If the words quoted from the proviso for redemption

> goods supplied by the parties of the second part to the parties of the first part during the continuance of the security

do not embrace the goods which were the subject of this transaction and I agree with the contention of the respondent that they do not, then the property affected by the bill of sale is not charged with the repayment of any moneys paid by Gault Bros. under their guarantee in respect of them and the obligation arising under the guaranty is not part of the consideration for the bill of sale within the meaning of section 7. The transaction is a collateral one which the parties were entitled to bring within the bill of sale or leave out of the bill of sale as they should choose. This objection for these reasons in my opinion fails. I do not discuss the decisions, none of which is inconsistent with, and one of which, at all events, *Ex parte Popplewell*(1), strongly supports the view I have expressed.

(1) 21 Ch. D. 73.

1914

GAULT BROS., LTD. v. WINTER.

Duff J.

There is still another point upon which the appellants rely. It is argued that the provisions of the "Bills of Sale Act," 1905, have no application to goods which were not property of Franklin & Nixon at the time the bill of sale was executed. I have no doubt that prior to the amendment of 1912, 2 Geo. V. ch. 2, sec. 5, the "Bills of Sale Act" of British Columbia did not apply to assurances of after-acquired goods. My reasons for that were given in *Traves* v. *Forrest*(1). I there gave my reasons for thinking that the history of the British Columbia "Bills of Sale Act," taken together with the course of judicial decision in England in relation to the definitions of "personal chattels" in the English Acts of 1854 and 1878, which have been closely followed in the British Columbia legislation, led to the conclusion that the British Columbia legislature had adopted the decision in *Brantom* v. *Griffits*(2), and that in construing the Act of 1905 one must be governed by that decision. In this view a majority of the court concurred and it may be noted that the parts of the Act then construed were re-enacted without relevant alteration in the consolidation which took place two years later. The law was changed by the amendment of 1912 above referred to. If that enactment is retroactive in its operation then the contention of the appellant on this point must fail; but that question need not, in the view I take of the point raised as to the onus of proof, be considered on this appeal.

I have come to the conclusion after carefully weighing the argument advanced by the appellants that the onus was on the appellants to identify the goods in respect of which they alleged the bill of sale

(1) 42 Can. S.C.R. 514. (2) 1 C.P.D. 349.

was effective, and I have come to that conclusion for this reason:—The interest in after-acquired goods under a mortgage of them when they come under the operation of the mortgage is, as Lord Macnaghten pointed out, in *Tailby* v. *Official Receiver*(1), at page 546, an equitable interest. The appellants' interest, if any, therefore, under this mortgage in the property in question was an equitable interest only. Now the effect of the assignment was to vest in the assignee the general property in the goods affected by the mortgage subject to this equitable interest of the mortgagee, if any; and such being the case it appears to me that, on general principles, the onus is upon the mortgagee who alleges this equitable interest to establish his title to it.

Since writing the above my attention has been called to the fact that a point raised by the counsel for the appellant has not been noticed in any of the judgments and in view of the possibility of further proceedings and in order to avoid any dispute on the subject I think it is right to mention it. The point was, briefly, that on the construction of sub-section 8 of section 7 of the "Bills of Sale Act," which I have adopted, it would be impossible to frame an affidavit of *bona fides* for the bill of sale in question which should at once be truthful and in conformity with the requirements of that enactment. I merely add, in a word, that having carefully considered the argument I have been unable to satisfy myself that there would be any real difficulty in framing such an affidavit.

ANGLIN J.—With some regret, because the transaction appears to be free from the slightest taint of

(1) 13 App. Cas. 523.

1914

GAULT BROS., LTD. v. WINTER.

Anglin J.

fraud or suspicion of fraudulent preference, I find myself obliged to concur in the dismissal of this appeal.

As to the goods which were in the possession of the mortgagors when the impeached instrument was executed, I agree that it was void as against the plaintiff because the affidavit of *bona fides* did not comply with the statutory requirements. It is also possible that the consideration for which the mortgage was given was not accurately or sufficiently stated.

As to the after-acquired goods, assuming that, notwithstanding the sweeping terms of section 7 of the British Columbia "Bills of Sale Act" of 1905, the mortgage was enforceable, I agree with Mr. Justice Clement and the Court of Appeal that the burden was on the mortgagees to have shewn that there were in fact such goods in the insolvents' stock, and to have segregated and identified them. That they have failed to do.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Russell, Mowat, Hancox & Farris.*

ALEXANDER SMITH (DEFENDANT) . . APPELLANT; 1914

AND

THE RURAL MUNICIPALITY OF VERMILION HILLS (PLAINTIFF) } RESPONDENT.

*Feb. 12.
*March 23.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Assessment and taxes—Lease of Crown lands—Interest of occupier—Constitutional law—Exemption from taxation—Construction of statute—"B.N.A. Act, 1867," s. 125—(Sask.) 6 Edw. VII., c. 36, "Local Improvements Act"—(Sask.) 7 Edw. VII., c. 3, "Supplementary Revenue Act"—Recovery of taxes—Non-resident—Action for debt—Jurisdiction of provincial courts.

The Saskatchewan statutes, 6 Edw. VII., ch. 36 ("The Local Improvements Act") and 7 Edw. VII., ch. 3 ("The Supplementary Revenue Act") and their amendments, authorizing the taxation of interests in Dominion lands held by persons occupying them under grazing leases, or licences from the Minister of the Interior, are not in contravention of the provision of section 125 of the "British North America Act, 1867," exempting from taxation all lands or property belonging to the Dominion of Canada; consequently, these enactments are *intra vires* of the provincial legislature. *The Calgary and Edmonton Land Co.* v. *The Attorney-General of Alberta* (45 Can. S.C.R. 170), followed.

For the purposes of the collection of taxes so levied the provincial legislature may authorize their recovery by personal action, as for debt, against persons so occupying such lands, in the civil courts of the province, notwithstanding that the residences of such persons may be outside the limits of the province.

The judgment appealed from (24 West. L.R. 903; 4 West. W.R. 1219) was affirmed.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of New-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 24 West. L.R. 903; 4 West. W.R. 1219.

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

lands J. at the trial(1), which maintained the plaintiff's action with costs.

The circumstances of the case are set out in the judgment of Mr. Justice Duff now reported.

Ewart K.C. for the appellant.

H. Y. MacDonald K.C. for the respondent.

T. A. Colclough K.C., Deputy Attorney-General of Saskatchewan, for the Attorney-General of Saskatchewan.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

IDINGTON J.—The facts in question herein as well as the substance of the enactments in question are set forth in the opinion judgment of the learned Chief Justice of the Supreme Court of Saskatchewan.

Upon these facts, which, by the way, appear to be admitted, I cannot see how this case in regard to the application of the statutes and principles of law which must govern our decision can be distinguished from the case of *The Calgary and Edmonton Land Co.* v. *The Attorney-General of Alberta*(2). The statutes in question are substantially the same.

The right of respondent to sue for any taxes imposed by them or their officers or their predecessors seems clearly given.

The enactments upon which such taxation rest do not attempt to tax the land so far as vested in the Crown. In the absence of any such express attempt the statutes must be read as bearing only upon the interest of others in the lands and in this case of the

(1) 23 West. L.R. 708. (2) 45 Can. S.C.R. 170.

appellant as lessee or occupant. The claim that these assessments are so excessive as to shew that they exceeded the value of the land cannot be raised herein.

The justice or injustice of the rating is something which we can have nothing to do with.

The local court for determining any such question can alone be appealed to or, default that, the legislative authority.

Then it is suggested that appellant was a non-resident and hence the attempt to tax his interest in the lands or him in respect of such interest is *ultra vires*.

There is no evidence of appellant's residence except his description in the grazing lease granted him by the Dominion Government. It does not follow that he was, therefore, not resident in the province at the times involved in the imposition of these taxes. Nor does it follow that he as occupant of the lands can set up any such contention in law or in fact.

And as at present advised I do not think the power of direct taxation given by the "British North America Act" to the province can be circumscribed or limited in the case of taxation relative to lands by anything involved in the question of the owner's place of residence.

It may well be that in attempting to enforce by action in courts beyond the province, claims for taxes the municipality might find some difficulty.

But the courts of the province when duly constituted by its Legislature under and by virtue of the "British North America Act" and given thereby jurisdiction to enforce such a claim as if a debt, must be bound by the law of the province in everything per-

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Idington J.

taining to direct taxation and to property and civil rights in the province.

For the purposes of this appeal we must assume that the taxation of land or any interest therein or of any person in relation to any land in the province, or interest in any such land is direct taxation within the meaning of the "British North America Act"; and that if the legislature had declared taxes so rightfully imposed to be or constitute a debt within the province due by those who enjoy the protection relative to such land and advantages thereof, for which the taxation is a compensation, it has acted within its power over property and civil rights in the province and that the courts duly constituted by the province to administer its laws must enforce them even if in doing so they may have to deal with people domiciled beyond the province and their property within the province.

The argument founded upon the provision of the statutes in question anticipating and providing for enforcement of the tax liens by way of sale of the lands seems to move in a circle for it is only that interest the owner taxed may have that can be reached. And if that remedy by any mode of construction can be made to appear otherwise it would simply be in that view inoperative as the Crown is not made subject to these enactments.

The appeal should be dismissed with costs.

DUFF J.—I agree with the learned Chief Justice of Saskatchewan and, for his reasons, that if the taxes sued for in this action were lawfully imposed at all they can now be recovered by the respondent municipality. In 1909, the area comprised within the limits of the municipality was included in Large Local Improve-

ment District C(3) and the appellant was assessed in that year for local improvement tax at the rate of $1\frac{1}{4}$ cents an acre by the Local Improvement Branch of the Provincial Government under section 73 of the "Local Improvements Act" of 1906. In December, 1909, the respondent municipality was organized and the appellant in the years 1910 and 1911 was assessed at the rates of $3\frac{1}{2}$ cents and 3 cents an acre respectively under the authority of sections 50 and 51 of the Act of 1906. In each of the years 1909, 1910 and 1911 the appellant was assessed at the rate of $\frac{1}{2}$ cent per acre under the authority of the "Supplementary Revenue Act." The lands in respect of which the appellant was assessed were, when the assessments were made, the property of the Crown in the right of the Dominion of Canada, subject to the grazing leases that had been granted to the appellant. It is admitted that in each of the years in question the appellant used these lands for grazing purposes under his leases; and it is further admitted that if he is assessable in respect of them such assessment was duly made. I think also that the result of the admissions is that the appellant was an occupier of these lands within the meaning of the statute. I think, moreover, that section 50 (as amended by section 7, chapter 25, statutes 1909), section 55 and section 59 of the Act of 1906 taken together had the effect of making taxes levied within the limits of a local Improvement District and unpaid a debt due to the District. It is admitted that the respondent municipality is entitled to recover these taxes unless the legislation under the authority of which they are levied is itself *ultra vires* or the taxing authority has exceeded the powers conferred upon it by the legislation. The first question

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff J.

is: Has the Legislature of Saskatchewan authority to tax the appellant as occupant of these lands, the appellant himself residing outside the province, and to provide effectively for the recovery of the taxes in the courts of the province as a debt?

As to this point, very little need be said. *Primâ facie,* the authority of the province under section 92(2) of the "British North America Act, 1867," to legislate in relation to the subject of direct taxation in the province includes the power to levy taxes upon the occupants of the property within the province in respect of their occupation, whether they are residents or non-residents.

It would appear also that as reasonably incidental to the authority of the province in relation to that subject there must be vested in the legislature the right to empower the taxing authority to recover as a debt any taxes assessed upon or in respect of property owned or occupied within the province. That is the view that has always been taken and acted upon in the Canadian provinces and until the argument of this appeal I do not think I have heard a doubt expressed as to the correctness of it. Of course, one ought not to lose sight of the fact that under section 92(13) and section 92(14) the province has exclusive legislative authority in respect to property and civil rights in the province and the administration of justice. I may further observe that we are not concerned with any question here whether provincial legislation, enacting that a tax assessed upon the property of non-residents, shall be recoverable as a debt, has or has not the effect of creating an obligation enforceable beyond the limits of the province. The general rule is that the revenue laws of one country are not taken

notice of in another country and it appears to be on this principle that judgments proceeding upon such laws are not recognizable. *Planché* v. *Fletcher*(1). It is also on this principle that it has been held in the United States (*Henry* v. *Sargeant*(2), at page 332, *per* Parker C.J.) that the courts of one state cannot be used as a means of collecting the taxes imposed by another. In *Municipal Council of Sydney* v. *Bull*(3) Mr. Justice Grantham dismissed an action brought by the Municipal Council of Sydney to enforce the payment of a local improvement rate levied on the authority of an Act of the Legislature of New South Wales, whereby the Council was authorized to recover the amounts levied under the Act, by action. It was held that the action was analogous to an action brought in one country to enforce the revenue laws of another country and consequently would not lie.

It was, moreover, held in the last mentioned case that the enactment on its true construction established only a liability to be enforced in the courts of New South Wales; and it may be that the true intendment and effect of the Act of 1906 is to create in respect of these taxes a debt recoverable by action in the courts of Saskatchewan only. At all events it could be forcibly argued that this particular provision ought to be read in the light of the recognized principle of private international law to which I have referred and if when so read it offends against no limitation imposed by the "British North America Act" upon the legislative powers of the province, one would not, of course, be justified in ascribing to it a

(1) 1 Douglas 251. (2) 13 N.H. 321.
(3) (1909) 1 K.B. 7.

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff J.

construction and effect which would make it *ultra vires*.

The point the appellant really endeavours to make in this connection is that the legislation infringes the prohibition of section 125 of the "British North America Act,"

> no lands or property belonging to Canada or any province shall be liable to taxation.

Now, first, it is beyond question that the appellant is assessed in respect of the occupation of the lands in question, which lands, as I have already said, are (subject to the interest vested in him by virtue of his leases) the property of the Crown in the right of Canada. If this legislation really and truly authorizes the taxation of the appellant in respect of the property of the Crown then I have no hesitation in saying that it does infringe this provision. If, on the other hand, what the Legislature has done is to tax the appellant in respect of his own interest or in respect of his occupation in right of his own interest, it appears to me to be unobjectionable. I think it is hardly arguable that section 125 prohibits the levying of taxation by the Dominion or by a province upon or in respect of a particular interest held by a subject in Crown lands. The section may easily be read as exempting from taxation the interest of the Crown in Crown lands only. And the alternative reading suggested would have the effect of exempting from taxation a large variety of interests such, for example, as those arising under timber leases, mining leases, fishing leases, with which we are very familiar in this country, and it is not a construction which commends itself to my judgment.

Then does this particular legislation exceed the limits set by the enactment mentioned either in itself or in the manner in which the respondent municipality has professed to put it in operation? First, as to the legislation itself: I do not think it was seriously argued that the tax imposed by the "Supplementary Revenue Act" of one-half of one cent per acre upon lands held under grazing leases is *ultra vires*. At all events, I am quite at a loss to understand on what ground it could be plausibly contended that this particular enactment ought not to be read as imposing a tax upon the lessee or occupant in respect of his occupation or his interest. The provisions relating to local improvement tax are sections 50 and 51 and sections 73 and 74 of the Act of 1906. These sections are as follows:—

50. The council may cause to be levied in each year for the general purposes of the district a tax not less than one and one-quarter cents and not more than five cents per acre upon every owner or occupant in the district for land owned or occupied by him:

Provided that any person whose assessment would be less than fifty cents shall be assessed fifty cents.

51. The rate per acre of the said tax shall be fixed by a resolution of the council.

73. In large districts the rate of assessment shall be one and one-quarter cents per acre:

Provided that in any large district if the commissioner is satisfied that the said rate of assessment would raise a sum greater than would be necessary to effect the improvements required in such district the rate of assessment may be reduced to such less amount per acre as the commissioner may determine.

Provided further that any person whose assessment would be less than fifty cents shall be assessed fifty cents.

