REPORTS

OF THE

SUPREME COURT

OF

CANADA

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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.

ERRATA ET ADDENDA

Errors and omissions in cases cited have been corrected in the Table of Cases Cited.

Page 2, line 3, for "him" read "the motorman." Add "Duff J. dissenting" at end of line.

Page 153, line 3 of caption and line 5 of headnote, for "1908" read "1903."

Page 203, line 3 of caption, for "c. 50" read "c. 56."

Page 379, line 11, for "his" read "its."

Page 380, line 26, for "he" read "it."

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 54 OF THE SUPREME COURT REPORTS.

Dominion Creosoting Co. v. *Nickson Co.* (55 Can. S.C.R. 303). Leave to appeal refused, June, 1917.

Franco-Canadian Mortgage Co. v. *Greig.* (55 Can. S.C.R. 395). Leave to appeal refused, June, 1917.

Grand Trunk Pacific Railway Co. v. *British Columbia Express Co.* (55 Can. S.C.R. 328). Leave to appeal granted, June, 1917.

Meeker v. *Nicola Valley Lumber Co.* (55 Can. S.C.R. 494). Leave to appeal refused, February, 1918.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

COLUMBIA BITHULITIC LIMITED (PLAINTIFF) ..... APPELLANT;

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

1917

*Feb. 6, 7.
*March 26.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Damages—Negligence — Contributory negligence—Statutory powers —Collision—Railway crossing—Defective brakes—Electric street railway—Speed.

The principle, that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendants, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence: British Columbia Electric Rly. Co. v. Loach [1916] 1 A.C. 719, followed.

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

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

The act of the respondent in coming out with defective brakes, though antecedent to the appellant's negligence really prevented him from stopping his car in time to avoid the collision.

It is unlawful for the driver of a car on a tram-line operated under the Dominion Railway Act to approach an unprotected highway level crossing at such speed that his car is not under reasonable control.

Judgment of the Court of Appeal (23 B.C. Rep. 160), reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Murphy J. at the trial, by which the plaintiff's action was maintained with costs.

The appellant's servant (one Hall) was driving a team of horses and a wagon, the property of the appellant, along a road, known as Townsend Road, which was crossed by the company respondent. On the way, one Sands got up from the road and sat beside the driver. On nearing the track, which was approached by an up grade, the two men were engaged in conversation and took no precautions. When the horses were partially across the track, they were struck by a tramcar of the company respondent. Sands and the two horses were killed, Hall was thrown from the wagon and the wagon was damaged. The tramcar at the time was coming down grade at about 40 miles an hour. There was evidence that the brakes on the tramcar were defective.

The issues raised on the present appeal are stated in the judgments now reported.

Armour K.C. for the appellant.
Tilley K.C. for the respondent.

(1) 23 B.C. Rep. 160.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

The Chief Justice.

THE CHIEF JUSTICE.—I agree with Mr. Justice Anglin with this addition.

The general proposition that "statutory powers may not be exercised with reckless disregard for the common law rights of others" cannot be open to objection. A statement of the contrary would seem sufficient to refute it. Adopting the language of Lord Sumner in *Great Central Railway Co.* v. *Hewlett* (1), I would say that however general the terms used by the legislature in authorizing for the company's benefit what would otherwise be a nuisance the authority conferred must be exercised with reasonable care and not without it.

The application of the rule to the particular case, however, presents some difficulty. It is not suggested that railway trains can never pass over a public crossing except at such speed that in case of necessity they can be stopped before reaching it. If it were, that would seem to be a proposition that one might have much hesitation in accepting although at first sight it seems reasonable.

In *British Columbia Electric Railway Co.* v. *Loach* (2), the Privy Council held that it was the negligence of the respondent in coming out with defective brakes which though antecedent to the appellant's negligence did not come into effect until afterwards and therefore was the cause of the accident. It may perhaps be suggested that the point of the decision was a fine one and that if the respondent had previously tied its hands so that it could not help coming too fast the appellant had also previ-

(1) [1916] 2 A.C. 511, at pp. 523-524. (2) [1916] 1 A.C. 719.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

The Chief Justice.

ously tied his hands so that he arrived at the crossing too slow to be able to clear.

However, the judgment of the Privy Council must be accepted as the law not only as to the abstract principle which is clear but as applicable to this particular case; and as Mr. Justice Archer Martin said in the Court of Appeal,

> on the inferences to be drawn from facts about which there is no real dispute * * * the accident could * * * have been avoided if the brake had been in good order.

This conclusion clearly brings the case within the decision of the Privy Council in *Loach* v. *British Columbia Electric Railway Co.*(1), and the appeal must be allowed with costs here and in the Court of Appeal and the judgment of the trial judge must be restored.

DAVIES J.—The case between the *British Columbia Electric Rly. Co.* v. *Loach,* reported(1), was one arising out of the same accident and on the same facts and circumstances as this action was brought on. The only difference is in the person who brought the action; but it is contended there exists a difference between the findings of the jury in the former case and the findings of facts or inferences from the evidence made by the learned trial judge in the present action. The record of the *Loach* case is not before us and it may be that some of the evidence in that case as to the power of the motorman to have stopped the car before reaching the team crossing the track at the rate of speed the car was running with a defective brake, such as there was on the car, was not precisely the same as in this case. However, in the *Loach* case

(1) [1916] 1 A.C. 719, 23 D.L.R. 4.

their Lordships cite the finding of the jury that while both parties were guilty of negligence, nevertheless

> the motorman could have stopped the car if the brake had been in an effective condition;

and Lord Sumner, who delivered the judgment, says:—

> If the brake had been in good order, it should have stopped the car in 300 feet.

In so far as the general principle is concerned I take it we are bound by the law laid down in the *Loach* case by the Judicial Committee.

In the headnote to that case it is stated that their Lordships held:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Several questions were raised and argued at bar as to whether the rate of speed at which the car was running when the motorman first saw the plaintiff's servant man driving his team and cart to cross the car track, was not in itself negligence, and whether the provisions of the "Railway Act" on the subject of the rate at which cars might run, extend to electric cars. In the view I take of the facts I think the appeal must be decided by determining whether there was evidence from which the proper inference should be drawn that if the car had been equipped with an adequate and efficient brake instead of an admittedly defective and inefficient one, it could, if promptly applied at the proper moment by the motorman, have

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Davies J.

stopped the car and avoided the accident. If such an inference is the proper one to draw, the defendants (respondents) under the authority of the *Loach* case must be held liable. The learned trial judge thought himself bound by the decision of the Judicial Committee in the *Loach* case, and his finding on the fact whether efficient brakes would, if applied, have stopped the car in time, is as follows:—

> The plaintiffs desire me to find that had the brakes been efficient and applied as soon as the motorman saw the team, the car would have been slowed down sufficiently to allow time enough for the team to have cleared the tracks. It is possible the horses might have got over, but I do not think I can hold it proven that the wagon would also be across, and if not the horses would probably have been killed and certainly the wagon would have been damaged.