74. As soon as possible after the beginning of each year or after the organization of a large district an assessment roll shall be prepared for each large district upon which shall be entered as accurately as may be the following information:—

(*a*) Each lot or parcel of land owned or occupied within the district and the number of acres it contains;

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff J.

(*b*) The name and post office address of the person assessed as owner or occupant of each lot or parcel;

(*c*) The amount of assessment;

(*d*) The amount of previous assessments which have not been paid.

First.—Of the sections 73 and 74 under which the rate for the year 1906 was levied:—Is the tax thereby imposed a tax upon Crown lands within the meaning of section 125 of the "British North America Act?" I think, perhaps, there was some misapprehension in relation to this point as to the effect of *Calgary and Edmonton Land Co.* v. *The Attorney-General of Alberta*(1). It will be found, I think, that the decision in that case really rested upon the view taken by the majority of the court that the whole beneficial interest in the lands in question (subject to a lien for a fee payable to the Department of the Interior) had become vested in the land company. In the present case the contention is that looking at the provisions of these enactments as a whole and especially the provisions relating to the proceedings for the recovery of the tax levied through the sale of the lands themselves one sees that the tax is intended to be levied against and made a charge upon the fee simple or the equivalent of the fee simple in all the lands in the province. In the case of lands in respect of which the legal title is vested in the Dominion, but the entire beneficial interest is vested in the subject there would seem, and that was the view taken in the *Calgary and Edmonton Case*(1), to be nothing to prevent such provisions having their full operation. But where the Crown in the right of the Dominion retains a substantial beneficial interest, as well as the legal title in the lands, then a different question entirely arises;

(1) 45 Can. S.C.R. 170.

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff J.

and I have no manner of doubt that if the effect of the legislation in this respect is what the appellant contends for then it is obnoxious to section 125 of the "British North America Act."

I concur, however, in the view which was expressed in some of the judgments of the *Calgary and Edmonton Case*(1) to the effect that the interpretation clause entitles us where that is necessary to make the legislation effective and reasonably possible to read "land" and "lands" in these enactments as meaning "interest in land"; and, I think, we ought to give to these provisions a construction in so far as the language of them is reasonably capable of it, consistent with the assumption that the Legislature did not intend to offend against the section 125 of the "British North America Act"; and on the other hand, having regard to the circumstances of the Province of Saskatchewan and the obvious injustice of exempting from taxation limited interests such as those in question here we must, I think, read these provisions in light of the strong probability that the Legislature did not intend to sanction such a sweeping exemption. In other words, the entire exclusion from the operation of these Acts of all interests in Dominion Crown lands would operate so unfairly that one really can not suppose the Legislature to have contemplated it.

Whatever difficulties there may be in putting into operation some of the provisions of these statutes in respect of an assessment such as that in question here I can see no good reason against holding that the essential enactment by which the liability to pay the tax is created may be given effect to in proceedings

(1) 45 Can. S.C.R. 170.

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff J.

in personam against the occupier, who is at the same time owner of a limited interest in Dominion Crown lands.

At first sight it appeared that a difficulty might arise by reason of the fact that the rate is a uniform one with reference to owners and occupiers. But if the rate be conceived as having been fixed primarily with reference to the occupation value which may very well have been the case, one can quite understand the Legislature having resolved that the owners of lands which are unoccupied should not by reason of that fact alone escape taxation.

Coming now to sections 50 and 51, the only point necessary to refer to is that from admission No. 5 it appears that the rate imposed by the resolution of the respondent municipality was a uniform rate levied alike upon the owners and upon the occupants of land. Any objection founded on that circumstance must stand or fall with the objection just dealt with.

I think the appeal should be dismissed with costs.

ANGLIN J.—For the reasons given by the Chief Justice of Saskatchewan, in which I respectfully concur, I am satisfied that the respondent municipality had the right to collect the taxes in question if they were validly imposed.

Their validity is impugned on one ground only; namely, that they are in contravention of section 125 of the "British North America Act," which exempts from provincial taxation lands belonging to the Crown in right of the Dominion. In *The Calgary and Edmonton Land Company* v. *Attorney-General of Alberta*(1), we held legislation similar to, if not iden-

(1) 45 Can. S.C.R. 170.

tical with, that now impeached to be *intra vires* of a provincial legislature. We regarded it as authorizing, in the case of Dominion Crown lands, only the taxation of any interest in them with which the Crown had parted. It was suggested — indeed argued at some length — that in the present case the tax is not upon an interest so parted with, but upon the lands themselves. It may be that the tax on the defendant's interest as holder of a grazing lease is excessive, but that is not a matter with which we can deal. There is no evidence that it was intended to tax any interest in the lands still held by the Crown. Nor is it established that the tax in question will indirectly affect the interest of the Crown to any greater extent than that interest is necessarily affected by the prospect that when parted with it becomes subject to provincial taxation.

It is also urged that because the defendant is a non-resident the provincial legislature cannot make him liable to a personal action for these taxes. I see no reason why the legislature may not authorize the recovery in its own courts of a personal judgment against the owner, wherever resident, for arrears of taxes levied upon an interest in lands situate within the province. That judgment will be enforceable only against property of the defendant within the province. It can be enforced against his person only if he should come within the provincial boundaries. If he should be sued upon it in any other jurisdiction it is quite possible that some very nice questions of international law would arise. But the purchaser of an interest in land buys it subject to provincial legislation, whether present or future, affecting it and the incidents of its ownership within the province, and cannot be heard

1914

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Anglin J.

to say in a court of the province, or on appeal therefrom, that he is not bound by legislation which makes him personally liable within the province for taxes validly imposed in respect of such interest.

I would dismiss this appeal with costs.

BRODEUR J.—In my opinion the case of *Calgary and Edmonton Land Co.* v. *The Attorney-General of Alberta*(1) disposes of the present appeal.

That case determined that the provincial legislatures had the right and the power to authorize the taxation of beneficial or equitable interests in lands wherein the Crown in the right of the Dominion of Canada holds some interest and the legal estate.

The interest of the appellant in the Dominion lands in question then can be taxed. It may be that in this case the municipal valuation of that interest is larger than it should be, but we have no evidence to guide us on that issue.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Knowles, Hare & Benson.*

Solicitors for the respondent: *McKenzie, Brown & Co.*

(1) 45 Can. S.C.R. 170.

ANNIE CONROD AND OTHERS (PETITIONERS) ..... } APPELLANTS;

AND

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

1914

*Feb. 18, 19.
*March 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Right of action—Lord Campbell's Act—Death by accident—Action by widow—Accord and satisfaction.

Where the death of a person is caused by the wrongful act, neglect or default of another an action for damages does not lie under Lord Campbell's Act unless the deceased could have maintained an action if death had not ensued.

C. was a temporary employee on the Intercolonial Railway and, as such, a member of the "Employees Relief and Insurance Association." By the rules of the Association the object of the Temporary Employees Accident Fund was to provide for members suffering from bodily injury and for the family or relatives of deceased members. Each member had to contribute to the fund and the Railway Department gave the annual sum of $8,000 in consideration of which it was to be "relieved of all claims for compensation for injury or death of any member." C. was killed by a railway train and his widow was paid $250 out of this fund. She then brought an action under "Lord Campbell's Act."

Held, affirming the judgment of the Exchequer Court (14 Ex. C.R. 472), that as by his contract with the Association C. could not have maintained an action had he lived the widow's right of action was barred.

APPEAL from a judgment of the Exchequer Court of Canada (1), dismissing the petition of the appellant.

The suppliants, who were the wife and dependent children of Thomas Conrod, deceased, sought to re-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 14 Ex. C.R. 472.

1914

CONROD v. THE KING.

cover against the Crown under "Lord Campbell's Act" (R.S.N.S. 1900, ch. 178) ten thousand dollars damages for the alleged loss sustained by the death of the said Conrod on a public work, resulting from the alleged negligence of a servant of the Crown while acting within the scope of his employment.

The deceased was killed in the Intercolonial Railway yard at Richmond, near Halifax, on Sept. 11th, 1911, by the falling over of a tripod which had been set up by one James Cody, an Intercolonial Railway carpenter, for the purpose of dismantling a crane.

The Railway Department was enlarging the yard, laying new tracks, etc., and it was in connection with this work that the crane was being removed.

The alleged negligence was the failure on Cody's part to secure the tripod by guy-ropes or otherwise so as to make it safe for the intended purpose, the tripod having toppled over while the heavy part of the crane was suspended by a block and fall from the apex of the tripod, this heavy part falling against Conrod, who failed to get out of its way, causing the injuries resulting in his death.

The Crown denied that there was negligence and pleaded contributory negligence. The following other defences were also relied upon:—

(1) *Volenti non fit injuria.*

(2) That the negligence, if any, was that of a fellow workman.

(3) The deceased being a member of the I.C.R. Employees' Relief and Insurance Association, the Crown was relieved, by the rules and regulations of that Association, and by the deceased's agreement on becoming a member thereof, of all liability for the claim now being made.

1914

CONROD
v.
THE KING.

(4) That the suppliant, Annie Conrod, had by release under seal dated September 25th, 1911, discharged the Crown from all claims and demands arising out of the death of her husband.

The trial judge found that the death of Conrod was caused through negligence of the foreman in charge of the work, but dismissed the petition on the ground that the latter was a fellow-servant of the deceased. The suppliant appealed to the Supreme Court of Canada.

Power K.C. for the appellants. The trial judge found all the facts in favour of the suppliant, held that the foreman was guilty of negligence and that there was no contributory negligence. He applied the doctrine of common employment and dismissed our petition on that ground only.

I respectfully submit that the learned judge took an erroneous view of the facts proved. The doctrine of common employment will not relieve the employer where the accident is caused by a defective system or lack of proper safeguards. *Canada Woolen Mills* v. *Traplin*(1); *Ainslie Mining and Railway Co.* v. *McDougall*(2); *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(3); *Canadian Northern Railway Co.* v. *Anderson*(4).

Then as to the effect of deceased's membership in the Railway Insurance Association.

The action under "Lord Campbell's Act" is separate from and independent of the estate of the deceased or any right the latter might have had if he had

(1) 35 Can. S.C.R. 424.
(2) 42 Can. S.C.R. 420.
(3) 44 Can. S.C.R. 412.
(4) 45 Can. S.C.R. 355.

1914

CONROD v. THE KING.

lived. See *White* v. *Parker*(1); *Seward* v. *The "Vera Cruz"*(2); *Robinson* v. *Canadian Pacific Railway Co.* (3). And the release given by the widow is no bar. *The King* v. *Desrosiers*(4); *Miller* v. *Grand Trunk Railway Co.*(5).

Rogers K.C. for the respondent. *Ryder* v. *The King*(6), followed by the learned trial judge, is conclusive against the appellant. See also *Burr* v. *Theatre Royal*(7).

Deceased having contracted away his own right of action his widow's right is barred. See *Griffiths* v. *Earl of Dudley*(8). The cases cited by appellant's counsel hold that there is a substantial difference between the provisions of the Quebec Code and "Lord Campbell's Act" as to the right of action in case of death.

THE CHIEF JUSTICE.—I express no opinion as to the sufficiency of the apparatus or the qualification of the foreman or whether the claim could have been successfully maintained on the ground of negligence.

I regretfully come to the conclusion that the claim is barred by the release given by the appellant and which reads as follows:—

$250.00

Received from the Intercolonial Railway Employees' Relief and Insurance Association the sum of two hundred and fifty dollars, *which I hereby accept in full satisfaction and discharge of all my claims and demands against the said Association, and against His Majesty The King,* His officers or servants arising out of the death of my husband, the late Thomas Conrod.

(1) 16 Can. S.C.R. 699.
(2) 10 App. Cas. 59, at p. 67.
(3) [1892] A.C. 481.
(4) 41 Can. S.C.R. 71.
(5) [1906] A.C. 187.
(6) 9 Ex. C.R. 330; 36 Can. S.C.R. 462.
(7) [1907] 1 K.B. 544.
(8) 9 Q.B.D. 357.

1914

CONROD
v.
THE KING.

The Chief Justice.

It is submitted that this receipt or release is a complete discharge in so far as the claim is concerned. The circumstances under which this document was executed have not been, and could not be well, called in question, and I do not think that the suppliant was not fully aware as to the plain meaning of the words used.

It appears upon the pleadings and admissions that the deceased was a member of the Intercolonial Railway Employees' Relief and Insurance Association, an incorporated society, to the funds of which the Government of Canada contributes annually the sum of six thousand dollars. One of the rules of the Association was that in consideration of such contribution of the Government to the Association, the Government should be relieved of all claims for compensation for injury or death of any member. The rules were in force at the time of the accident and had been in force throughout the whole period of the employment of the deceased, and the contribution by the Crown to the funds of the Association had continued during the whole period. The facts upon this point constituted an agreement by the deceased with the Government by which he agreed to accept the contribution and advantages to which he might be entitled under the rules of the Association in lieu of any claim for damages which he might have against the Government. He would, therefore, have been precluded from maintaining this action had he survived, and it is apparent that the suppliant was likewise precluded.

The suppliant, having accepted $250, the amount of insurance on the life of deceased payable by the Association under its rules and regulations, is estopped from setting up any claim inconsistent with those

1914

CONROD v. THE KING.

The Chief Justice.

rules and regulations, and, therefore, precluded from maintaining this action. *Clements* v. *London and North Western Railway Co.*(1); *Griffiths* v. *Earl of Dudley*(2). We were referred to the case of *Miller* v. *Grand Trunk Railway Co.*(3), but the terms of article 1056 of the Civil Code of Quebec, which was the foundation of the liability in that case, differ substantially from the provisions of "Lord Campbell's Act" and the Nova Scotia provincial statutes. The suppliant here has not an independent and personal right which the deceased could not, in his lifetime, have released.

The appeal should be dismissed with costs.

IDINGTON J.—The decision of this court in the case of *The Queen* v. *Grenier*(4) seems conclusive against the appellant's right to recover herein by reason of deceased having by terms of his employment agreed to release the Crown in consideration of the benefits to be received by the rules of the Intercolonial Employees' Relief and Insurance Association.

The appeal must be dismissed; and with costs if respondent insists thereon.

DUFF J.—The view I take of the terms under which the late Conrod was employed by the Department of Railways makes it unnecessary to express any opinion upon the question whether or not (the special stipulations of that contract apart) the appellants might have succeeded in this action. Thos. Conrod was required, according to the practice of the department, on entering on his employment, to become a member of

(1) [1894] 2 Q.B. 482.
(2) 9 Q.B.D. 357.
(3) [1906] A.C. 187, at p. 191.
(4) 30 Can S.C.R. 42.

the I.C.R. Employees' R. & I. Association, and to enter into an express agreement to be bound by the rules of the Association. These rules contain the following provisions:—

Copy of Rules (1 and 3).

Intercolonial Railway Employees' Relief and Insurance Association.

Object.

The object of the Temporary Employees' Accident Fund shall be to provide for its members while they are suffering from bodily injury, and in case of death by accident, to provide a sum of money for the benefit of the family or relatives of deceased members. All payments being made subject to the Constitution, Rules and Regulations of the Intercolonial Railway Employees' Relief and Insurance Association, from time to time in force.

General.

1. Each and every temporary employee shall contribute to the funds of the Association one cent for each day or part of a day worked by him in the railway service, and in case of injury received while at such work, he shall receive medical attendance and medicine, and an allowance of $3 a week, of six working days, during the time he is unable to work in consequence of the said injury, but such weekly allowance shall not be paid for a shorter period than one week or for a longer period than thirteen weeks in any one year; and in case death shall occur as the result of the said injury within thirteen weeks from the date on which the said injury was received, the sum of $250 shall be paid to his widow, or failing his widow, to the executor or administrator of his estate.

* * * * * * *

3. In consideration of the annual contribution of $8,000 from the Railway Department to the Association, the Constitution, Rules and Regulations, and future amendments thereto, shall be subject to the approval of the Chief Superintendent; and the Railway Department shall be relieved of all claims for compensation for injury or death of any member.

It is not disputed—indeed it is admitted—that the provisions of Rule 3 formed part of Conrod's contract of employment. The sum of $250 for the payment of which Rule No. 1 provides, was duly paid to the appellant Annie Conrod. The effect of Rule No. 3 is, of course, effectually to bar any action under the provi-

1914

CONROD v. THE KING.

Duff J.

sions of the "Exchequer Court Act" against the Crown, by Conrod himself; and the only point susceptible of discussion is whether, notwithstanding that, the appellants can maintain an action for the loss occasioned by Conrod's death as his dependents under "Lord Campbell's Act." It seems to me to be unnecessary to cite authority to shew that no such action is maintainable. Section 3 of the Act as re-enacted in Nova Scotia, ch. 178, R.S.N.S., 1900, is as follows:—

> Where the death of a person has been caused by such wrongful act, neglect, or default of another as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereto, in such case, the person who would have been liable if death had not ensued, shall be liable to an action of damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a crime.

It seems too clear for argument that under this provision only such "wrongful acts, neglects or defaults" as would, "if death had not ensued have entitled the person injured to maintain an action and recover damages in respect thereto," can give rise to any right to recover compensation under this Act; and since no damages could have been recovered by Conrod, if death had not ensued, in respect of the negligence charged (because of the above quoted rule by which he was bound) it follows that the Act can have no application.

ANGLIN J.—As a condition of his engagement on the Intercolonial Railway the deceased Conrod had undertaken to relieve the Crown of all liability to him for injuries which he might sustain in the course of his employment. In *The Queen* v. *Grenier*(1) a con-

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

tract in the same terms was held to preclude recovery of damages for the death of the plaintiff's husband which had been occasioned by negligence of servants of the Crown. The decision in that case on this point is not affected by the judgment in *Miller* v. *Grand Trunk Railway Co.*(1). It is a condition precedent of the right of recovery under "Lord Campbell's Act" that the deceased must have had a right of action against the defendant for the injuries which caused his death. *British Columbia Electric Railway Co.* v. *Turner*(2).

The appeal, in my opinion, fails and must be dismissed with costs if insisted on.

BRODEUR J.—This is an action under "Lord Campbell's Act" which was re-enacted in Nova Scotia under ch. 178, R.S.N.S. 1900.

It was dismissed by the Exchequer Court on the defence of common employment.

I would be inclined to agree with the appellants that on that question of common employment they should succeed. But I hold that their claim fails on account of the contract existing between the deceased and the Railway Department in whose employ he was when he was fatally injured.

In virtue of that contract every temporary employee of the Intercolonial Railway is entitled in case of injury to receive a weekly allowance; and, if he dies, his widow receives $250; *and the Railway Department is relieved of all other claims for compensation.*

Is the effect of such a contract to debar his widow and his heirs from claiming any other compensation than the one provided?

The appellants claim that their right of action is

(1) [1906] A.C. 187. (2) 49 Can. S.C.R. 470.

1914

CONROD
v.
THE KING.

Brodeur J.

independent of the estate of the deceased and is for the exclusive benefit of the widow and children.

It had been decided, however, that in order to succeed the representatives of the deceased must prove and establish that he had an action against the wrongdoers at the time of his death.

If the deceased has settled his claim in his lifetime, no further action can be brought on his dying through the same injuries. *Read* v. *Great Eastern Railway Co.*(1). Or if he has made a contract with his employer not to claim compensation for personal injuries his widow and his children are bound by that contract and cannot claim under "Lord Campbell's Act." *Griffiths* v. *Earl of Dudley*(2).

The appellants have been relying in support of their contention on some Quebec cases; but our art. 1056 C.C., which gives a right of action to a widow, confers an independent and personal right of action on the widow and relatives of the deceased and not as in "Lord Campbell's Act" a right conferred on the representatives of the deceased only. Therefore, decisions under art. 1056 are not applicable to cases under "Lord Campbell's Act." *Robinson* v. *Canadian Pacific Railway*(3); *Miller* v. *Grand Trunk Railway Co.*(4).

The appeal should be dismissed on the ground that the deceased had agreed that his employer should be relieved of all other claims for compensation, except the $250 which were paid to his widow.

Appeal dismissed with costs.

Solicitor for the appellant: *John T. Power.*

Solicitor for the respondent: *T. F. Tobin.*

(1) L.R. 3 Q.B. 555.
(2) 9 Q.B.D. 357.
(3) [1892] A.C. 481.
(4) [1906] A.C. 187.

JEREMIAH MULVIHILL .....APPELLANT; 1914

AND *March 23. *March 25.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Stated case—Extension of time—Notice of appeal—Criminal Code, ss. 901, 1014, 1021, 1022, 1024.

Where, on an application under section 901 of the Criminal Code, the court, in the exercise of judicial discretion, has refused to allow a postponement of the trial of the person indicted, there can be no review of the decision by an appellate court and the question presented does not constitute a question of law upon which there may be a reserved case under the provisions of section 1014 of the Criminal Code. Judgment appealed from (5 W.W.R. 1229; 26 West. L.R. 955) affirmed. *The Queen* v. *Charlesworth* (1 B. & S. 460); *Winsor* v. *The Queen* (L.R. 1 Q.B. 390); *Rex* v. *Lewis* (78 L.J.K.B. 722); *Rex* v. *Blyth* (19 Ont. L.R. 386); *Reg.* v. *Johnson* (2 C. & K. 354); and *Reg.* v. *Slavin* (17 U.C.C.P. 205) referred to.

APPLICATION, on behalf of the appellant, for extension of the time for giving notice, as required by section 1024 of the Criminal Code, of an appeal from the judgment of the Court of Appeal for British Columbia (1), whereby the conviction of the appellant upon an indictment for murder was sustained, McPhillips J. dissenting.

---

*PRESENT:—Idington, Duff, Anglin and Brodeur JJ.

(1) 5 West. W.R. 1229; 26 West. L.R. 955.

1914

MULVIHILL v. THE KING.

The circumstances in which the application was made are stated in the judgments now reported.

Coté appeared in support of the application.

J. A. Ritchie contra.

IDINGTON J.—Unless we are prepared to declare that it is arguable that it may be held to be law that a prisoner has a legal right to insist upon postponement of his trial in any case where some evidence to be adduced against him has been brought to the notice of his counsel for the first time on the day of the trial, this motion must be refused.

The proposed appeal here is based upon the dissenting opinion of Mr. Justice McPhillips, which in turn rests upon facts which imply nothing more than I have stated. A good many more facts are set forth therein, but none adding anything to the strength of the alleged legal right, or interfering in any way with the discretion assigned the learned trial judge in such case.

It would not be in the interests of the administration of justice to grant an indulgence such as now asked to permit of the presentation of such a case.

It may in some cases where like indulgence may be asked not be so easy as here to grasp all that really is involved in the proposed appeal.

The motion must be refused.

DUFF J.—After full consideration of the circumstances I think the application ought not to be granted. The question which counsel for the accused desires to raise upon appeal to this court is the ques-

1914

MULVIHILL v. THE KING.

Duff J.

tion whether the accused was entitled to a traverse of the trial in the circumstances mentioned in the reserved case. My opinion is that, in this respect, the case does not present a question of law within section 1014 of the Criminal Code. I have reached this conclusion after the most anxious consideration of the judgment given in the court below in which the considerations in favour of the view that a question of law is stated are set forth with great fullness and ability. I can only say that, having come to a very clear conclusion that the appellant's appeal on this point would be hopeless, and that being of the opinion of my learned brothers, I think no possible object could be served by granting the application.

The right to invoke the jurisdiction of the courts by way of appeal from a conviction after a trial at the assizes given by section 1014 of the Criminal Code is a strictly limited one. The Code does not contemplate that an accused person should be entitled as of right to claim redress by way of appeal in every case in which it alleged that the trial judge has made a mistake as, for instance, in respect of a question which is left to his discretion; the appeal given is by way of case stated and the case must present some question of law. In respect of cases not falling within section 1014 or section 1021 a right is given by section 1022 to apply to the Minister of Justice who has power to order a new trial.

ANGLIN J.—The defendant applies to extend the time for service of notice of appeal to this court under section 1024 of the Criminal Code. The judgment of

1914

MULVIHILL v. THE KING.

Anglin J.

the Court of Appeal for British Columbia affirming his conviction for murder was pronounced on the 27th of January, 1914. He had the right to give notice of appeal within the fifteen days thereafter which section 1024 allows. But, having permitted that time to expire without giving notice, he now asks indulgence on the ground that he had not until quite recently the means to launch or prosecute the appeal which he desires to take. Before granting an extension of time to serve the notice it is our duty to satisfy ourselves that the proposed appeal involves a question of law which could be reserved under section 1014 of the Code and would properly form the subject of an appeal to this court.

The learned trial judge reserved three questions for the opinion of the Court of Appeal:—

(1) Whether the prisoner was entitled to a traverse of the trial to the Spring Assizes.

(2) Whether the trial judge was right in permitting counsel for the Crown to ask the accused when he was giving evidence on his own behalf if he had been charged with or had committed certain offences.

(3) Whether the trial judge was right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions.

The Court of Appeal unanimously answered the second and third questions in the affirmative; and it has been decided in *McIntosh* v. *The Queen*(1), that the right of appeal to this court is confined to questions upon which there has been dissent in the provincial court of appeal. The defendant's right of appeal

(1) 23 Can. S.C.R. 180.

is, therefore, restricted to the first question. Three of the five judges of the provincial court of appeal held that this was not a question of law which might be reserved under section 1014, and four of them that, if it were, it should be answered in the negative. Mr. Justice McPhillips dissented from the opinion of the majority on both grounds(1).

Section 901 of the Criminal Code declares that

> no person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court.

By sub-section 2, power is conferred on every trial court, in its discretion, to grant an adjournment of trial to any prisoner.

The grand jury indicted the defendant, on the 13th of October, 1913(2). On that day he was assigned counsel, who was informed that the Crown proposed to call two witnesses whose names were on the indictment, but who had not given evidence at the preliminary investigation. A copy of the memorandum purporting to state the substance of the testimony which these witnesses were expected to give was also furnished him. There is no doubt that this evidence was of vital importance and disclosed facts not stated at the preliminary investigation. Counsel for the prisoner moved to traverse the trial in order to have an opportunity to

> inquire into the antecedents (of these witnesses) and the reason their evidence had not been given at the preliminary investigation and was being now given,

and on other general grounds. The Crown opposed postponement because of the expense involved and the great danger of loss of material evidence. The court

(1) 26 West. L.R. 955. (2) 26 West. L.R. at p. 968.

1914

MULVIHILL v. THE KING.

Anglin J.

offered to transfer the case to the Vernon Assizes to be held a fortnight later. Counsel for the defence declined to accept this offer, saying it would be useless to him, and the trial proceeded, on the 16th October, resulting in the defendant being convicted of murder.

While it is possible to conceive of cases in which it would be clear that there had not been any exercise of judicial discretion in granting or refusing postponement of trial, and in such cases there might be error of law which would be properly reviewable, where, in what was clearly an exercise of his discretion, the trial judge has refused a postponement because he was "of the opinion" that further time should not be allowed (sec. 901, sub-sec. 2 (Crim. Code)), I am satisfied that the propriety of that exercise of discretion is not reviewable by an appellate court and is not properly the subject of a reserved case under section 1014. The principle which underlies the decisions in *The Queen* v. *Charlesworth*(1), and *Winsor* v. *The Queen*(2), approved in *Rex* v. *Lewis*(3), applies. I am, with respect, unable to appreciate the distinction which it is suggested exists between the discretion conferred where "the matter rests in the opinion of the court" (4), and this case where the court is empowered to postpone, if it "is of the opinion" that it should do so.

If the propriety of the refusal of the postponement is a question of law (*Rex* v. *Blyth*(5), pp. 389, 392, re-reviewable under section 1014 *et seq.* of the Criminal Code, I agree with Martin J.A. and Irving J.A. that, under the circumstances of the present case, interference by an appellate court would be out of the question. *Reg.* v. *Johnson*(6); *Reg.* v. *Slavin*(7).

(1) 1 B. & S. 460.
(2) L.R. 1 Q.B. 289, 390.
(3) 78 L.J.K.B. 722.
(4) 26 West. L.R. 955, at pp. 964-5.
(5) 19 Ont. L.R. 386.
(6) 2 C. & K. 354.
(7) 17 U.C.C.P. 205, at p. 211.

1914

MULVIHILL
v.
THE KING.

Brodeur J.

I am, for these reasons, of the opinion that the extension of time asked for must be refused.

BRODEUR J.—By the provisions of article 1024 of the Criminal Code there is an appeal to this court by any person convicted of any indictable offence if the court of appeal has not been unanimous. But notice of appeal should be served on the Attorney-General within fifteen days after the judgment appealed from has been rendered. However, this court or a judge thereof may extend the time within which the notice of appeal should be given.

The object of the present application is to obtain that extension.

The applicant has been convicted of murder in the month of October last. He was, by the sentence of the court, to be executed on the 29th of December last. On the 23rd of December, just a few days before the date fixed for the execution, his counsel applied for a reserved case and a reprieve was granted until the 30th day of January. The Court of Appeal rendered its judgment on the 27th of January last. The execution of sentence was postponed until the 4th of April, 1914.

Instead of giving notice of appeal to this court, as required by law, the applicant waited until the 17th of March to apply for an order extending the time for serving upon the Attorney-General of the province the notice of appeal.

I have gone into the merits of the case in order to satisfy myself as to whether the case presented some serious doubts, and I failed to see any good reason why we should grant the delay asked for.

1914

MULVIHILL v. THE KING.

Brodeur J.

The only point of importance which was reserved by the trial judge and about which there was a dissenting opinion in the Court of Appeal was whether the trial judge had exercised a proper discretion in refusing to postpone the trial to the Spring Assizes.

It was not established that the ends of justice would have been served by postponing the trial to the Spring Assizes. On the contrary, it was to be feared that the witnesses could not be procured at the future time at which it was prayed to put off the trial.

The witnesses about whom the prisoner wanted to have some information were well known to him, had been in relation with him for some time, and he knew of the antecedents of those witnesses.

It has been stated in *Rex* v. *Jones*, in 1806(1), that it is the constant practice of the Old Bailey not to put off trials for the absence of witnesses to character only.

For those reasons the present application now made to this court should be dismissed.

Application refused.

(1) 8 East 31, at p. 34.

WILLIAM E. BEAMISH (DEFENDANT) ..... APPELLANT;

AND

JAMES RICHARDSON & SONS, LIMITED (PLAINTIFFS) ..... RESPONDENTS.

1914

*Feb. 13, 14.
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Broker—Dealings "on 'Change"—Speculative options—Principal and agent—Liability for contracts by agent in his own name—Privity of contract — Purchases and sales on "margin" — Settlements through clearing house—Wagering contract—Malum prohibitum —Criminal Code, sec. 231.

B. entered into speculative transactions, on "margin," by instructing the plaintiffs, members of a "Grain Exchange" to buy and sell for him on the Exchange, from time to time, quantities of grain for future delivery in accordance with the rules, regulations and customs of the Exchange, and a number of purchases and sales were made on commission for him. He was not, however, informed of the names of any sellers or purchasers, the brokers carrying out the transactions in their own names. There was a "clearing house" association connected with the Grain Exchange of which the brokers dealing on the Exchange were members and through which all transactions were settled daily by setting off purchases against sales, liability for the same being assumed by the clearing house and the brokers released upon a settlement for the resulting balances instead of for every separate transaction reported. It was not proved that B. was aware of this practice as to settlements, although he, from time to time, had paid "margins" to the brokers when required to do so by them in order to protect them against losses on his account. B. became in arrears for "margins" and, in an action against him, the brokers recovered the amount of their claim.