After careful consideration of the evidence, I am of opinion that the proper inference to be drawn from it is that had the car been equipped with proper and efficient brakes the motorman would have stopped it when he applied the brakes in time to have avoided the accident.

The evidence of Andrews is not as clear and satisfactory on the point as one could desire; but in answer to the learned judge who said to him: "Well if you are going 40 miles, you couldn't get down to 10 miles in a hundred feet?" he answered: "Oh! no Sir, about 200 feet in 40 miles an hour."

That 200 feet was 100 feet less than in the *Loach* case Lord Sumner thought it could be stopped altogether and would bring the car running at the reduced rate of 10 miles an hour within 200 feet of the horses and truck crossing the track and still allow 200 within which the car might have been stopped altogether before it reached the team.

I would therefore allow the appeal and restore the judgment of the trial judge with costs here and in the Court of Appeal.

IDINGTON J.—I do not see enough in the facts presented herein whereby it is fairly possible to distinguish this case from that of the *British Columbia Electric Railway Co.* v. *Loach* (1), arising out of same accident as in question herein, and am therefore of the opinion that the appeal should be allowed with costs throughout and the judgment of the learned trial judge be restored.

DUFF J.—The accident out of which the litigation arose occurred in Townsend Avenue in the municipality of Point Grey, a suburb of Vancouver, where that street is crossed by the Vancouver and Lulu Island Railway the appellant company's horses and wagon being run down by a car of the respondent company.

Pursuant to a contract with the Vancouver and Lulu Island Railway Company and the Canadian Pacific Railway Company, the lessee of the railway, the respondent company, some years ago, equipped the railway as an electric railway and were working it under the terms of the contract by authority of an Act of the Parliament of Canada (ch. 66, 6 & 7 Edw. VII.). The agreement requires the respondent company to provide an "electric car service" between Granville Street in the City of Vancouver and Steveston on the Fraser Delta (a distance of about 15 miles) in part over the Vancouver and Lulu Island

(1) [1916] 1 A.C. 719.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff, J.

Railway and in part over a track owned by the Canadian Pacific Railway Company which, it may be assumed, was constructed under statutory authority as part of that company's system. The Vancouver and Lulu Island Railway though originally constructed under the authority of Provincial legislation was afterwards declared to be a work "for the general advantage of Canada" and thereupon became and is a Dominion Railway. The respondent company was incorporated under the "English Companies' Act," acquired the property and rights of the Consolidated Railway Company, a British Columbia corporation, and own and operate lines of electric railway and other works in Vancouver and the suburbs of Vancouver and in other places in British Columbia under the authority of the Consolidated Company's special Act (B.C. Statutes, 1896, ch. 55), all these works being local works under the exclusive jurisdiction of the Provincial Legislature. It may be a question whether the intention of the legislation authorizing the agreement above mentioned (ch. 66, 6 & 7 Edw. VII.) was to give the respondent company the status of a Dominion Railway Company *vis à vis* the enactments of the "Dominion Railway Act," or whether the company is merely authorized to exercise, as contractor with the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company, powers which are directly conferred upon and are the powers of the last mentioned companies which they are permitted to execute by the respondent company as their instrumentality. The point is not material to any question arising now and I mention it to make it clear that nothing said in relation to this appeal

should be treated as affecting any question which may hereafter arise concerning the status of the respondent company or the responsibility of either of the railway companies mentioned.

The line operated by the respondent company for the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company crosses numerous streets within the territorial boundaries of Vancouver which occur at the usual intervals and after passing the southern limit of the municipality (about a mile from the Granville Street terminus) in the municipality of Point Grey until the north arm of the Fraser is reached.

The respondent company contends that it is not judicially amenable in respect of harm caused to persons and things lawfully passing on a public highway across the line it operates by reason merely of the fact that such harm is ascribable to the unusual and dangerous speed of the car causing it; in short operating the railway, as it contends under the provisions of the "Dominion Railway Act" the matter of the speed of its cars (it is argued) rests in its own uncontrolled discretion, save in cases in which that discretion is affected by the express provisions of the "Railway Act" or by some regulation on the subject by the Board of Railway Commissioners.

It has often been laid down as a general proposition that the grantee of statutory powers is not in general responsible for harm resulting from that which the legislature has authorized provided it is done in the manner authorized and without negligence; but that an obligation rests upon persons exercising such powers not only to exercise them with

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. Co.

Duff J.

reasonable care but in such a manner as to avoid unnecessary harm to the persons or property of others: *Geddis* v. *Bann Reservoir*(1), at p. 438; *Canadian Pacific Railway Co.* v. *Roy*(2), at p. 231; *East Fremantle* v. *Annois*(3), at p. 218; *Hewlett* v. *Grand Central*(4). The principle has often been applied and has been always considered to impose upon street railway companies an obligation to regulate the speed of their cars in and upon the public streets in such a way as not unduly to endanger the safety of the public.

All such general rules and principles are, however, in the last analysis rules of construction, and must give way to an express or implied contrary intention. "Obviously," said Bowen L.J., in *Truman* v. *London Brighton and South Coast Railway Company*(5), at p. 108, "the question in each case turns on the construction of the Act of Parliament."

In *East Fremantle* v. *Annois*(3), at p. 217, referring to a remark of Abbott C.J., in *Boulton* v. *Crowther*(6), at p. 707, that if the donee of a statutory power act "arbitrarily, carelessly or oppressively" the law has provided a remedy. Lord Macnaghten observed that such expressions, although as applied to the circumstances of a particular case they probably create no difficulty, are nevertheless when used generally and at large neither precise nor exact as to scope or meaning. In a word, his Lordship said "the only question is, has the power been exceeded? Abuse is only another form of excess." "There is,"

(1) 3 App. Cas. 430.
(2) [1902] A.C. 220.
(3) [1902] A.C. 213.
(4) [1916] 2 A.C. 511.
(5) 29 Ch.D. 89.
(6) 2 B. & C. 703.

said Lord Selburne in *Truman* v. *London, Brighton and Coast Railway Company*(1), at p. 53,

> no cause of action on the ground of negligence in the manner of doing what is authorized if that * * * is in fact authorized;

that is to say has been declared to be lawful. If the particular thing

> complained of is done in the place and by the means contemplated by the legislation

it is not an actionable wrong: *Canadian Pacific Railway Co.* v. *Roy*(2), at p. 227; *Hamilton St. Rly.* v. *Weir*(3), at p. 506; *Hewlett* v. *Grand Central*(4). An electric railway company having authority by statute to place its transmission wires above the streets on poles or under ground was held not to be answerable in negligence for the consequences of not adopting the plan less dangerous to the public; the exercise of this discretion vested in the company was not reviewable by a jury: *Dumphy* v. *Montreal Light, Heat and Power Co.*(5).