Held, reversing the judgment appealed from (23 Man. R. 306), the Chief Justice and Duff J. dissenting, that, as the evidence failed to shew that, by the manner in which the transactions were made, the amounts claimed had been expended in carrying out

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

BEAMISH v. RICHARDSON & SONS.

the commissions according to the instructions the brokers had received from B., they were not entitled to recover the balance so claimed from him.

Held, further, *per* Idington and Brodeur JJ., and *semble per* Anglin J.—Where, in such transactions, neither party intends that there should be actual delivery made or received of the commodities to which the purchases or sales relate the contracts are illegal and prohibited by the terms of section 231 of the Criminal Code.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J., at the trial, by which the plaintiffs' action was maintained with costs.

The circumstances of the case are stated in the judgments now reported.

W. A. T. Sweatman for the appellant.

Chrysler K.C. and *E. A. Cohen* for the respondents.

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal with costs.

IDINGTON J.—This is an action by an agent to recover from his principal moneys expended in his service.

The respondent as a commission merchant was instructed from time to time either to buy or sell, as directed, wheat and other grains on the Winnipeg Grain Exchange.

The ordinary agency in way of buying and selling anything does not give rise to implications out of which can arise claims for reclamations by the agent. Either the agent is directed merely to make the bargain as directed, to buy and pay for or sell, and there the matter rests.

(1) 23 Man. R. 306.

But, on change, there has arisen a practice of buying and selling of options and a custom of the agent advancing the needed cash, called margins, for the purpose of securing or of protecting the bargain and out of this peculiar form of agency often arise claims by way of reclamations.

The claim made herein is for a series of reclamations arising out of such mode of dealing. The parties are agreed, so far, that the law declares in such case that the agent has implied authority to act according to the usage and customs of the particular place, market or business in which he is employed, provided that no agent has implied authority to act in accordance with any usage or custom which is unreasonable unless the principal had notice of such usage or custom at the time when he conferred the authority.

Applying this to the facts, it is clear that as regards the several dealings in question, in which the respondent acted as agent, it expressly represented, time and again, that the dealing entered upon was as follows:—

> On all marginal business we reserve the right to close transactions when margins are running out, without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange.

On these rules alone the bargains made would each have created a privity of contract between the appellant principal and some one else to whom he could have looked and to whom he would have been bound.

None of the transactions in question here were allowed to remain in that simple primitive condition which the observance of these rules and ancient well-known usages would have produced.

1914

BEAMISH v. RICHARDSON & SONS.

Idington J.

A few years before these dealings the "Clearing House," known as "The Winnipeg Grain and Produce Clearing House," was incorporated. Any member of the voluntary association known as "The Winnipeg Grain Exchange," referred to in the above-quoted memo., could become a member of this Clearing House.

But all the members of the Grain Exchange were not members of the incorporated Clearing House. The latter had a peculiar set of by-laws which no doubt bound its own members to each other, but could not bind others unless expressly or impliedly assenting to be so bound.

I shall not enter into the details of the system for I find the learned counsel engaged in this case are very wide asunder not only as to the law, but the essential facts relative to the consequence of members of this Clearing House using its machinery and dealing through means thereof with bargains made between them on the "Exchange"; and I find the learned judges in the court below seem to be in as hopeless a sort of disagreement in same regard as counsel in the case; and, to crown all, counsel for respondent will not accept the evidence of its own manager as to the position in which the practice and dealings of its members are supposed to have brought their respective clients in relation to contracts on their behalf when dealt with by means of this Clearing House.

Indeed, we are invited to determine that matter by the construction of a few obscurely worded rules and, in doing so, to first determine that the meaning thereof is that which will best serve the purposes of respondent in this appeal, and next, under such circumstances, to find that appellant must be held bound

by reason of his knowledge, or duty to know of the existence of such a Clearing House and its uses, and the legal consequence of such use, as part of the usage and custom of the Grain Exchange on which he authorized respondent to deal for him.

There is not a word of evidence to shew appellant had ever heard of such an institution or knew anything of its uses and the consequences of such use.

His examination for discovery is put in, so far as serving respondent's purpose, and a perusal of it leads me to conclude that all his apparent knowledge of the Grain Exchange was at best shallow; and it by no means leads me to conclude that he ever got beyond very old-fashioned notions of the business he was engaged in when entering on the dealings now in question.

To impute to such a man knowledge of what his agent would be likely to do in regard to the Clearing House seems absurd.

And if the radical differences of opinion, amongst those likely to know about such a mode of doing business, which I have presented do not demonstrate how unreasonable it would be to bind an ignorant man to its adoption, I imagine I should fail if I attempted further elaborate demonstration.

The ordinary man cannot realize the existence of a contract without its continuation till ending in the ordinary way. It is contended that the twenty-four contracts involved herein each ended in some sort of novation by which the party with whom in each case appellant was brought into some contractual relation either as buyer or seller became discharged almost immediately after the contract had been framed.

And it is said the Clearing House corporation be-

1914

BEAMISH v. RICHARDSON & SONS.

Idington J.

came substituted in and by such novation as either buyer or seller as suited the exigencies of the case.

That is the position taken by counsel for the respondent and it has some colour of support in one if not more of the opinion judgments in the court below.

But the respondent's manager who took part in these deals and was at the time of giving evidence herein president of this Clearing House Association, and I infer, from a reading of his evidence, was possessed of a clear head, says:—

Q.—In other words, two days later Bingham may have closed the transaction so far as he was concerned?

A.—Yes; of course, his position would be the same as ours. The purchase he made from another may have cancelled some deal he had outstanding, and he may have cleared on the Clearing House that day.

* * * * * * *

Q.—And the clients would look to you and no one else?

A.—Yes.

Q.—No one else would be responsible to the clients except you? You alone would be responsible to the clients?

A.—We are in every case. They can only look to us; they cannot look to the Clearing House.

The result would seem to be, as the man best fitted to know thus explains it, that there was by means of the ingenious and beneficent plan of the Clearing House a method whereby the commission agent and his clients could by due process of law form an apparently contractual relation between them, as basis for betting against the rise and fall of the market without the annoyance of being troubled by others, and the Clearing House be a good and safe place for recording the bet and, barring some occasional accidents, form a stakeholding security.

At least such is what the appellant charges and relies upon as his second line of defence resting upon

the section 231 of the Criminal Code, which, abbreviated, is as follows:—

> Every one is guilty of an indictable offence * * * who * * * (*a*) without the *bonâ fide* intention of acquiring any such * * * goods, * * * or of selling the same * * * makes * * * any contract * * * purporting to be for the sale or purchase * * * of any * * * goods * * * ; or, (*b*) makes * * * any contract * * * purporting to be for the sale or purchase of any such * * * goods * * * in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery."

The contention of respondent, either through its witness or counsel, as to the consequences of dealing through the machinery of the Clearing House, if correct, produces a situation that better lends itself to the operating of a system of betting or wagering than the old system of treating the contracts, as between the buyer and seller, as being kept on foot.

But the most significant fact bearing upon the essential question of whether or not these transactions were intended to be mere wagering transactions is that we have presented at least twenty-four transactions between the parties hereto in which alleged contracts of selling and buying are apparently involved yet not one of them resulted in the transfer and delivery of a single pound of goods of any kind.

Surely it is asking too much of us to believe that the sale and form of delivery in all these cases was made with the *bonâ fide* intention to make or receive such delivery as the law contemplates and that in such a mass of cases it so signally failed of fruition in a single instance.

There is, however, more than that curious and continuous unbroken chain of business dealings between these parties to be considered; for we find that the very first contract, in January, 1910, was one of a

1914

BEAMISH v. RICHARDSON & SONS.

Idington J.

sale for delivery in the future of "May wheat" and long before the time for delivery had arrived, indeed, within a few days, another alleged contract is made for the purchase of exactly the same quantity of wheat, ostensibly bought for "May delivery," and these parties seem to have set the one off against the other and settled on that basis allowing a small item of profit as the result to the appellant.

An examination of other similar transactions and reckoning shews this process was gone through and a settlement arrived at, on the like basis and through the like methods, long before the respective times at which the future delivery ostensibly contemplated by the form of the transaction had arrived. Whether all were recorded in the Clearing House or not does not appear.

In some ancient temples we are told ceremonies were performed which no one but the initiated were supposed to behold or quite understand and outside that charmed circle the whole performance was treated with that respectful awe which is ever due to mystery.

In this modern temple probably some consecrated symbolical delivery takes place accompanied with appropriate ceremony. No ruthless hand has dared to lay bare before us exactly what form or symbol was substituted and accepted by the faithful as something they may call, and swear, to be delivery of that grain; in the clouds or four hundred miles away.

It never, in transactions such as presented herein, moves out of the warehouse or helps to propel the wheels of commerce. But the chips change sides and the bank accounts are expected to do the rest.

I assume the usual ceremony or form was gone through on twenty-four successive occasions. No one saw, or felt, or ever handled a pound of grain or flax in any single instance!

This was not, I imagine, all accidental, but a mere using of the forms of the law to promote an illegal purpose present to the minds of those concerned. And the methods used and consequences involved in the use of the machinery provided by the Clearing House and its system facilitated this mode of mere wagering.

I am not to be understood as alleging that the Clearing House and its system is used solely for that purpose and is not used for an honest and most beneficent purpose.

But, when asked to find that it was not used for such wagering purpose and could not be so used, I must say that to ask so much seems like trading on one's credulity, in face of the facts presented. As I read the statute it fits these facts.

It is idle to call a mere symbolical form, never intended to result in anything but a change in the bank ledger containing records of the gains and losses of those concerned, a delivery or evidence of intention to make or receive delivery.

There is a letter from appellant which opens the dealing in flax that is relied upon as lending colour to the abandonment of the vicious system pursued in the eighteen wheat deals which had preceded it.

If the flax sale had taken the form that it might have done or, by any reasonable interpretation of what transpired, have been attributed to a sale of flax grown or to be grown upon the farms in which appellant was interested, then I might have found some colour of reason for supposing the practices of a year's

1914

BEAMISH v. RICHARDSON & SONS.

Idington J.

duration now spread out before us had been abandoned.

I can find nothing in the transaction to bear this out. I conclude that the appellant is entitled to succeed on both grounds taken and that the reasoning of the learned Chief Justice of Manitoba both upon the facts and the law and application of the authorities he relies upon is well founded and that I accept to cover the ground which I have not dwelt upon in detail.

I think the appeal must be allowed with costs.

DUFF J. (dissenting).—I think this appeal should be dismissed. My reasons for thinking that the plaintiff is chargeable in respect of the transactions upon which the action is based, are so fully and satisfactorily stated in the judgments of Mr. Justice Perdue and Mr. Justice Cameron that I should not have considered it necessary to do more than simply express my concurrence in those judgments, had it not been for the difference of opinion in this court. The first point for consideration arises out of the position taken by the appellant that the transactions in course of which the moneys were paid for which he had been held responsible in the courts below, were not within the scope of the respondents' employment. Reduced to its lowest terms the appellant's contention upon this head could, perhaps, be stated in this way: The respondents were instructed by the appellant as *brokers* to buy or sell grain; under such instructions the authority of the respondents was limited to making contracts of sale or purchase in a representative capacity for and on behalf of the appellant, or to put it more concretely — it was the respondents' duty, and their authority was limited by this duty, in executing the instructions of

the appellant, to constitute agreements of sale and purchase between the appellant as seller or buyer with a purchaser or seller, which contracts should be enforceable by the appellant as the respondents' principal, and in respect of which contracts, moreover, the rights of the appellant should not be affected by the state of the account between the respondents or their clients and the other party, or parties, to the transactions. The process by which these legal incidents are said to be ascribable to the respondents' employment is something like this: first, it is said — and perhaps I ought to say assumed — that *primâ facie* the respondents were employed as agents of the appellant to make contracts of sale or purchase for him as his representatives, and this is assumed to involve as a legal consequence the limitations upon the authority of the respondents above indicated in the absence of evidence proving the contrary which, it is argued, is not forthcoming in this case.

I think this is not the right road of approach for arriving at the nature of the employment of the respondents. I will discuss later the decisions of the courts upon which the appellant relies. In the meantime, for the purpose of stating my view as to the nature of the respondents' authority, I refer to a passage of the judgment of Parke, B., in *Foster* v. *Pearson* (1), at pages 858 and 859, which indicates, I think, the point of view from which the evidence bearing upon the question ought to be examined. In point of fact, the respondents, as the appellant knew, were grain merchants carrying on business at many places in Canada in buying and selling on their own account and also as commission merchants. They were also

(1) 1 C. M. & R. 849.

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

commission merchants and members of the Winnipeg Grain Exchange and the appellant dealt with them as such. The commissions they undertook for the appellant were to buy or sell grain "on margin" in the Winnipeg Grain Exchange and they were, by the terms of the respondents' employment, to be executed according to the "rules, regulations and *customs*" of the Exchange. As regards the incidents of the respondents' employment in these circumstances, those observations of Baron Parke in the case above mentioned appear to me to be pertinent.

The judgment in the case of *Haynes* v. *Foster*(1), is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill broker that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had, therefore, no right to mix bills together and pledge the mass for one entire sum. In truth, *a bill broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing.* It may differ in different parts of the country; it may have powers more or less extensive in one place than in another: what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place.

Instead of beginning with certain presumptions founded upon legal decisions with reference to states of fact, more or less remotely similar to that disclosed by the evidence in this case, I shall try to ascertain what the facts in evidence have to say as to the nature of the transactions contemplated by the appellant's instructions to the respondents to make sales and purchases for his benefit "in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

(1) 2 C. & M. 237.

Connected with the Winnipeg Grain Exchange is an incorporated company, known as the Winnipeg Grain Exchange Clearing House Association, the members of which are necessarily members of the Grain Exchange. The function of the Clearing House Association is to "clear" transactions entered into between its members. Members of the Grain Exchange who are not members of the Clearing House Association were not entitled to avail themselves of the services of the latter. As to members of the Clearing House Association it is their duty to report any transactions entered into between any two of them, within three-quarters of an hour after closing on the date of the transaction. The transaction is examined by the manager of the Clearing House Association and, if accepted by him, the Association itself intervenes, assuming towards the seller the obligations of buyer and towards the buyer the obligations of seller. The single contract between two members becomes decomposed into two contracts, the Clearing House Association being a party to each, in one case being seller and in the other case being buyer. For the purposes of these two contracts the price is the closing price of the day, and if that differs from the price in the original contract, the difference is settled by payment in cash. This practice applies, of course, only to sales and purchases for future delivery. These contracts between the purchasing member, on the one hand, and the Association, and the buying member, on the other hand, and the Association, are, of course, subject to the rules of the Clearing House Association and there are two points as to the effect of these rules which are important; indeed, it is upon these two points that the defence and the appeal are based. The first of these is

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

that the Clearing House Association treats the buying member, or the selling member as the case may be, as the principal and the only principal in the transaction. It is admitted by Mr. Ruttan, the general manager of the respondents, that according to the system in force the Clearing House Association is not bound to recognize any client of any member. The next point is: according to the regulations of the Clearing House Association a settlement takes place each day between each member and the Association, which settlement is effected in this way. At the close of any given day each member is credited by the Association with the aggregate amount of any advance in that day's closing price of commodities in respect of which the member is seller over the closing price of the previous day, or debited, as the case may be, with the amount in the aggregate of the decline, while with regard to commodities in respect to which he is a purchaser the process is reversed. The difference between the credits and debits is paid to the Clearing House Association by the member or to the member by the Clearing House Association, according to the state of the account. In order to secure payments of differences by members, the manager of the Association is entitled to call upon members from time to time for reasonable "margins" which are placed to the credit of the member. In the event of a member failing to pay differences, or to produce margins, when called upon to do so, authority is conferred upon the manager of the Association by the by-laws, in respect of transactions in which the member is a seller, to produce commodities sufficient to fulfil such contracts, and, in respect of contracts in which he is buyer, to sell the commodities to which he is entitled. That, it appears to me,

on careful reading of them, is the true construction of sections 3 and 4 of by-law 14.

The sum of the matter as affecting the respondents' transactions now in question is this: As regards sales a contract arose between the C.H.A. and the respondents by which the C.H.A. agreed to take delivery of a given number of bushels of grain at a certain future date and pay for them at the closing price of the date of the sale and to credit the respondents in the daily settlement with the decline in price (if any) for that day while the respondents undertake to deliver on the named date and to account in daily settlement for the rise in price (if any) for that day and to provide margins when called upon. When the date for delivery arrives, the respondents are bound to deliver the commodity contracted for unless they have it at the Clearing House, *i.e.,* unless they have contracts entitling them to receive an equal amount from the Clearing House.

The incidents of a purchase are the same *mutatis mutandis*. As for the appellant (assuming the respondents are right) he had no right to enforce these contracts as against the Clearing House Association by which he would not be recognized; but, as between him and the respondents, he was entitled to have them carry out any transactions entered into for him so long as he furnished the required "margins" and to have the benefit of all profits arising from such transactions.

All contracts for delivery of commodities within the scope of the business of the Grain Exchange made between two members of the Grain Exchange who are also members of the Clearing House Association, being necessarily subject to the rules of the Clearing

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

House Association, have the incidents, and the rights of the parties to them are held subject to the conditions just indicated.

It follows, of course, that any contract for sale or purchase of commodities for future delivery made by a commission merchant who is a member of the Clearing House Association with another member of the Clearing House Association, in execution of a commission to buy or sell such commodities, is necessarily affected by the same incidents. The question is whether transactions having such incidents are within the class of transactions contemplated by the appellant's instructions to the respondents.

For more than five years before the first of the transactions in question the appellant had been dealing in options on the grain exchange. That he was familiar with the practice of depositing margins is shewn by the correspondence. He was also familiar with the practice of "closing out" one transaction by entering into another; by off-setting a sale with a purchase and taking the profits. It seems reasonable to conclude from the whole correspondence touching these matters that the appellant knew perfectly well that when a sale was made for his benefit the purchaser was not looking to him as principal. It seems reasonably clear that he never entertained any idea of assuming any obligation to anybody but the respondents.

But it is not necessary to go so far as that. The appellant knew there was some system in operation among the members of the Exchange by which profits could be made through speculating in sales and purchases for future delivery; and it was this system he wished to take advantage of.

He desired and expected the benefit of all the advantages the respondents could offer their clients; he expected doubtless to have them act as they would act for themselves. If anybody had conceived the impracticable idea that, in executing his commissions they should buy only from persons who were not members of the Clearing House Association or sell only to such persons I think it is fair to assume he would have been the first to protest. Yet that would be the necessary effect of the appellant's construction by reason of the rigorous rule requiring all transactions between members of the Clearing House Association to be reported to the Association.

On a fair interpretation the stipulation that "all purchases and sales" are "made in accordance with and subject to the" * * * "customs of the Winnipeg Grain Exchange" seems to authorize these transactions. It would assuredly not be "in accordance with" the "customs" of the Exchange for a member of the Clearing House Association, in executing commissions for a client, to confine himself in his dealings with persons not members of the Association; nor would it be "in accordance with" those customs for members of the Association to fail to report their transactions to the Association and the requirement that a transaction between two members of the Association should be "made * * * subject" to the "customs" of the Exchange would seem to import that a practice not only obligatory, but universally observed as regards such transactions should be followed.

But it is said that there is a series of decisions which oblige us to hold that the duty of the respondents was to establish privity of contract between the appellant and somebody else in each one of these trans-

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

actions. I think that is a proposition which cannot be sustained. Lord Blackburn in his judgment in *Robinson* v. *Mollett*(1), pointed out that where a merchant instructs an agent in a foreign country to enter into a contract for him, the rule founded upon the presumed intention of the parties in the circumstances is that the agent contracts as principal and not as representative. In *Clarke* v. *Bailie*(2), I called attention to the fact that in the State of Massachusetts (see *Chase* v. *City of Boston*(3)) stockbrokers engaged in buying on margins for their clients are deemed to buy on their own account entering at the same time into an executory agreement to sell to the client on demand at the market price. That seems also the legal effect of transactions on the London Stock Exchange known as "contango" transactions which constitute, apparently, a very large proportion indeed of the transactions on the Exchange. There is nothing startling or inherently improbable in the idea of a person buying and selling on margin speculation, that is to say, by the aid of the credit of a broker or a commission merchant who lends his credit for a commission, agreeing with the broker or the commission merchant that in the transactions in which he expects to make his profits the commission merchant shall act as principal while at the same time the client or customer shall be entitled to the profit derived from the transaction.

Robinson v. *Mollett*(1), and cases following it, are the authorities chiefly relied upon. But, the principle of those cases appears to have no application to the circumstances now under consideration. The plaintiff there relied upon an implied term of his employment

(1) L.R. 7 H.L. 802. (2) 45 Can. S.C.R. 50.
(3) 180 Mass. 458.

founded upon a custom of his trade. It was held that a custom which, on being imported, would have the effect of altering the essential character of the employment could not be implied by law. It was not held that the plaintiff must fail if the contract of employment had expressly or by necessary implication provided that the employment was to be subject to a specified custom or the custom of the trade, whatever it might be, or if the circumstances shewed such to be the intention. Lord Blackburn, page 810, then Blackburn J.(1), uses these words:—

> Had the order in the present case expressed that it was to buy according to the custom of the tallow market, there can, I think, be no question that the custom would have been incorporated, and that all that the plaintiffs did would have been in strict conformity with the authority given.

Lord Blackburn had been in the same case in the Exchequer Chamber and on the question which presented itself for decision (namely, whether in the absence of any reference to the custom in the written order on which the plaintiff acted, the custom was to be incorporated), he had differed from other very able judges, including Mr. Justice Willes, and I do not think he would have used the language quoted above if he had supposed they entertained a different opinion upon the point he is there dealing with.

The next question arises on the second branch of the defence, namely, whether these dealings were illegal. Section 231 of Criminal Code, R.S.C., ch. 146, declares:—

> 231. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company, or

(1) *Robinson* v. *Mollett* (L.R. 7 H.L. 802).

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,—

(*a*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

(*b*) makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery,

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

This enactment first appeared in 1888, 51 Vict., ch. 42. The preamble to the Act shews that the legislature had in view the suppression of "bucket shops." A "bucket shop" has been held to be a place where bets are made as to the rise or fall of commodities under the guise of fictitious sales and purchases. See *Pearson* v. *Carpenter*(1). Now it cannot be contended that the sales and purchases entered into by the respondents for the account of the appellant were fictitious. In each case there was an actual contract. It is quite true that in each of these cases the contract, on being reported to the Clearing House Association and accepted by the manager, became pursuant to the rules of the Association transformed into two contracts in the manner already described, but these two contracts were legally binding contracts which either party could be called upon at the proper time to fulfil and which in the ordinary course would be fulfilled either by the delivery of the commodity sold and the

(1) 35 Can. S.C.R. 380, at p. 382.

payment of the purchase price actually or by setting off the performance of one contract against the performance of another between the same parties relating to the same commodity deliverable at the same time.

The evidence shews that the Winnipeg Grain Exchange and the Winnipeg Clearing House are not mere conveniences for speculation. All transactions for future delivery, in fact, take place through the Grain Exchange and the vast majority apparently through the instrumentality of the Clearing House Association. When the commission merchant buys or sells for future delivery on the exchange and the transaction takes place between two members of the Clearing House Association, the commission merchant enters into a contract which he knows he will be obliged to carry out either by payment or delivery actually or by set-off of payments against the exigible obligations under some other real contract which has been accepted by the manager of the Clearing House Association. I think the following observations of Mr. Justice Holmes in *Board of Trade of Chicago* v. *Christie Grain and Stock Co.*(1), at page 247, are pertinent:—

> As has appeared, the plaintiff's Chamber of Commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavour to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have

(1) 198 U.S.R. 236.

1914

BEAMISH v. RICHARDSON & SONS.

Duff J.

recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange: *Clews* v. *Jamieson*(1).

When the Chicago Board of Trade was incorporated, we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the state of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time, and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then, as now, a settlement would be made by the payment of differences, after the analogy of a Clearing House. This naturally would take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

(1) 182 U.S.R. 461.

In point of fact, the particular transactions entered into in this case were transactions with milling companies or other exporters and, as regards the sales, the evidence of the respondents' manager is that in every case the warehouse receipts were actually delivered.

The argument most strongly pressed upon us under this head was that the appellant had no *bonâ fide* intention of acquiring any commodity or selling any commodity or of making or receiving delivery of any commodity. What I have already said as to the intention of the appellant furnishes, I apprehend, the answer to this argument. The appellant's intention was to "speculate in futures" but to do so by means of sales and purchases of commodities for future delivery by the respondents "in accordance and subject to the rules, regulations and customs of the Winnipeg Grain Exchange." The contracts authorized were to be contracts in accordance with those rules, regulations and customs. As the authority was in fact executed the contracts entered into were contracts to which the appellant was not a party. They were not contracts which in any way professed to be purchases or sales by him, or to give him the right to demand delivery, or to insist upon delivery being taken. But they were contracts in every case, as I have already pointed out, which bound the respondents as principals in a contract of sale or purchase to make or receive delivery as the case might be; and there is no support in the evidence — indeed, the evidence is entirely against it — for the proposition that the respondents in entering into these contracts had no intention of acquiring commodities or selling commodities or to make or receive delivery.

1914

BEAMISH v. RICHARDSON & SONS.

Anglin J.

ANGLIN J.—The facts of this case are fully stated in the judgment of the learned Chief Justice of Manitoba.

The plaintiffs sue to recover moneys expended by them in alleged discharge of their employment as brokers of the defendant. It is essential to their right to recover that they should prove that this expenditure was incurred in carrying out the commission entrusted to them. Either failure on their part to establish that, or proof that the undertaking was itself illegal, is fatal to their right to recover.

Their commission was to procure persons to enter into binding contracts to buy grain from the defendant. It is admitted that, although they made contracts with other brokers for the sale of grain in the quantities stipulated, these contracts were all subject to the rules of the Clearing House Association — an adjunct of the Winnipeg Grain Exchange. It is conclusively established by the evidence that, as the result of what the plaintiffs did in professed fulfilment of the defendant's commission, he did not, and it was intended that he should not, obtain any contract whereby any other person became and remained bound to him as a purchaser of the grain which he instructed the plaintiffs to sell on his account. By the system of the Clearing House his purchasers and their brokers were discharged, on the respective days on which the several contracts were made, from any obligations under them to accept delivery from, and make payment to, the defendant. That obligation was assumed by the Clearing House and was in turn set off by it against other obligations of the plaintiffs to the Clearing House. The adjustment of accounts between the

plaintiffs and the Clearing House would afford a complete answer to any claim which the defendant might attempt to prefer against the Clearing House. In fact, as the net result of what occurred, the personal responsibility and solvency of the plaintiffs was the only security which the defendant had that, at the maturity of the contract he had employed them to make for him, purchasers would be available to take his grain and pay him the sale prices. Nobody else was under any contractual obligation to do so. Such an outcome is something so radically and essentially different from what is contemplated by the instructions ordinarily given to a broker to buy or sell stocks or commodities that it could be taken to be a performance of the broker's undertaking only upon the clearest proof that the principal knew of the rules which operated to produce it, and therefore contemplated the adoption of this method of carrying out his mandate. That the evidence does not establish. The present case, in my opinion, falls within the principle of the authorities cited and relied upon by the learned Chief Justice of Manitoba, in whose conclusions on this branch of the appeal I respectfully concur.

While I do not rest my judgment on the ground of illegality, because in the view I take on the other question it becomes unnecessary that I should do so, I incline to think the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorized and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain — to

1914

BEAMISH v. RICHARDSON & SONS.

Anglin J.

adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise. Such transactions are within the literal terms of section 231 of the Criminal Code, and, I believe, are also within the mischief against which it was directed. The difference in morals between thus dealing in differences and speculative transactions in which there is an actual purchase accompanied by present or future receipt and a subsequent sale accompanied by delivery, the intent being to make profit by the rise in price of the commodity so dealt in, may not be very clear; but Parliament in its wisdom has deemed it proper to make this distinction, with the result that a transaction of the former class is, while one of the latter is not, *malum prohibitum*.

For these reasons I would allow this appeal and would dismiss the plaintiffs' action.

BRODEUR J.—I concur in the opinion of my brother Idington.

Appeal allowed with costs.

Solicitors for the appellant: *Richards, Sweatman, Kemp & Fillmore.*

Solicitors for the respondents: *Critchton, McClure & Larmonth.*

JAMES HUTCHISON (PLAINTIFF) ....APPELLANT;

AND

THE CITY OF WESTMOUNT (DEFENDANT) ..... RESPONDENT.

1914

*March 2.
*May 18.

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

Municipal corporation—Dedication of lands for highway—Opening of street—Construction of agreement.

A land company made a donation of certain lots of land to the municipal corporation for the purpose of a highway and the corporation agreed to open and construct a portion of the street when necessary.

Held, that, on the proper construction of the agreement, in view of the powers conferred upon the corporation by section 85 of its charter (Que.), 56 Vict. ch. 54, the word "necessary" in the agreement should be construed as meaning "necessary in the public or general interest" and not merely in the interest of the other party to the agreement. *In re Morton and the City of St. Thomas* (6 Ont. App. R. 323) and *Pells* v. *Boswell* (8 O.R. 680), referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the appellant's action was dismissed with costs.

The circumstances of the case are stated in the judgments now reported.

Mignault K.C. and *Lafleur K.C.* for the appellant.

F. S. Maclennan K.C. for the respondent was not called upon for any oral argument.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

HUTCHISON v. CITY OF WESTMOUNT.

Idington J.

THE CHIEF JUSTICE.—I think that this appeal should be dismissed with costs.

IDINGTON J.—Respondent is alleged to have acted in entering into the agreement here in question upon section 85 of the respondent's charter contained in 56 Vict., ch. 54, which reads as follows:—

> 85. The council shall have power to purchase, acquire and enter into any land, ground or real estate whatever, within the limits of the town, for the purpose of opening any street or roads through the same, or for forming or making any public parks or squares of a nature to conduce to the health or well-being of the inhabitants of the town, *either by amicable arrangements, entered into between the corporation and the proprietors, or any persons interested,* or by complying with the provisions, applicable to the corporation, respecting expropriations, and, in the event of its being necessary or advisable, for the purpose of such improvements, to acquire any larger tract of land than may be ultimately required for the purpose of such improvements.

By some means not very clear the Westmount Land Company, on the 15th September, 1897, induced respondent's council on its behalf to accept, for the purposes of streets, the gift of a few lots of the property which the company seems to have acquired and divided into lots, and, as appellant alleges, to agree to bind the respondent to assume the burden of constructing certain streets. The successors of that council have never been able to find it was necessary in the public interest to open said streets to the extent desired by appellant, who claims to be a purchaser of a considerable number of lots in the survey of the Westmount Land Co., Limited, to be served by said streets.

He claims herein a declaration that respondent is under the obligation arising from said contract "to properly open and grade Grosvenor Avenue opposite" his property "and in its entire extent," and that the

corporation, defendant, be condemned to pay him "ten thousand dollars with interest and costs."

He reserves all other rights and remedies and future damages.

It has been found by the two courts below as a matter of fact that the extension of the said street as demanded has never yet become necessary in the public interest.

Why should we, contrary to our usual rule (which, of course, has its exceptions) be asked to reverse such finding of fact?

It is suggested this fact is to be determined by the construction of the instrument relied upon by appellant and hence is not purely a question of fact, but rather of law.