The question whether a railway company whose railway is being worked under the authority of the "Dominion Railway Act" is answerable in negligence for running its trains over a highway crossing at a speed which makes it impossible for the locomotive engineer with the appliances at his command, or with due regard to the safety of his passengers to exercise any effective control over the train with a view to the safety of persons crossing the track on the highway is therefore reducible to the question: Is such man-

(1) 11 App. Cas. 45.
(2) [1902] A.C. 220.
(3) 51 Can. S.C.R. 506, 25 D.L.R. 346.
(4) [1916] 2 A.C. 511.
(5) [1907] A.C. 454.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

agement of the trains legalized? And the answer to the question must, to repeat the remark of Bowen L.J., turn upon the construction of the enactments from which the authority to work the railway is derived.

The difficulty of holding railway companies to be under the duty generally to regulate the speed of their trains at highway crossings in accordance with some standard of reasonableness to be determined and applied by a jury is obvious. Decisions upon questions of speed, it may be assumed, affect more radically the management of a railway line than decisions upon questions of what may be called collateral precautions, in providing, for example, signalling devices or gates and watchmen at highway crossings. Reasonableness means, of course, reasonableness in all the circumstances. Is it for a jury to say whether a fast service between Montreal and Toronto or Montreal and Ottawa, for example, necessitating the passing of numbers of highway crossings at a rate of speed precluding the possibility of exercising in most cases control over the trains sufficient in itself to afford any safeguard for persons using the highway—is the reasonableness of such a service entailing such consequences to be left to a jury to determine? Is the fetter upon the railway company's discretion involved in such a rule within the contemplation of the "Railway Act?" I think the decision of this court in *Grand Trunk Railway Co.* v. *McKay* (1), may be taken broadly to establish the proposition that the discretion of the railway company exercised *bonâ fide* with regard to the speed of trains on a Dominion rail-

(1) 34 Can. S.C.R. 81.

way worked in the usual way by steam is not as a general rule amenable to judicial review with reference to some standard of reasonableness to be determined by a judicial tribunal.

It does not follow that in no circumstances does a legal obligation rest upon a company operating a railway under the "Dominion Railway Act" in relation to the speed of its trains in approaching or crossing a highway. For example, the Act provides for certain precautions with the object of warning the public of the approach of trains and the enactments prescribing these precautions presuppose that railway trains are not run at a speed which makes these warnings useless; and I am not prepared to say that for harm caused by a train running across a highway at such a speed as to nullify the utility of the prescribed statutory signals, other efficacious signals not being provided, the railway company could not be made answerable as for negligence. And the circumstances of a particular emergency may obviously cast a duty upon the servants in charge of the train to moderate its speed or bring it to a stop; so also the permanent conditions of a particular crossing or the practice of the railway in relation to it (a point to which I must again advert) may give rise to a duty to take extraordinary measures there for the protection of the public by controlling train speed where other effective measures are impossible or neglected: *Rex* v. *Broad*(1).

In addition to the general considerations above alluded to there is another consideration which applies with some force to railway works under the

(1) [1915] A.C. 1110 at pages 1113, 1114; 33 N.Z.L.R. 1275 at pages 1291, 1299.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

"Dominion Railway Act." The jurisdiction of the Dominion with regard to railways is limited to what may be called through railways, that is to say, railways passing beyond the limits of a province or connecting two provinces, and local railways declared by the Dominion Parliament to be works for the general advantage of Canada. Down to the time when the "Railway Act" received its present general form in the year 1888, the practice of making such declarations on grounds and for reasons having no kind of relevancy to the substance of the declaration itself had not come into vogue. Generally speaking such declarations were reserved for undertakings connected organically with through railways. The responsibilities of the Dominion railway companies with regard to through traffic should not be lost sight of in considering the effect of the "Dominion Railway Act" in this regard.

The considerations, however, ordinarily relevant where the question concerns the management of a Dominion railway worked by steam, are largely without application to the undertakings operated by the respondent company under the authority of 6 & 7 Edw. VII. ch. 66. To make this clear it is necessary to refer to the specific provisions of the agreement of 1905 between the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company and the British Columbia Electric Company ratified by that statute.

The agreement requires the respondent company to maintain a

> good, proper and efficient electric car service equipped with modern cars and supplied with the latest appliances;

and it prescribes that the service

shall be equal in every respect to the service now in effect on the lines owned and operated by the party of the second part between Vancouver and New Westminster.

By section 16 of the agreement it is stipulated that the respondent company shall protect and indemnify the Canadian Pacific Railway Company against all loss, damage or claims which may arise in consequence of the working of the railway under the agreement and

will bear and pay all expenses incurred in doing all acts, matters and things as they are now or may hereafter be required for the maintenance and operation of the said railway in conformity with the laws of the Dominion of Canada

—meaning of course the Dominion law as affecting the undertaking in question. By another clause, inspection by the Superintendent of the Pacific Division of the Canadian Pacific Railway Company is provided for and the respondent company undertakes to remedy any defects in the service of equipment of the railway to the satisfaction of the superintendent or any official appointed by him to make such inspection. It is quite evident that all the parties to these agreements have assumed—and carried the assumption into effect in practice—that important provisions of the "Dominion Railway Act" enacted for the protection of the public at highway crossings had no application to the railway when worked under the provisions of this agreement. The cars in use are of a type familiar in this country as the interurban trolley car worked by electric motor, equipped with compressed air whistle and foot gong, brakes and reversing apparatus, having neither steam whistle nor bell weighing "at least 30 pounds" as prescribed for "engines" or "locomotives" by the "Dominion Railway Act." The photographs in evidence indicate, and we may assume cor-

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

rectly, that at Townsend Avenue the sign "Railway Crossing" prescribed by that statute does not appear.