I see no reason to complain of the construction adopted by the learned trial judge which implies in the term "when necessary" only when in the public interest such work shall become necessary, and not merely when the prospects of the speculator making a profit might render it necessary to have the work done.

If the latter must be the construction put upon the contract, then it was an illegal contract.

Indeed, if the private interest in any other way than when and so far as that interest might coincide with the public interest were to be allowed to enter into the making of such a contract it must be held null and can furnish no basis for any undertaking by such a corporate body as the respondent.

In addition to the authorities upon which the learned judge relied I might refer to such cases as *In re Morton and City of St. Thomas*(1), and *Pells* v. *Boswell*(2), where, as well as in a note on page 333 in

(1) 6 Ont. App. R. 323. (2) 8 O.R. 680.

1914

HUTCHISON v. CITY OF WESTMOUNT.

Idington J.

Biggar's Municipal Manual, numerous authorities are collected which shew how jealously the courts have guarded against the infringement of the principle. Most of these cases turned upon just such municipal power as given respondent's council by above-quoted section of the statute.

And though not binding upon this court they illustrate a principle of law which does bind this as well as other courts.

Indeed, I know of nothing in the administration of our municipal systems which needs one to be more watchful lest evil creep in, than in relation to just such cases as this. It is so easy to present a plausible case of alleged identity of public and private interest (an apt, but inaccurate, phrase) when in truth it may only be the latter that is kept in view.

A perusal of the evidence herein in support of appellant's case alone destroys any possibility of holding such a work as sought herein to have execution decreed and the expenses thereof to be imposed upon the public by order of the court as in truth necessary from a purely public interest in its promotion.

It is a work evidently needed to develop the appellant's property. The expense would be quite beyond what any reasonable expectations on the part of the public to reap any benefit therefrom can be found to justify.

There is no similarity between this case and what was agreed to be done in the case of *Town of Outremont* v. *Joyce* (1). The only relation the cases can have is that that case illustrated how there may be an identity of private and public interest, and this case shews

(1) 43 Can. S.C.R. 611.

how impossible it is to find that identity. I shall not labour the matter.

I think the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed with costs.

ANGLIN J.—The plaintiff seeks to enforce an agreement whereby the defendant municipality undertook to open a portion of Grosvenor Avenue "when necessary." The court of appeal, confirming the *dispositif* of the judgment of the Superior Court, held that the plaintiff had failed to prove that such opening had become necessary.

The plaintiff complains that without the opening of Grosvenor Avenue his land abutting upon it is inaccessible owing to the lowering of the grade of the boulevard on the south side of the property by the defendant municipality. He maintains that this fact makes the opening of Grosvenor Avenue necessary. There are no residences on lands abutting on Grosvenor Avenue except a summer cottage, and no other land-owner has asked for the opening of the street.

Unless we are to attribute to the municipal council the intention of making a most improper agreement, one wholly for the benefit of the Westmount Land Company and its grantees and disadvantageous and unfair to the city at large and its ratepayers, which would be an improper exercise of their powers, *In re Morton and City of St. Thomas* (1), we must give to the word "necessary" the meaning "necessary in the public or general interest," and not merely in the interest of

(1) 6 Ont. App. R. 323.

1914

HUTCHISON v. CITY OF WESTMOUNT.

Anglin J.

the other party to the agreement. That is, in my opinion, the meaning which should be given to it. I agree with Mr. Justice Carroll that such necessity has not been shewn.

Moreover, I think it is reasonable and proper to ascribe to the municipal council the intention to preserve to itself and to its successors the right to determine when such necessity shall have arisen. It can scarcely have meant to abdicate the discretionary power in regard to opening streets vested in it by the legislature and to confer upon the courts the right to decide when that power should be exercised. Such an abdication would result from the agreement if construed as the appellant contends for. Looked at most favourably to the plaintiff the word "necessary" is ambiguous and should not be given a construction which would imply grave dereliction of duty by a public body.

The appeal fails and should be dismissed with costs.

BRODEUR J.—I agree that this appeal should be dismissed for the reasons given by my brother Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *P. B. Mignault.*

Solicitors for the respondent: *Maclennan & Baker.*

THE HARBOUR COMMISSIONERS OF MONTREAL (DEFENDANTS) ... } APPELLANTS;

AND

THE SYDNEY, CAPE BRETON AND MONTREAL STEAMSHIP COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

1914

*March 3.
*May 18.

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

Statute—"Colonial Courts of Admiralty Act, 1890," (*Imp.*) 53 & 54 *V. c.* 27—"*Public Authorities Protection Act,* 1892," (*Imp.*) 56 & 57 *V. c.* 61—*Limitations of actions—Effect of statutes—Practice and procedure—Jurisdiction.*

The "Public Authorities Protection Act, 1893" (Imp.), 56 & 57 Vict. ch. 61, does not apply to suits or actions instituted in the Exchequer Court of Canada in the exercise of its jurisdiction as a Colonial Court of Admiralty.

APPEAL from the judgment of the Exchequer Court of Canada (1), reversing the judgment of Mr. Justice Dunlop, local judge for the Quebec Admiralty District of the said court, and dismissing the appellants' demurrer to the plaintiffs' action.

The action was for the recovery of damages alleged to have been sustained in consequence of the negligence of the Harbour Commissioners in permitting a shoal patch to remain in a dangerous position in the Harbour of Montreal. The Harbour Commissioners demurred to the action on the ground that the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 15 Ex C.R.

1914

HARBOUR COMMISSIONERS OF MONTREAL v. SYDNEY, CAPE BRETON AND MONTREAL S.S. Co.

Imperial "Public Authorities Protection Act, 1893," was made applicable to the admiralty jurisdiction of the Exchequer Court of Canada by the provisions of sub-sections 2 and proviso (*a*) of sub-section 3 of section 2 of the "Colonial Courts of Admiralty Act, 1890" (Imp.), 53 & 54 Vict. ch. 27, and that the plaintiffs' right of action, if any, was barred by the limitation of six months provided by the first section of the "Public Authorities Protection Act, 1893."

On the hearing upon the demurrer before Dunlop, J., local judge for the Quebec Admiralty District of the Exchequer Court of Canada, the demurrer was maintained and the plaintiffs' action was dismissed. By the judgment appealed from, Mr. Justice Cassels reversed this decision and dismissed the demurrer with costs.

Peers Davidson K.C. for the appellants.

Holden K.C. for the respondents.

THE CHIEF JUSTICE concurred in the opinion stated by Cassels J.

IDINGTON J.—This appeal raises the question of whether or not the "Public Authorities Protection Act, 1893," can be pleaded in the Exchequer Court of Canada (in the Quebec Admiralty District) in answer to a claim for damages alleged to have been caused by the negligence of appellants.

The case is presented to us in argument for appellant as one of jurisdiction. Even so, I am by no means convinced that Parliament intended in its creation of the jurisdiction to carry into every place where ex-

ercised the local law now invoked. Indeed, I see many reasons why it might not so intend and especially when we consider that the Statute of Limitations is, generally speaking, a personal privilege having relation to the subject-matter in question in litigation and that, as a defence, it must be clear that the legislature intended to confer it upon the party setting it up. The statute relied upon herein is clearly applicable only to those acting in the United Kingdom and, certainly, is not by any terms used therein or elsewhere made clearly applicable to any causes of action arising elsewhere and not out of any act or omission of those it applies to.

In a sense it may even seem or may be made to seem, as urged here, to be a question of jurisdiction as illustrated in the case of *The Metropolitan Water Board* v. *Bunn*(1), from which it would seem that the same subject-matter might in one forum give rise to the defence resting upon one statutory limitation and yet be met in another forum by another statute of that sort.

The learned judge of the Exchequer Court, in his reasons, has so fully dealt with the matter that I need not repeat his argument here, but adopt it as properly maintaining his decision.

The appeal should be dismissed with costs.

DUFF J.—I do not think the "Public Authorities Protection Act" can reasonably be said to be an Act relating to admiralty jurisdiction.

I do not think that sub-section 2 of section 2, which authorizes the Colonial Court of Admiralty to exercise

(1) [1913] 1 Q.B. 134.

1914

HARBOUR COMMISSIONERS OF MONTREAL v. SYDNEY, CAPE BRETON AND MONTREAL S.S. Co.

Duff J.

admiralty jurisdiction in like manner and to as full an extent as in the High Court in England, contemplates the giving effect to such statutes as the "Public Authorities Protection Act" by the colonial court.

I think it is in respect of the exercise of the admiralty jurisdiction *as such* that the phrase "in like manner and to as full an extent as the High Court in England" is used.

I may add that I fully concur in the judgment of Mr. Justice Cassels and I think the appeal should be dismissed with costs.

ANGLIN J.—For the reasons stated by Mr. Justice Cassels, to which I cannot usefully add anything, I would dismiss this appeal with costs.

BRODEUR J.—The Imperial Parliament never intended, when they passed, in 1893, the "Public Authorities Protection Act," that it should apply to Canada in proceedings before our Court of Admiralty. On the contrary, it is formally declared that the limitation enacted by that Act could be invoked only in the actions instituted *in the United Kingdom.*

The appellants rely on a provision of the "Colonial Courts of Admiralty Act" of 1890, in which it was declared that

> any enactment in an Act of the Imperial Parliament referring to the admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for *England and Wales.*

That last provision, as we may see, in reading the "Admiralty Court Act" of 1861, is passed with a view of restricting the jurisdiction of our admiralty courts

1914

HARBOUR COMMISSIONERS OF MONTREAL v. SYDNEY, CAPE BRETON AND MONTREAL S.S. Co.

Brodeur J.

to cases where the ships are registered in Canada or where the ship's owners, or some of them, are domiciled here.

We cannot, then, under that special provision of the Act of 1890, incorporate the "Public Authorities Protection Act" in our local admiralty jurisdiction when the Imperial Parliament declared specifically it should apply only to actions instituted in the United Kingdom.

It would have required express words or necessary intendment in order that such a provision would apply in our country.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. R. Angers.*

Solicitors for the respondents: *Meredith, Macpherson, Hague, Holden & Shaughnessy.*

1914
March 4.
May 18.

THE W. J. McGUIRE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ELLEN S. BRIDGER, WIDOW OF JOSEPH TUNLEY, DECEASED, FOR HERSELF AND ÈS-QUALITÉ, (PLAINTIFF) . RESPONDENT.

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

Negligence — Construction contract — Sub-contract — Dangerous premises—Servant or agent—Building materials—Duty of principal contractor—Injury to invitee—Responsibility for damages—Evidence—Findings of jury.

The McG. Co., contractors for plumbing and heating in a building under construction, sub-let part of their contract to the R. Co., who manufactured the necessary material at Amherst, N.S., and at one time shipped a boiler-plate for use in executing their sub-contract consigned to the McG. Co. at Montreal. The McG. Co. sent the advice note of the shipment to the R. Co.'s local representative, who employed carters to get the plate from the railway company and carry it to the place where the works were being carried on. It was, under directions of the McG. Co.'s foreman, leaned up against a pillar of the building and remained there for about one day in a position where it projected over a part of the cartway used for bringing materials into the building. T. applied for employment as a labourer on the works and was told to return next day which he did and, while waiting to be employed, stood near the plate. When a vehicle entered the cartway the plate fell upon T., causing injuries from which he died. In an action by his dependents to recover damages from the R. Co. and the McG. Co.,—

Held, Anglin J. dissenting, that, in the circumstances, the McG. Co. were responsible for damages; that the fault from which the injury resulted was that of their foreman who, acting as their servant or agent, supervised the placing of the plate in a dangerous position, and that the plate itself was a thing which was, at the time, in the care of the McG. Co. *Lucy* v. *Bawden* ([1914] 2 K.B. 318), referred to.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914

W. J. McGUIRE CO. v. BRIDGER.

Held, also, Anglin J. dissenting, that the evidence shewing the circumstances stated justified the jury in finding that deceased was lawfully in the place where the accident occurred, that he had not been guilty of contributory negligence, and that the accident was due to negligence of the McG. Co. and the sub-contractors in placing the plate in a dangerous position.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of Greenshields J., in the Superior Court for the District of Montreal, whereby, upon a verdict in favour of the plaintiff, judgment was entered for the plaintiff for $5,000 damages, apportioned between the plaintiff and her minor children, with costs.

The action was brought by the respondent, plaintiff on her own behalf and as tutrix for her minor children, against the present appellants and the Robb Engineering Company, claiming from them, jointly and severally, damages sustained in consequence of the death of Joseph Tunley, deceased husband of the respondent and father of her minor children, his death having been caused, as alleged, on account of the negligence of both defendants in the circumstances stated in the head-note.

The trial took place before Mr. Justice Greenshields and a special jury, to which questions were submitted and answered, as follows:—

"Question.—1. Was Joseph Tunley, the plaintiff's husband, the victim of an accident, on or about the 9th November, 1909, while within or upon the premises known as the Jacobs Building, on St. Catherine Street in Montreal?

"Answer.—Yes.

"Question.—2. Was the plaintiff's husband lawfully in the place where he was injured at the time of the said accident?

1914

W. J. McGUIRE Co. v. BRIDGER.

"Answer.—Yes.

"Question.—3. Did the said Joseph Tunley die, on the 18th December, 1911, as a result of the said accident ?

"Answer.—Yes.

"Question.—4. Was the accident due to the sole fault, negligence and want of care of the said Joseph Tunley, and if so, in what did such fault and negligence consist ?

"Answer.—No.

"Question.—5. Was the accident due to the sole fault and negligence of:—

"(*a*) The Robb Engineering Company, Limited ?

"Answer.—No.

"(*b*) Meldrum Bros., Limited ?

"Answer.—No.

"(*c*) W. J. McGuire & Company, Limited ?

"Answer.—No.

"(*d*) Emile Gellin ?

"Answer.—No.

"(*e*) One or more of them, and, if so, in what did their respective fault and negligence consist ?

"Answer.—Due to the neglect, fault, want of care and lack of supervision of The Robb Engineering Company, Limited, and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

"Question.—6. Was the accident due to the combined fault and negligence of the said Joseph Tunley and

"(*a*) The Robb Engineering Company, Limited ?

"Answer.—No.

"(*b*) Meldrum Bros., Limited ?

"Answer.—No.

"(*c*) W. J. McGuire Company, Limited ?

"Answer.—No.

"(*d*) Emile Gellin ?

"Answer.—No.

"And if so, in what did their respective fault and negligence consist ?

"Answer.—No.

"Question.—7. Has the plaintiff, as well personally as in her quality of tutrix to her two minor children suffered damage by reason of the said accident, and if so, in what amount ?

"Answer.—Yes, $5,000 (five thousand dollars).

"Question.—8. If you have answered question 6 in the affirmative, that the accident was due to the combined fault and negligence of the late Joseph Tunley and any of the four defendants, in what amount do you fix the contribution of the said Joseph Tunley in the damage assessed by you in answer to question No. 7 and to what amount do you fix the contribution of the defendants or of any of them ?

"Answer.—All unanimous."

Upon the answers so given by the jury, His Lordship Mr. Justice Greenshields ordered judgment to be entered in favour of the plaintiff, for the damages assessed, apportioned, as follows: $2,500 to the plaintiff personally, and $1,250 to each of her minor children, and condemned the defendants the Robb Engineering Company and the W. J. McGuire Company to pay the said sums jointly and severally, with interest and costs. This judgment was affirmed by the judgment now appealed from.

Mann K.C. for the appellants.

Atwater K.C. for the respondent.

THE CHIEF JUSTICE agreed with Duff J.

1914

W. J. McGUIRE Co. v. BRIDGER.

Idington J.

IDINGTON J.—There are two questions raised by this appeal. The first is as to the right of the deceased to be where he was when the metal fell upon him. This is hardly arguable upon the facts shewing an invitation to be there. The jury has passed upon it as they were entitled to upon such facts.

The other question is as to the scope of the authority which one Finlay had from appellants when he directed the placing of the metal where it was placed.