In this, no doubt, the purpose of the agreement as touching the character of the cars was faithfully carried out. The cars contemplated by the agreement are certainly not "locomotives" or "engines" within the meaning of the "Dominion Railway Act." The intention of the parties was to establish a service which should be remunerative, and within the city limits, at all events, the agreement must be taken to have contemplated stopping at street intersections as in the working of a street railway service, for taking up and setting down passengers, and this would necessarily involve the use of such cars and appliances as would enable the cars to be easily started and readily brought to a stop. With such cars the working of a "proper and efficient" service as regards measures required for the safety of the public on the highways (by regulation of speed and otherwise) as well as in the interest of the patrons of the railway—would in the case of a short railway of 12 or 15 miles in length, having no through connections, present no greater difficulty than the working of an ordinary street car system in a large city.

By the special Act, ch. 66, 6 & 7 Edw. VII., it is declared that "subject to the provisions of the 'Railway Act'" the agreement referred to and another to which a brief reference will be necessary set forth in the schedule to the statute, shall be legal and binding upon the parties thereto and it is enacted that

> such respective parties may do whatever is necessary in order to give effect to the substance and intention to the said agreements.

Light is thrown upon the effect of the words "substance and intention" in the ratify-

ing statute by a reference to the agreement of 1904 between the Canadian Pacific Railway Company and the respondent company which the statute also authorizes the respondent company to carry out. This agreement requires the company to establish an "electric street car" service between the corner of Robson street and Granville street (one of the principal thoroughfares in Vancouver) and Kitsilano, a route lying entirely within the municipal boundaries (except where it passes over the Canadian Pacific Railway Bridge at False Creek) crossing on the way numerous city streets. The operation of this service required the running of the cars on Granville street between Robson street and the northern terminus of the railway bridge over the respondent company's tracks and this part of the service being operated over the respondent company's own street railway in Vancouver, a provincial undertaking, neither in whole or in part declared to be "a work for the general advantage of Canada," it follows that the parties must have had in view the use of cars of a character conforming to the provisions of the provincial law and to the arrangements between the respondent company and the municipality with respect to its street car service in Vancouver; and by the very terms of the agreement itself, the service provided is to be an extension of that street car service and is to be a continuous service from the corner of Robson and Granville streets to Kitsilano and back.

As regards this agreement there could be no manner of doubt that what was contemplated was "a street car service" in the strict sense "proper and efficient" as the agreement requires.

It follows from what I have said that the "sub-

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

stance and intention" of the ratified agreements was that a "street car service" and an "electric car service" should be provided by means of cars not equipped with steam whistle and bell in compliance with the requirements in respect of locomotives, of the "Railway Act," but of the kind used by the respondent company in its already established electric car services. The agreements contemplated, I repeat, as protection of the public at highway crossings and on the highway generally against the dangers incidental to the working of the service not the specific precautions prescribed by the "Railway Act" when such precautions would be unusual and impracticable but such precautions as would properly be taken in the operation of "proper and efficient" services of the character authorized; the "law of the Dominion of Canada" as pointed out above, in section 16 of the agreement means the law as it affects the particular undertaking.

That such cars should be equipped with efficient brakes is obviously contemplated—brakes, that is to say, efficient for use in such a service; but unqualified license as to the speed of cars might reduce this requirement to an idle formality.

The public would be entitled to expect the observance in both these services of the safeguards and precautions commonly observed in the operation of services of the same character for the protection of persons using the streets. That is what the agreements contemplate and that therefore is what the statute contemplates and that is undoubtedly what the respondent company professed, and no doubt quite honestly attempted to carry out.

Such being the effect of the special Act it is proper to note that by section 3 of the "Railway Act" the provisions of the special Act in so far as it is necessary to give effect to them shall be taken to override the provisions of the general Act.

Conformably to the spirit of that provision it is, I think, to the character of the service established and authorized (which excludes the use of most important special precautions for the safety of the public at highway crossings prescribed by the "General Railway Act") that we must look for the purpose of ascertaining whether or not the general rule against negligent execution of the statutory powers applies in the matter of the speed of cars at such crossings. It results, I think, from what I have said, that the proper answer to the question is, yes.

As regards the crossing and the car in question there are, however, two reasons which put the question of the duty of the appellant company in relation to speed beyond question. First, as to the crossing—there was a stopping-place there and in the ordinary course of operation the car would be brought under control to enable the motorman to stop for passengers; and there could consequently be no general overriding necessity or convenience to prevent the taking of proper measures for the safety of the public on the highway; as to the car, the fact alone that it was not equipped with proper brakes was sufficient to limit in the special circumstances any otherwise uncontrolled discretion as to speed, assuming such discretion as a general rule to exist.

Two further questions arise: First, was the learned trial judge right in finding as a fact that had

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

the car been equipped with a proper brake Hayes, the motorman, would nevertheless have been unable to stop it or to check its speed sufficiently to avoid a collision or to make it harmless if one had occurred? My view is that the finding cannot now be interfered with in this court, first, because it was concurred in by the majority of the Court of Appeal and it is at least quite impossible to treat the conclusion that the plaintiff had not adequately established the affirmative of this issue as clearly erroneous. And secondly, I agree fully with the Chief Justice of the Court of Appeal in his opinion that on the evidence presented, Mr. Justice Murphy could not properly have reached any other conclusion and that the testimony on which the appellant relies for impeaching the finding of the trial judge is quite worthless. The evidence relied upon is that of one Andrews who says that he was acquainted with the car that caused the injury and that going at a rate of 35 to 40 miles an hour at the place where the accident occurred he could with the brake in proper order have brought the car to rest, to use his own language, in "about 12 poles" that is to say within a space of 1,200 feet. He is then asked to say within what distance he could reduce the speed from 40 miles an hour to 10 miles an hour assuming the appliances to be in perfect order. His testimony given in answer to that question, put by Mr. Justice Murphy himself, was that he thought he could effect such a reduction while the car was traversing a space of about 200 feet. I agree with the learned Chief Justice of the Court of Appeal that the learned trial judge was entitled to disregard this evidence.

It is too obvious for argument that both state-

ments of the witness cannot stand; which is to be accepted? It is evident that Mr. Justice Murphy did not consider he had evidence before him justifying the conclusion that with perfect appliances the speed of the car could be reduced from 40 to 10 miles an hour in less than 400 feet; and this view cannot be satisfactorily explained away on the assumption that the trial judge misunderstood the answer to a pointed question asked by himself.

The next question is: Does the principle in *Loach* v. *British Columbia Electric Railway Co.*(1), apply in view of this finding of the learned trial judge? Mr. Tilley relies upon the following passage in the judgment of Lord Sumner, speaking for the Judicial Committee, at p. 725:—

> Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequence of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

Mr. Tilley argues that Hayes' negligence really came to an end when he put the emergency appliances into operation on seeing the horses approaching the railway tracks about 16 or 18 feet west of the west rail, although the effect, he admits, of his negligent conduct did not; and this, he argues, distinguishes Hayes' personal negligence from the negligence of the company in not providing the car with a proper brake, while (he argued) Hall's negligence in going on to the track after Hayes had done every-

(1) [1916] 1 A.C. 719.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

thing he could to stop the car, intervened between the negligence of Hayes and the final catastrophe. The acceptance of this argument seems to lead to the rather embarrassing position that if the rate of speed had been such that the car (equipped with a proper brake) could have been stopped in time to avert the accident the company might have been responsible; while given the higher rate of speed at which a proper brake would be ineffective the company would escape responsibility.

But assuming that in such a case as this it is possible to separate the negligence of the official responsible for default in failing to provide a proper brake from the negligence of the motorman who runs at a speed which is excessive not only in view of the fact that the brake is defective, but would have been excessive, that is to say, unreasonably excessive, even if the car had been equipped with proper appliances—assuming that the negligence of Hayes and that of this official can be considered as distinct negligences and that the two together ought not to be regarded as constituting one negligence, (see the judgment of Lord Watson in *Smith* v. *Baker*(1), at p. 352), I think the judgment in *Loach's* case, when due effect is given to the whole of it, requires us to hold that the trial judge was entitled to find Hayes' negligence to have been the sole cause of the injury of which the appellant company complains.

I think this conclusion follows from the observations upon *Brenner* v. *Toronto Railway Co.*(2). To make this clear it will be necessary very briefly to indicate what was involved in that

(1) [1891] A.C. 325. (2) 40 Can. S.C.R. 540.

case. The plaintiff, a girl of 18, being on the south side of Queen street in Toronto and having to cross the street saw a car coming towards her from the east, and assuming that she had time to cross before the car would reach her line of advance, she proceeded, and arriving at the car track, stepped on to the track in front of this car without having taken any precaution to ascertain its position before doing so and without having given the motorman any warning of her intention. She was immediately struck down and terribly injured.

The plaintiff's case at the trial was that the car, when she saw it, was at a considerable distance from her and that she was reasonably entitled to assume, if it was proceeding at the usual speed, that she could cross the track before it came up to her; that it was due to the motorman's negligence in driving the car at an excessively high rate of speed that this reasonable expectation was unfulfilled; and that this negligence of the motorman was the sole cause of the accident. The defendant's case was that when the plaintiff left the sidewalk after seeing the car approaching it was only a short distance east of her with power thrown off and running at about 6 miles an hour; and that the motorman reasonably assumed that she had no intention of crossing in front of the car until as she approached the rail her seeming want of attention to the noise of the gong which he was sounding excited his apprehensions and he applied first the brake and afterwards the reversing apparatus; but that after he had done this she stepped in front of the car and was knocked down. The plaintiff alleged also that assuming the car was mov-

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

ing at a moderate rate of speed, as the defendants alleged, the motorman was negligent in not stopping sooner. The jury rejected the plaintiff's case in its entirety finding the plaintiff's negligence to be the sole cause of her injury. Their findings acquitted the motorman of negligence in the matter of speed involving, in view of the judge's charge, a finding that the motorman if he had more swiftly divined the plaintiff's intention to cross the track, could have stopped the car in time to avoid a collision, but negativing the charge of negligence in failing to do so.

On appeal to the Divisional Court the charge of the learned trial judge was attacked in this way. The scene of the accident was immediately opposite the terminus of University Avenue, a street which runs north from the northerly boundary of Queen street. A few feet east of University avenue, another street, University street, runs in the same direction from the northerly limit of the street also without crossing it. One of the rules of the company required the motorman on approaching a "crossing" to throw off the power or reduce the speed of his car so as to get it under control with a view to emergencies. The Divisional Court held that in approaching the easterly limit of University street the car was approaching a "crossing" and that this rule applied. The motorman in fact did not throw off his power or reduce his speed until he reached the easterly limit of University avenue. The plaintiff impeached the direction of the learned judge and asked for a new trial on the ground that under a proper direction they might have found that the motorman was negligent in not throwing off power or reducing speed on approaching University

street and that they might moreover have found that if he had done so the motorman might in consequence of the reduced momentum, thereby occasioned, more effectually have checked his car on the application of the emergency apparatus and thus left the plaintiff a fraction of time more to escape. The Divisional Court gave effect to this contention. On appeal to the Court of Appeal it was held that there was no misdirection, that the rule in question had been sufficiently brought to the attention of the jury. In this court the defendant company contended that supposing the rule might more pointedly have been brought to the attention of the jury on the issue of the motorman's negligence, a new trial ought nevertheless to be refused because when the admitted facts were considered with the conclusions of fact necessarily involved in the findings of the jury, it was clear that the plaintiff must fail because, assuming the motorman had been negligent in failing to observe the rule and that this negligence was one cause of the accident, still the plaintiff's negligent conduct was such that consistently with the conclusions involved in the verdict which were not affected by the alleged misdirection and the admitted facts the jury could only have found that this conduct was a "direct and effective cause" of the mishap. In other words, assuming the mishap to have been due in part to the negligence of the motorman and in part to the negligence of the plaintiff, then under the undisputed principles of the law of negligence the plaintiff could not in such circumstances recover. This contention prevailed with Girouard J. and myself.

The effect of their Lordships' observations at pp.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Duff J.

725 and 726 appears to be that their Lordships disapprove of this view of *Brenner's* case.

The broad principle is, of course, undisputed (it is distinctly recognized in the last paragraph of their Lordships' judgment in *Loach's Case*) that a plaintiff whose negligence is a direct cause of the injury complained of cannot recover even though the accident would not have occurred but for the defendant's own negligence; in other words, where the injury complained of is "directly" caused by the negligence of the plaintiff and the defendant. (See Lord Esher in *The Bernina*(1), at p. 61, and Lindley L.J. in the same case at pp. 88 and 89, and Mr. Justice Willes in *Walton* v. *The London, Brighton and South Coast Railway Co.*(2)). That is to say if the injury is not only the actual consequence but the consequence which any reasonable person in the plaintiff's position, knowing what the plaintiff knew, must have seen to be the probable consequence of his negligence and the chain of causality is not interrupted by the negligence of the defendant, then it is settled law that the plaintiff cannot recover. The effect of their Lordships' disapproval of the judgment mentioned seems to be that on the facts, undisputed or involved in the findings in *Brenner's* case which were unaffected by the misdirection, if there was any, the jury would have been entitled to find that the plaintiff's negligence was not a "direct" cause of the accident in the sense above indicated if they had found that the motorman was negligent in not observing the rule and that this negligence was one of the causes of the accident. There was in fact, it may be noted,

(1) 12 P.D. 58. (2) H. & R. 424, at pp. 429 and 430.

nothing in the judgment referred to at p. 725 expressed or intended as a "comment" on any of the judgments in the Divisional Court; and one must, I think, assume especially in view of the sentence at the top of p. 726 that the observation on p. 725 was not intended as *obiter* and was not directed to any single sentence detached from its context or considered apart from the concrete issues raised by the *Brenner* appeal.