The appellant had a contract from the proprietor to do the work upon the building, and it was in the doing of such work that this accident was caused whereby the deceased was injured.

Part of the work undertaken by appellant had been sub-let by it to the Robb Engineering Company. If nothing more had transpired for consideration possibly appellant might have relied upon this sub-contract to exonerate it.

The case is, however, by no means so simple in its character as that.

The appellant contracted with the proprietor:—

> To assume all liability for damage or injury occurring to any persons or property through neglect or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants, and to indemnify and save harmless the party of the first part all claims caused by reason of said damage or injury.

As between the proprietor and deceased it might well be said that the invitation by which deceased came there was in last analysis what the proprietor authorized. Whether in law the proprietor could have been held liable need not be passed upon. He desired appellant should take all that risk and it did so. It was thus, as well as by implication of law in executing its contract with the proprietor, bound to take due care that the execution thereof should not lead to

1914

W. J. McGUIRE CO. v. BRIDGER.

Idington J.

injury to others. It became the duty of its foreman in charge to do all that his master and his master's interest in the premises might call for in order to avert any possibility of risk to the master by reason of anything happening within the scope of the master's plenary authority as to the execution of the contract with the proprietor.

If the sub-contractor had attempted to do anything in execution of its share of the work which might have tended in any way not merely to render the appellant liable to an action upon its undertaking with the proprietor, but tended to involve it in the risk thereof, I think appellant would in such event have been entitled to insist upon desistment from such attempts so far as could reasonably be required.

Suppose the appellant instead of being a corporation had been a person then in the building under such circumstances at the time the metal in question was brought by the carters he would have had a perfect right to have insisted upon the metal being placed back out of the way of doing any damage to any one.

And even if there was no legal obligation resting upon such a man to interfere actively, regarding which I say nothing, his right, nevertheless, to interfere as against a sub-contractor insisting upon running such risks, would be undoubted unless, of course, he had contracted specifically not to do so; and in some classes of cases he might find he had rendered himself liable for the acts of his sub-contractor.

What I wish to make clear is that though there is a line yet it is by no means a well-defined line, in law, which renders it safe for any man sub-letting his work

1914

W. J. McGUIRE Co. v. BRIDGER.

Idington J.

to overlook the delinquencies of his sub-contractor in this regard.

Then in view of all this and the reasonable expectations of a contracting employer to have his foreman look after his interests, how can I say that one who did so under such circumstances as existed here could be disavowed as acting without authority and beyond the scope thereof ? And when we find that this foreman exercised his authority on more than one occasion by taking the gang under his charge, or four or five of them, to do the very thing now complained of, to help the sub-contractor, is it not drawing it rather fine to say he had authority on several occasions to do this, but yet none to direct how these men of the appellant should assist in such work ? Is it not asking too much when appealing here to ask us to say he had authority to spend his master's money in this way, but none to direct the proper use of such service ? To say he had authority to take the appellant's men to do the work, but none to insist upon its being done in a proper manner, seems illogical.

Now there was one of these occasions on which the appellant's foreman induced the carter's men to place the goods in a proper place, but on this latter occasion the foreman neglected this duty or part of his duty. As to this later occasion he denies interfering in any way but by helping with his men acting in obedience to his orders. The carter's man says not only did he interfere, but actually directed where the gang, including his own, were to put the metal in question.

It was for the jury to say which of these men they believed, and I assume they believed the carter's man.

And when we are asked to accept such denial of authority as the foreman did make I must assume

on the facts that this jury had to act upon they had a right to discredit this part of his story and did so. Moreover, no one over this foreman has ventured to appear in the witness box and add to the force of his denial or give more definite meaning to the limits of his authority than what we may gather from the course of conduct he manifests and the definition he gives in his evidence quoted hereafter.

The jury were then face to face with such narrow line of authority as is implied in the substantial leading facts relative to appellant's relation to the whole matter in ways I have set forth and in addition thereto as appears in the following evidence of the foreman:—

Q. In the month of November, 1909, you were foreman for the W. J. McGuire Company, Limited, were you not?

A. Yes.

Q. In the Jacobs Building on St. Catherine Street?

A. Yes.

Q. You had been foreman for a long time before that?

Witness: Foreman for the McGuire Company?

Counsel: Yes, in that building?

A. Since the building started.

Q. When would that be?

A. About May, 1909. No, I think it started in the fall.

Q. Were you present in the month of November, 1909, when a delivery was made of a part of the end of a boiler?

A. Yes.

Q. What time of the day was that?

A. That was just about ten minutes to twelve, or so.

* * * * * * *

Q. Did the lorry that brought this piece of iron in stop near this column?

A. A little bit from it. Pretty near it, but a little bit away.

Q. When it came in was it lying flat on the lorry?

A. Yes.

Q. Then your men with the Meldrum men canted it up and slid it down off the lorry?

A. Yes.

Q. You did not lift it clear?

1914

W. J. McGUIRE Co. v. BRIDGER.

Idington J.

A. We had to slide it off the rig.

Q. There was only one passage for a cart to come in from Alexandra Street into the building?

A. One passage, yes.

* * * * * * *

Q. You were McGuire's principal foreman on the building, were you not?

A. Yes.

* * * * * * *

Q. You and your men were present during the whole time this boiler front was being put into the position described by you?

A. Yes.

Q. Did you not advise them at all in any way as to the manner in which this boiler plate should be placed against the pillar?

A. Yes. It was placed against the column, and I suggested that they had better move it a little farther back from the position that we had placed it. I thought it might make it a little safer.

Q. You suggested, I think, that they should give it a little more cant?

A. A little more cant.

And speaking of the part taken in the unloading of the piece of metal which later fell on deceased, he says:—

Q. You had it taken off?

A. Yes.

Q. Did you have some of your men there to help you?

A. Yes.

Q. How many?

A. Well, I cannot say exactly how many.

Q. Did you have ten of them?

A. Oh, no. There were three or four of us, anyhow.

Q. You and the men of the W. J. McGuire Company, Ltd., helped the Meldrum people to take that piece of boiler out of the wagon?

A. Yes.

Q. And, altogether you placed it where?

Witness: The second piece?

Counsel: Yes, that big piece of iron?

A. We placed it against the column.

I think this evidence, together with the circumstances I have adverted to shewing the relation of appellant to the work in question, form such evidence as could not be withdrawn from the jury.

1914

W. J. McGUIRE Co. v. BRIDGER.

Duff J.

Upon their verdict so submitted the judgment rests and must be upheld.

I, therefore, think the appeal should be dismissed with costs.

DUFF J.—The question of agency is a question of fact and the point to be considered in this connection is whether there was evidence upon which the jury could reasonably find that in taking charge of the boiler ends Finlay acted as servant or agent for the appellants. Consider the facts:—Jacobs, the owner, who was constructing the building, had let various contracts; one was a contract for doing the concrete work, that is, for putting up the frame of the building; another was a contract with the appellants for the plumbing. Under the latter contract the appellants were obliged to have certain boilers in operation according to a certain specification on a named date.

The appellants let to the Robb Engineering Co. a sub-contract for the erection and completion of these boilers which the Robb Company agreed to finish by the 30th of November, 1909. There can be no doubt, of course, that McGuire & Co. were entitled to sub-let a part of their contract with Jacobs, their relation to Jacobs being that of contractors merely who had undertaken to produce a certain result. The contract with Jacobs, which is in the evidence, obviously contemplated the letting of sub-contracts. On the other hand, McGuire & Company specifically covenant to

indemnify and save harmless the owner from all claims, loss, or cost by reason of damage or injury to any persons or property through the negligence

of these sub-contractors.

The Robb Engineering Company had their factory at Amherst, N.S., where the parts required for the

1914

W. J. McGUIRE Co. v. BRIDGER.

Duff J.

execution of their contracts were made. These they shipped to Montreal, and they appear to have been in the habit of sending these parts to the building without making any express provision for their reception. Of this the appellants appear to have been complaining. It was obviously in the interest of McGuire & Co. to see that these parts were received and properly taken care of. In the first place they were under a contract to complete their work by a given time. In the next place, they were bound by the covenant to which I have already referred, and pieces of heavy machinery, carelessly placed by carters without proper directions may cause damage. In the third place, it might cause inconvenience to other contractors working in the same building and all the contractors so situated would be naturally interested in mutually accommodating one another in order to avoid unnecessary delays in executing the work; while Robb & Co. were sub-contractors, for whose actions they would not be directly responsible in a legal sense, still these sub-contractors had been engaged by McGuire & Co. to perform a part of their contract, and it was altogether natural that they and their workmen should take an interest in seeing that the sub-contract was not carried out in such a way as to give unnecessary trouble to others. All these points lend weight to the probability that McGuire & Co. would expect their foreman in their interest to exercise some supervision in the absence from the premises of anybody having authority from Robb & Co. in the placing of these pieces.

Coming now to the particular circumstances:—the boiler ends in question were shipped by Robb & Co. to McGuire & Co. It is not explained why this was done

in this particular case unless it was in accordance with the usual practice. At the request of Robb & Co.'s manager in Montreal, the McGuire Company gave to a carter furnished by Robb & Co., the shipping documents shewing the articles directed to McGuire & Co. with instructions to obtain them from the railway company and deliver them at the premises in question. In the circumstances the carter naturally treated these goods as goods deliverable to McGuire & Co., and I think the jury would be entitled to find that they were so treated with the concurrence of McGuire & Co. When they reached the premises, there being nobody there representing Robb & Co., Finlay, McGuire & Co.'s foreman, assumed control of them, and it is upon Finlay's negligence, assuming there was negligence, that McGuire & Co. are charged.

Taking all the circumstances I have mentioned together, it appears to me that the jury would be entitled to find — and I must say that I do not think that it would be a conclusion in the least unreasonable — that Finlay was acting in the interest of and for McGuire & Co. with their authority, and not either giving his services to the Robb Co. or simply acting gratuitously in general interest.

I have only one more word to add on this point, and that is with the object of emphasizing this:—That the question as to whether Finlay was acting within the scope of some authority he had from the McGuires, is simply a question of fact, and for the purpose of determining this question I do not think that judicial decisions upon other states of fact can be of much value. The point upon which the jury had to pass was whether in view of all the circumstances Finlay

1914

W. J. McGUIRE CO. v. BRIDGER.

Duff J.

was doing something which he and his employers understood he was there to do. That question was, I think, put to the jury with entire fairness and in such a way that I believe they could not fail to understand the nature of the question they were called upon to decide and being, indeed, far from certain that I should not have taken the same view as the jury did upon this question, I think there is here no good ground for setting aside their verdict.

Then comes the question as to whether there was evidence of negligence. Now I think the test to be applied is this. The owner of the building as occupier owed a certain duty to persons invited to come upon the premises in the ordinary course of business. I think that, as regards positive acts, the responsibility of the concrete contractors would be the same as that of the owner, and I think, also, that any other person engaged in the work of construction, as the appellants were, would be under precisely the same responsibility as to his own positive acts in relation to such persons as the owner would be. To put the point a little more concretely:—McGuire & Co., were, in my judgment, bound, as regards such acts, to use the same care, that is to say, they were under the same duty to persons properly on the premises in the course of their business with any of the contractors engaged in the construction of the building as the owner would be obliged to use with regard to persons invited by him or as any particular contractor would be obliged to use with regard to the safety of persons invited by that contractor himself. I am now speaking, let me repeat, of positive acts only. What then, is the measure of that duty? The nature of the situation with which we are dealing must not be left out of sight. Here is a

1914

W. J. McGUIRE Co. v. BRIDGER.

Duff J.

building in course of erection. Different contractors are engaged at one and the same time in carrying on different operations. In the very nature of things the possibilities of injury are numerous. It would be most unreasonable that anybody going into such a place, in the ordinary way of business, should expect to find himself at every point protected against these possibilities as if he were a person incapable of taking care of himself. A person going into such a place assumes a certain amount of risk. He himself assumes the responsibility of exercising vigilance of a person of ordinary faculties and judgment in order to avoid the reasonably probable dangers of such a place, and the responsibility of the occupier must be considered in relation to this responsibility of the invitee. The result, I think, has been summed up by Mr. Justice Atkin in *Lucy* v. *Bawden*(1), in the proposition that the duty is to avoid setting traps.

Coming to the particular case before us, Bridger, so long as he kept to the way provided for persons coming on the premises, or apparently provided, was entitled to assume that there were no traps. I have had a great deal of difficulty in satisfying myself whether there was evidence in this case to convict Finlay of doing what could be fairly called setting a trap. I think the point is a very doubtful one, and I do not feel justified in going further than saying that I am not satisfied that there was not sufficient evidence to support the finding of the jury.

ANGLIN J. (dissenting).—I am, with very great respect, of the opinion that this appeal should be allowed.

(1) (1914) 2 K.B. 318.

1914

W. J. McGUIRE Co. v. BRIDGER.

Anglin J.

The deceased Tunley was, no doubt, upon the premises where he was injured as an invitee. Persons employed on the premises or lawfully there might reasonably be expected to be where he was when the boiler end fell upon him. If the placing of this boiler end where it was had been attributable to the appellants, I should not have been prepared to disturb the verdict and judgment against them. But I find nothing in the evidence to justify fixing them with responsibility either for placing or leaving the boiler end in the dangerous position in which it was.

The appellants were contractors with the owner of the premises for the installation of a system of plumbing and steam-heating. Their contract, however, contemplated that they might sublet any part of the work. They undertook with the owner Jacobs

> to assume all liability for damage or injury occurring to any persons or property through the negligence or illegal acts of the said party of the second part, *his contractors, sub-contractors,* agents or servants; and to indemnify and save harmless the party of the first part from all claims, loss, or cost, by reason of such damage or injury.

The appellants in fact sublet to their co-defendants, the Robb Engineeing Co., the contract for supplying and installing the boilers for the heating-system. Over that part of the work the appellants had no control or supervision. The Robb Engineering Co. were independent contractors.

The boilers were shipped in parts by the Robb Engineering Co. from their factory at Amherst, N.S. Through some unexplained mistake the end of the boiler which fell on the deceased Tunley was consigned to the defendants, The W. J. McGuire Co., instead of to the Robb Engineering Co. Immediately upon their being notified of its arrival at Montreal, the McGuire Company advised the Robb Engineering

1914

W. J. McGUIRE Co. v. BRIDGER.

Anglin J.

Company, and the latter company employed their co-defendants, Meldrum Bros., Ltd., to deliver it at the Jacobs' building, as they had delivered other material. It is admitted that this boiler end was the property of the Robb Engineering Company, and it is clear that it was for them that the delivery was made by Meldrum Bros., Ltd.

There is nothing in the record to warrant an inference that there was any agreement or understanding whereby the appellants had undertaken to receive or to look after the Robb Company's material when it should be delivered at the Jacobs' building.

When the lorry carrying the boiler end reached the building it was driven along a passage on the ground floor, to the third pillar, which, as Davidson C.J., says, was as far as its size would permit. There was nobody on the premises representing the Robb Engineering Company. The Meldrums' foreman, Little, went to the basement and informed one Finlay, foreman for the McGuire Company, who was engaged in installing the plumbing, of the arrival of the load.

To quote the learned Chief Justice:—

> Little swears he asked for instructions as to where the plate should be placed (and) got them. Finlay denies this and asserts that the only request was for assistance in the unloading. Some undisputed facts exist. Finlay took up three men and assisted in the unloading; the plate was stood up against the western face, sixteen inches wide, of the third octagonal pillar, with a space of about two feet between the base of the plate and the pillars, the end of which projected into the roadway; Finlay thought it might be knocked down and that for the sake of safety, it should be moved a little farther back from the road and also be given a little more cant; these suggestions were adopted. The plate still projected, however, about 18 inches into the roadway. So matters stood until shortly after seven of the following morning, when Gellin entered the passageway with his cart.