The plaintiff in *Brenner's Case* had deliberately, knowing the car to be near and approaching her, stepped on the track in front of it without looking to see exactly where it was until, as she said, the catastrophe was "upon her" and, as the jury found, without any reasonable excuse for doing so; and after the motorman divining her intention, had made every proper effort to avoid a collision by trying to stop the car with his emergency apparatus, which he could have done had she given any reasonable warning of her intention to cross the track.

The effect of the approval of the judgment in the Divisional Court in *Brenner's* case seems to be that the negligence of the motorman, in the case before us, notwithstanding his efforts to stop the car, must be regarded as continuing in the sense of being operative down to the moment of impact, while their Lordships expressly declare in *Loach's* case that the negligence of the teamster is to be considered to have ceased to operate when looking up on Sands' exclamation he, for the first time, became aware that a car was approaching but too late to enable him to escape.

ANGLIN J.—In the same accident in which the horses were killed and the wagon wrecked for loss of

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

which the present plaintiff sues, one Sands, who accompanied the driver, also lost his life. In an action brought by his administrator against the present defendants, although the jury had found contributory negligence by Sands, the Judicial Committee of the Privy Council held them answerable for his death, (*Loach* v. *B.C. Electric Rly. Co.*(1)); on the ground that they

> could and ought to have avoided the consequences of that negligence and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it.

In that decision their Lordships have authoritatively determined, as stated in the head-note to the report, that:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Lord Sumner answered the contention that the contributory negligence of Sands (which was the same as that found by the learned trial judge against the present plaintiff) had continued up to the moment of the collision by stating that "it does not correspond with the fact;" and his Lordship adverted to the distinction between negligence and its consequences. These observations are directly applicable to the facts as disclosed by the evidence and found in the present case.

(1) [1916] A.C. 719.

The difference between *Loach's* case and the case at bar on which respondents rely is that, whereas in the former the jury had found that

> the motorman could have stopped the car if the brake had been in effective condition,

in the case now before us the trial judge, though he held the brake was defective, and thought that, had it been efficient, the horses might have got over the crossing, did

> not think (he could) hold it proven that the wagon would also be across, and, if not. the horses would probably have been killed and certainly the wagon would have been damaged.

Nevertheless,

> applying the law as laid down in Loach v. B.C. Electric Rly. Co., in reference to this same accident to the facts as found at the conclusion of the trial,

the learned judge held the defendants liable on the ground that by running at a reckless rate of speed in approaching a dangerous crossing the motorman had disabled himself from preventing the collision, which he might otherwise have avoided. If the rate of speed under the circumstances amounted to negligence, and disability to avoid the collision resulted from it, it was just as truly "'ultimate' negligence which makes the defendant liable" as was the sending out of the car with a defective brake, which their Lordships so characterized in *Loach's* case because of the motorman's consequent incapacity to avoid killing the unfortunate Sands.

That it would be negligent, without the warrant of statutory authority, to drive a railway train or a tramcar when nearly approaching an unprotected highway level crossing at a speed approximating 40

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

miles an hour (as was done in this case) is indisputable. Under some circumstances it might be more than merely negligent; it might be criminal.

The defendants are a Dominion railway company. They seek to justify the otherwise indefensible conduct of their motorman by invoking the "Dominion Railway Act;" and they cite the decision of this court in *Grand Trunk Railway Company* v. *McKay*(1).

It was determined in that case that the speed of a train passing through a thickly peopled portion of a city, town or village, unless so restricted by a special order of the Railway Committee of the Privy Council (now the Railway Board), need not be limited to six (now ten) miles an hour, under section 8 of 55 & 56 Vict. ch 27 (now section 275 (1) of the "Railway Act"), when the fences on both sides of the track are maintained and turned into cattle guards at highway crossings as prescribed by section 6 (now section 254 (2)) of that Act. (But see subsection 3 of section 275, as enacted by 7 & 8 Edw. VII., ch. 32, sec. 13.) The decision in the *McKay* case is also authority for the proposition that, at all events in the case of a steam railway, such as was there under consideration, if the requirements of the statute and of any orders or regulations duly made thereunder as to the protection of a highway level crossing are complied with, there is no legal limitation which would make approaching and running over it at any rate of speed practically necessitated by the exigencies of rapid transit *per se* illegal or negligent *quoad* the public using such highway. That was merely an application of the rule that an action will not lie for the doing of

(1) 34 Can. S.C.R. 81.

that which is authorized by statute. What is *necessary* for accomplishing the purpose of a legalized undertaking will be deemed within the purview of the powers conferred for carrying it out.

No doubt the presence in it of subsection 1 of section 275, already adverted to, and of subsection 4 of the same section (as enacted by 8 & 9 Edw. VII., ch. 32, sec. 13), which limits the speed at crossings where there has been an accident, and of section 30 (*g*) and sections 237 and 238 (8 & 9 Edw. VII., ch. 32, sections 4 & 5) affords strong ground for the contention that in the case of steam railways, with which it is chiefly concerned, the "Railway Act" impliedly sanctions trains approaching and passing over the ordinary rural highway level crossing at a rate of speed limited only by the duty of not unnecessarily imperilling the safety of the trains and of passengers and employees. The chief purpose of authorizing the establishment of steam railways—rapid transit between widely separated points—(*Wakelin* v. *London and South Western Rly. Co.*(1)), would be frustrated in Canada if the trains run upon them were obliged to reduce speed on approaching every unprotected rural highway which they cross at grade level.

I do not understand, however, that *Grand Trunk Railway Company* v. *McKay*(2), or any other decision is authority for the proposition that statutory powers may be exercised with reckless disregard for the common law rights of others. Even in cases where the Act, speaking generally, authorizes the running of trains at a high rate of speed and the Board of

(1) 12 App. Cas. 41, 46. (2) 34 Can. S.C.R. 81.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

Railway Commissioners has not made an order for special protection under section 237 or section 238 (8 & 9 Edw. VII., ch. 32, sections 4 and 5) or, in the case of urban crossings, an order regulating speed under section 275(3), circumstances may exist at particular level crossings which involve peril from running at high speed obviously exceptionally great. Failure to have a train under such control that it can be stopped, or its speed sufficiently reduced to avoid injury *at such a crossing*, when there would be a reasonable opportunity to do so if the speed were moderate, would amount to reckless disregard of the rights of others. As put in the very recent case of *Hewlett* v. *Great Central Railway Co.*(1), by the Lord Chief Justice of England, presiding in the Court of Appeal,

> The common law said that when statutory powers were conferred in the absence of special provision to the contrary, those powers must be exercised with reasonable care.

Although the House of Lords (1916, 2 A.C. 511), applying the principle of the decision in *Moore* v. *Lambeth Waterworks Co.*(2), reversed the judgment of the Court of Appeal because the danger had been created not by the doing of that which the statute specifically authorized, but by a subsequent diminution of light owing to the exigencies of the war, for which the company was not responsible and against the consequences of which it was under no obligation to provide, Lord Sumner took occasion to state the principle of law which governs the operation of railways in these terms:—

> In such cases the authority in question is given in general terms; it is, for example, authority to work railways and to run railway

(1) 32 Times L.R. 373.

(2) 17 Q.B.D. 462.

trains in the undertakers' discretion; hence it is reasonable to infer that the Legislature, in using such general terms, and in authorizing for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care, and not without it.

Where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers: *Southwark & Vauxhall Water Co.* v *Wandsworth Board of Works* (1).

The common law rights of persons using highways are abrogated or subordinated only to the extent necessary to enable railway companies given crossing rights to exercise their statutory powers in a reasonable manner having regard to the purpose for which such powers are conferred: *Roberts* v. *Charing Cross, Euston and Hampstead Rly. Co.* (2).

The photographs in evidence and the testimony as to the motorman being unable, owing to the station built in the angle between the railway track and the highway and close to both, intercepting his view, to see approaching vehicular traffic on the highway until it was almost on the railway (the driver of the wagon probably could not see the coming car until his horses were actually on the rails) afford ground for thinking that the danger at the crossing now under consideration was exceptionally great. But this aspect of the case was not dwelt upon below and I allude to it chiefly to preclude the misapprehension that this judgment proceeds on the assumption that the "Railway Act" authorizes the running of trains at very high speed over every unprotected rural highway crossing, however exceptional the danger due to the surroundings.

(1) [1898] 2 Ch. 603, 611.

(2) 87 L.T. 732.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

As Mr. Justice Sedgwick and Mr. Justice Davies both pointed out in the *McKay* case, at pp. 89 and 98, the provision made in Great Britain for the maintenance and operation of gates wherever a railway crosses a highway at the level is economically impracticable in Canada. In lieu of it Parliament has enacted that certain signals and warnings—the blowing of a steam whistle and the ringing of a bell ("Railway Act," section 274), and the erection of a painted signboard (section 243)—should be substituted. The statutory authorization of running trains at a high and undoubtedly dangerous rate of speed when approaching and passing over highway level crossings, which would at common law be illegal and would render the company answerable for resultant injuries, must, I think, be taken to be conditional upon the company providing and utilizing the means of danger-warning substituted by the "Railway Act" for the impracticable gates, and also upon their complying with the explicit provisions of section 264 as to equipment with efficient brakes, which, of course, implies maintaining them in good working order. (No doubt for the protection of passengers and employees it is also a pre-requisite that the roadbed should be properly constructed and maintained.) Unless these requirements of the statute intended to lessen the danger inseparable from the running over unguarded highway level crossings at a high rate of speed are complied with, the statutory sanction, in my opinion, cannot be invoked, the common law standard of reasonableness applies, and running at a speed which, under all the circumstances, is unreasonable is unwarranted and amounts to negligence towards the public lawfully using such highways.

For the safety of that public the statute prescribes that

> Every *locomotive* shall be equipped and maintained with a bell of at least thirty pounds in weight and with a steam whistle (section 267),

and that

> When any train is approaching a highway crossing at rail level, the *engine* whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be *rung* continuously from the time of the sounding of the whistle until the *engine* has crossed such highway (274 (1)).

At every highway level crossing the company is required to maintain a sign-board with the words "railway crossing" printed on each side thereof in letters at least six inches high (section 243). This latter precaution is no doubt quite practicable in the case of electric tramlines or railways operating on private rights of way through rural districts. That it was not taken in the present case, as the photographs of the locus in evidence shew, affords an indication that the defendants did not consider the section prescribing it applicable to an electric tramway such as that which they operated. That is a more reasonable presumption than that they deliberately violated the statute. I am not, however, to be taken as holding that section 243 was not applicable. On the contrary I incline to think it was and that failure to comply with it would probably, without more, suffice to render the running of the tramcar at a dangerously high rate of speed when approaching and passing over the highway crossing, if otherwise justifiable, unlawful.

But an electric tramcar is neither a "locomotive" nor an "engine" within the meaning of sections 267 and 274 of the "Railway Act." It is not equipped

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

with the appliances for giving warning prescribed by section 267. Evidence to that effect was not given, it is true, but it is a matter of such common knowledge that it is a proper subject of judicial notice that the electric tramcar carries neither a steam whistle nor a "bell of at least thirty pounds in weight," nor indeed any bell which can be "rung;" and it would indeed be startling to tramway companies were it held that the "Railway Act" imposes such an obligation. The compressed air whistle sometimes supplied and the ordinary foot-gong operated by the motorman, while reasonably sufficient as substitutes for giving warning at shorter distances of the approach of comparatively slow-moving tramcars, do not serve the same purpose as the steam whistle and the heavy locomotive bell; and it is scarcely practicable for a motorman, if properly attending to his other duties, to keep the foot-gong continuously sounding while traversing eighty rods before passing over every highway crossing. The sections of the "Railway Act" which prescribe these safeguards in lieu of the impracticable gates, equipment with and use of which are made conditions of the implied authorization to run at a high rate of speed over level highway crossings, were clearly not meant to apply to electric tramcars. The special provisions made for electric cars by secs. 277, 278 and 393(2) of the "Railway Act" tend to confirm this view. Moreover, the practical necessity, on which the implication of the right to run trains on steam railways over unprotected highway level crossings (where the statute or an order made under it has not prescribed a reduced speed) at the same high rate of speed as that maintained on the company's private right of way

chiefly rests, does not exist in the operation of the ordinary electric tramcar, whose speed can be so readily reduced and so rapidly increased that it is quite practicable to exact that it shall approach and pass over these crossings at such moderate rate of speed as should commend itself to a court or jury as reasonable under all the circumstances. It follows that the "Railway Act" does not authorize the running of tramcars when approaching and passing over unprotected highway level crossings at a dangerously high rate of speed. In the absence of any maximum speed otherwise fixed by law for the operation of a tramcar when approaching and passing over such crossings the standard of reasonableness must govern, and any speed so great that the car is not under reasonable control, having regard to the circumstances, must be deemed unlawful.