In passing the third pillar, Gellin turned to the

1914

W. J. McGUIRE CO. v. BRIDGER.

Anglin J.

right to avoid an outgoing cart, and his own cart probably struck the projecting boiler end which fell on top of Tunley and pinned him to the ground, causing injuries from which he died, some twenty-two months afterwards.

Upon the evidence it is clear that in whatever Finlay may have done in the way of assisting to unload the boiler end — even if he directed where it should be placed — he was not engaged "in the performance of the work for which he was employed" by the appellants. Art. 1054, C.C. It was not part of their work to bring the material required for the boilers into the premises or to look after it when it had been brought there. Whatever Finlay did he did on his own responsibility and it was probably nothing more than rendering the friendly aid which one workman usually gives to another when help is required. If he suggested where the boiler plate should be placed — if he even undertook to direct that it should be put where it was — in doing so he was not acting as the servant or agent of the W. J. McGuire Co. If he made a mistake, if he did something which was negligent, there is, in my opinion, nothing to warrant a finding that the appellants were responsible for it. He was not discharging any duty which he owed to them. He was not acting for their benefit or within the scope of his employment. He was not "under the appellants' control" within the meaning of article 1054 C.C.; nor was the boiler end a thing under their care. If he was acting for anybody other than himself it would be for the Robb Engineering Co. in whose interest he assisted the Meldrum employees. For collateral negligence of the Robb Company the appellants are not responsible, apart from the special provision in

1914

W. J. McGUIRE CO. v. BRIDGER.

Anglin J.

their contract above quoted. That clause of their contract might render the appellants liable to indemnify the owner, Jacobs, if he had been held responsible for the injuries sustained by Tunley. But it does not establish privity between Tunley and his representatives and the appellants.

The appellants should have their costs in this court and in the Court of Review and the action should be dismissed as against them with costs.

BRODEUR J.—It is stated by the appellant company that the respondent's husband was a trespasser in the Jacobs building. The evidence shews, on the contrary, that the deceased had an implied invitation to go into that building to get employment. He was waiting for that purpose when he was struck by the end of the boiler in question. The jury were justified in finding that the respondent's husband was lawfully in the place where he was injured.

As to the question of negligence charged against the appellant company, the jury found that the accident was

due to the fault, want of care and lack of supervision of the Robb Engineering Company and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

The appellant, the W. J. McGuire Co., had the contract for the whole heating system in the Jacobs building. They could not sublet their contract without the written consent of the proprietor. They assumed also by their contract with Jacobs

all liability for damage or injury occurring to any persons or property through the negligence or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants.

The appellant made a sub-contract with the Robb Engineering Company, of Amherst, N.S., to supply

1914

W. J. McGUIRE Co. v. BRIDGER.

Brodeur J.

and install the boilers that formed part of the heating system. One of the clauses of that sub-contract was to the effect that the appellant was

> to provide right-of-way, openings in buildings, fences, etc., and *space necessary for the delivery and installation of the machinery.*

The boilers were sent from Amherst to Montreal and consigned to the appellant company. It was, however, on the instruction of the local agent of the Robb Engineering Co. that the boilers were carted from the railway station to the Jacobs building. But there was nobody else representing the Robb Engineering Co. to receive the goods on the premises; and, as they were consigned to the McGuire Company, the carter applied to the McGuire Co.'s foreman to get the place where those goods should be placed and the employees of the McGuire Co. also helped in unloading the goods and in negligently placing them in a part of the building where carts were constantly passing by.

The jury seems to have been properly charged by the judge presiding at the trial, since the counsel representing the appellants stated in answer to the judge's inquiry:—

> My Lord, I am thoroughly satisfied with your Lordship's charge.

The jury, with all those facts and circumstances in evidence have found that the appellants were guilty of negligence. That verdict has been upheld by the unanimous judgment of the Court of Review.

The jury could find the verdict they have rendered; and, in view of articles 498 and 503 of the Code of Civil Procedure, the appellants would not be entitled to have the plaintiffs' action dismissed or a new trial granted.

1914

W. J. McGUIRE Co. v. BRIDGER.

Brodeur J.

I would refer to the case of *Harold* v. *City of Montreal*(1).

Appeal dismissed with costs.

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

Solicitors for the respondent: *Davidson & Ritchie.*

(1) 3 L.C.L.J. 88.

INDEX.

CASES—*Continued.*

CASES—*Continued.*

fault, the vendor had the right to give the purchasers thirty days' notice in writing demanding payment; in case of continuing default, at the expiration of that time, forfeiture would become effective and the vendor might retake possession and re-sell the lands. On default in payment as provided, a notice was given in the terms mentioned, but only to one of the purchasers, an extension of time was applied for and refused and, after thirty days from the time of the notice the vendor re-entered. Five days later the purchasers tendered the balance unpaid, which was refused by the vendor on the grounds that no conveyance was tendered for execution and that the purchasers had abandoned the agreement. Two weeks later the purchasers sued for specific performance. — *Held*, reversing the judgment appealed from (18 B.C. Rep. 271), that the clause making time of the essence of the contract had reference not to the gale dates, but to the time mentioned in the notice; that the notice as given did not comply with the condition of the agreement requiring notice to all of the purchasers, and that, in the circumstances of the case, there were not such laches chargeable against the purchasers as would amount to abandonment of their rights under the agreement or deprive them of their remedy of specific performance. BARK-FONG *v.* COOPER **14**

3——*Accident insurance — Construction of policy—Special conditions—Increased and diminished indemnity—Injuries from fits causing death.*] In an accident policy an insurance company agreed to pay the insured the principal sum in case of death or specified injuries, double that sum if such death or injuries occurred under certain conditions and one-tenth for "injuries happening from * * * fits causing death." * * W., holder of the policy, went at night with a lantern to an outbuilding of the fishing club which he was visiting. Shortly after the outbuilding was seen to be on fire. The fire was extinguished and W. brought out badly burned, from the effects of which he died the next day. In an action on the policy the trial judge found as a fact that W. had been seized with a fit and in that condition caused the fire.

This finding was concurred in by the two provincial appellate courts. The trial judge held that the company was liable for one-tenth only of the insurance. The Divisional Court reversed this ruling (26 Ont. L.R. 55, 3 D.L.R. 668), but it was restored by the Appellate Division (28 Ont. L.R. 537, 13 D.L.R. 113).—*Held*, affirming the judgment of the Appellate Division, Duff and Anglin JJ. dissenting, that the injuries causing the death of W. happened from a fit within the meaning of the clause in the policy diminishing the indemnity to be paid. *Winspear* v. *Accident Ins. Co.* (6 Q.B.D. 42), and *Lawrence* v. *Accidental Ins. Co.* (7 Q.B. D. 216), distinguished.—*Held, per* Fitzpatrick C.J.—The clause diminishing the indemnity payable is not an exempting clause but one of the three separate contracts between the insurers and insured as to amount of liability.—*Per* Anglin J.—It does not create a new liability, but is a clause of limitation in favour of the company and to be strictly construed.—(Leave to appeal to the Privy Council was refused, 15th July, 1914.) WADSWORTH *v.* CANADIAN RAILWAY ACCIDENT INS. CO. **115**

4——*Benevolent society—Life insurance —Payment of assessments—Extension of time — Rules and regulations — Place of payment — Demand — Default — Suspension — Authority to waive conditions —Conduct of officials — Estoppel — Company law—Arts.* 1152, 1164, *C.C.*] By the constitution and by-laws of a mutual benevolent society death indemnities were assured to members who, in order to maintain good standing and entitle their beneficiaries to the indemnity, were, thereby, required to make prompt payments of monthly assessments within thirty days from the dates when they became payable. In the subordinate lodge of which C. was a member it had for some time been the practice of its financier to receive such payments fifteen days later than the thirty days so limited and, if then paid, members were not reported as having been in default and, *ipso facto*, under suspension according to the regulations provided by the constitution and by-laws incorporated in the certificate whereby the indemnity was secured. For several years the financier of the subor-

limited interest in the timber destroyed. —*Held*, that, in these circumstances, the contention in respect to the pre-emptor's limited interest in the property destroyed (the evidence bearing upon it having been omitted from the appeal case) was not open for consideration in the Supreme Court of Canada. — The court refused to disturb findings of the trial judge, based upon sufficient evidence, or the assessment of damages made by him as limited by section 298 of the "Railway Act," R.S.C., 1906, ch. 37. The judgment appealed from (12 D.L.R. 425) was affirmed. CANADIAN PACIFIC RWAY. CO. *v.* KERR **33**

2——*Rivers and streams—Industrial improvements—Penning back waters—Permanent works — Measure of damages — Expertise — Arbitration — Reparation —Loss of water-power—Future damages —Compensation once for all—Right of action—Practice—Statute, R.S.Q.*, 1909, *arts.* 7295, 7296.] *Per* Davies, Duff and Brodeur JJ., Idington and Anglin JJ. *contra.*—In an action for damages occasioned by constructions in a stream for industrial purposes the plaintiff is entitled, under the provisions of article 7295 of the Revised Statutes of Quebec, 1909, to recover the full extent of damages which experts acting under article 7296, R.S.Q., 1909, would have authority to award as compensation, once for all, for the injuries sustained. *Breakey* v. *Carter* (Cass. Dig. (2 ed.) 463) and *Gale* v. *Bureau* (44 Can. S.C.R. 312), referred to.—By the judgment appealed from it was held that the plaintiff was entitled to reparation for loss incurred in respect of the diminution in value of his water-power and the adjoining property on account of the construction of the works in question.—*Held*, affirming the judgment appealed from (Q.R. 22 K.B. 265), Idington and Anglin JJ. dissenting, that the plaintiff was entitled to reparation for such injuries. — *Per* Idington and Anglin JJ.—As it was apparent that the defendants could operate their works in such a manner as to avoid, or diminish, the inconveniences occasioned thereby, it would not be proper, in such an action, to include possible future losses in assessing the damages to be given as compensation for the injuries complained of.

Montreal Street Railway Co. v. *Boudreau* (36 Can. S.C.R. 329); *Chanbly Manufacturing Co.* v. *Willett* (34 Can. S.C.R. 502); and *Backhouse* v *Bonomi* (9 H.L. Cas. 503), referred to.—*Per* Davies, Anglin and Brodeur JJ.—Where no effective steps have been taken by the party from whom damages are claimed to have the damages resulting from improvements constructed in a stream ascertained by an expertise, in the manner provided by article 7296, R.S.Q., 1909, he cannot set up a mere proposal of such an arbitration as an exception to an action against him to recover compensation.—*Per* Duff J. — The defendants not having taken steps under the statute for several months, and not having shewn that they were in fact ready and willing to proceed under the statute, the action lies. COMPAGNIE ELECTRIQUE DORCHESTER *v.* ROY. **344**

3——*Tramway company — Construction of works—Independent contractor—Dangerous system—Injury to property—Negligence—Exercise of statutory authority —Correlative duty—Special release.*] A company with statutory authority to construct a tramway acquired a strip of plaintiff's land for its right-of-way, the vendor granting a release for all damages which he might sustain by reason of the construction and operation of the tramway and the severance of his farm. The company let the work to a contractor who, in the construction of the roadbed blasted away a hillside by a method known as "top-lofting" thereby throwing large quantities of rock outside the right-of-way and upon plaintiff's adjoining lands in such a manner as to interfere with his use thereof. This injury could have been avoided by proper precautions. —*Held*, affirming the judgment appealed from (18 B.C. Rep. 81), Fitzpatrick C.J. *hesitante*, that the company was responsible in damages for the omission of their contractor to take precautions necessary to prevent his blasting operations producing the injury to the plaintiff's lands. —*Held*, further, that the general language of the release should be so construed as to restrict it to the matters in regard to which it had been granted with reference to the proper exercise of the powers of the company to

STATUTE—*Continued.*

temporizing manner and the business continued to be conducted without any change. Later on, the defendant served upon the plaintiff a notice of dissolution of partnership and, in the notice as well as in the correspondence, made use of the word "partnership" in referring to the relations between them.—*Held*, reversing the judgment appealed from (18 B.C. Rep. 230) that, under the statutes referred to, the onus was upon the plaintiff to shew that he had been admitted as a partner in the business in the strict legal sense and that the indefinite use of the term "partnership" in the correspondence and notice did not, in the circumstances, amount to evidence of an agreement that there should be a partnership. DONKIN *v.* DISHER **60**

2——*Appeal—New right of appeal—Application to pending actions.*] An Act of Parliament enlarging the right of appeal to the Supreme Court of Canada does not apply to a case in which the action was instituted before the Act came into force. *Williams* v. *Irvine* (22 Can. S.C. R. 108); *Hyde* v. *Lindsay* (29 Can. S.C. R. 99), and *Colonial Sugar Refining Co.* v. *Irving* ([1905] A.C. 369) followed. [*See now* Stat. (Dom.) 4 & 5 Geo. V., c. 15.] DORAN *v.* JEWELL **88**

3——*"Militia Act"—R.S.C.* [1896] *c.* 41 —*"Senior officer * * * present at any locality"—Military district—Right of action—4 Edw. VII. c.* 23, *s.* 86—*Retrospective effect.*] By section 16 of the "Militia Act" (R.S.C. [1896] ch. 41) Canada is divided into military districts of which the Province of Nova Scotia is one. By section 34 "the senior officer present at any locality" may, on requisition from three justices of the peace, call out the troops in aid of the civil power wherever a riot or disturbance of the peace has occurred or is anticipated.—*Held*, Brodeur J. dissenting, that the "senior officer present at any locality" is not necessarily the senior officer of a corps stationed at the place where the riot occurs or is likely to occur. The justices, in their discretion, may requisition the senior officer of any available force.—By section 34, sub-section 6, of the above Act the officer commanding the troops so called out may, in his own name, take action against the

STATUTE—*Continued.*

municipality in which the riot occurred to recover the amount of the expenses thereby incurred which are to be paid to His Majesty when recovered. By 4 Edw. VII., ch. 23, sec. 86, this right of action was vested in His Majesty.—*Held*, that the latter being a procedure Act is retrospective and an action was properly brought in the name of the Attorney-General of Canada to recover the expenses of calling out the troops on the occasion of an industrial strike in the City of Sydney, part of which expenses were incurred before, and part after, the last mentioned Act came into force.—Judgment appealed from (46 N.S. Rep. 527), reversed, Brodeur J. dissenting. ATTORNEY-GENERAL OF CANADA *v.* CITY OF SYDNEY **148**

4——*Appeal—Jurisdiction — "Matter in controversy" — Annuity—Quebec "Workmen's Compensation Act," R.S.Q.*, 1909, *arts.* 7321 *et seq.*—9 *Edw. VII., c.* 66 (Q.) *"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 46(*c*)—*Construction of statute.*] Plaintiff's action, under the Quebec "Workmen's Compensation Act," claimed $450 for loss of earnings, for six months, during incapacity occasioned by personal injuries, and also an annuity of $337 *per annum*. The plaintiff recovered judgment for the specific amount claimed and he was also awarded an annuity of $247.50, which might be subject to revision, under the statute. The capitalized value of the annuity would, probably, amount to a sum exceeding $2,000, the appealable limitation fixed by section 46(*c*) of the "Supreme Court Act," R.S. C., 1906, ch. 139.—*Held*, Davies J. dissenting, that, in the circumstances of the case, it did not appear that the *demande* amounted to the sum or value of two thousand dollars, within the meaning of section 46(*c*) of the "Supreme Court Act," and, consequently, the court had no jurisdiction to entertain the appeal. *Talbot* v. *Guilmartin* (30 Can. S.C.R. 482); *La Cie. d'Aqueduc de la Jeune Lorette* v. *Verrett* (42 Can. S.C.R. 156); *Lapointe* v. *The Montreal Police Benevolent and Pension Society* (35 Can. S.C.R. 5), and *Macdonald* v. *Galivan* (28 Can. S.C.R. 258), referred to.—(Leave to appeal to Privy Council granted, 15th July,