The learned trial judge found—in my opinion properly—that the defendants' tramcar was running at an excessive rate of speed in approaching the crossing. He also found that there had been contributory negligence by the plaintiff's driver. He further found upon sufficient evidence that but for the disability created by the excessive and unreasonable rate of speed the motorman could have avoided the collision notwithstanding such contributory negligence. I am, with great respect, of the opinion that on these findings his conclusion that the defendant company was liable under the law as laid down in *Loach* v. *B.C. Electric Railway Co.* was sound and should not have been disturbed.

But I am also of the opinion that the learned judge's finding that it was not proved that an effec-

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. CO.

Anglin J.

tive brake would have enabled the motorman to avoid the collision cannot be sustained. This court is, no doubt, extremely loath to disturb such a finding when it has been affirmed by a provincial appellate court. In the present case, however, it seems to be quite clear that in the Court of Appeal there was a misapprehension of the evidence by the two learned judges who upheld this finding. Macdonald C.J.A. (with whom McPhillips J.A. concurred), assumed that the witness Andrews had said that with an efficient brake the motorman could have reduced the speed of the car to ten miles an hour "at the time of impact." Now when the motorman saw the horses upon, or about to enter upon, the crossing, he was still 400 feet away. He says he immediately applied his brakes. His car was then running from 35 to 40 miles an hour. Andrews' testimony was that if going 40 miles an hour he could with brakes in good condition reduce the speed to 10 miles an hour within 200 feet. If so it would seem reasonable to infer that he could stop the car in the remaining 200 feet. The affirmance of the trial judge's finding in the Court of Appeal is therefore not entitled to the weight which must otherwise have been given to it. Indeed it would appear that the trial judge himself was probably under a similar misapprehension as to the effect of Andrews' testimony. Presumably referring to it, he says:—

> I would not care to be in a wreck that was struck with a street car that size with the momentum it would have of a forty mile speed, and then getting down to ten miles. Surely it would kill your horses just the same.

There is no question of credibility involved. Under these circumstances I think we may treat the

finding that an effective brake would not have enabled the motorman to avoid the collision, as open to review.

Having regard to the admittedly defective condition of the brake, to the fact that the point of impact of the car was between the horses and the wagon, to the evidence of the motorman that he "did not want to bring the car up with a jar," that he "could have stopped it in a shorter distance by throwing people off their seats," that "after (he) hit" he "released the brakes to a certain extent to prevent a jar * * * threw off the reverse and eased off the brakes," and to the fact that even under these conditions the car stopped about 500 feet beyond the crossing, I think it is a reasonable and proper inference that had the brakes been in good condition and effectively applied the car would either have been stopped before reaching the crossing, or its speed would have been so reduced that the horses and wagon would have had time to clear it. An additional moment or two would have sufficed. It is not wholly without significance that in the *Loach* case—of course it may have been on evidence somewhat different—Lord Sumner said:—

> if the brake had been in good order it should have stopped the car in 300 feet.

Mr. Justice Martin in the Court of Appeal has dealt satisfactorily with this aspect of the case and I agree with him that:—

> On the inference to be drawn from facts about which there is no real dispute * * * the accident could * * * have been avoided if the brake had been in good order.

If this conclusion be correct the present case falls directly within the decision in *Loach's* case.

1917

COLUMBIA BITHULITIC LIMITED v. BRITISH COLUMBIA ELECTRIC RWAY. Co.

Brodeur J.

For the foregoing reasons I am with respect of the opinion that this appeal should be allowed with costs in this court and in the Court of Appeal and that the judgment of the trial court should be restored.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the court below, and that the judgment of the trial judge should be restored. I concur with my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Senkler & Van Horne.*

Solicitors for the respondent: *McPhillips & Smith.*

LOUISE OLIVIER & VIR (DEFENDANT) ..... APPELLANT;

1917
March 5.
March 26.

AND

LUDGER JOLIN AND NARCISSE RIVARD ES-QUALITÉ (PLAINTIFFS) RESPONDENTS.

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

Appeal—Jurisdiction—Supreme Court Act, section 46—Future rights —Money payable to His Majesty.

The words "where rights in future might be bound," contained in sub-section (*b*) of section 46 of the "Supreme Court Act," apply to each of the subjects mentioned in the first part as well as to those mentioned in the second part of said subsection: Lariviere v. School Commissioners of Three Rivers (23 Can. S.C.R., 723), followed.

(Idington and Duff JJ. contra).

MOTION to quash for want of jurisdiction an appeal from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Three Rivers, maintaining the plaintiffs' action with costs.

The facts on which the questions of law for decision depend are sufficiently stated in the judgments now reported.

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

(1) Q.R. 25 K.B. 532.

1917

OLIVIER & VIR v. JOLIN.

Belcourt K.C. for the motion, on behalf of the respondents.

J. J. Denis K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash for want of jurisdiction. The facts are not in dispute. An action was brought by the present respondents, collectors of revenue for the Province of Quebec, to recover from the the defendants, Dame Louise Olivier and Dame Alice Mailhot, in their quality of universal legatees to the succession of Judge Mailhot, a tax imposed by the Province of Quebec of 2 per cent. upon the estate. There is no dispute that the amount of the tax due to the plaintiffs was $1,808.46. The husband of the defendant, Dame Alice Mailhot, in response to plaintiff's demand, paid one-half of the tax; the defendant, Louise Olivier, widow of the testator, contested the plaintiff's claim to recover any portion of the tax from her, on the ground that the declaration which is required to be made under article 1380 of the Revised Statutes of Quebec by one of the universal legatees, had been made by her co-defendant, Dame Alice Mailhot, and that, under the law, it is the person who makes the declaration alone who is bound to pay all the taxes due from the succession. The amount claimed in the present action is $904.23, and the respondents now claim that the case is not appealable as it does not fall within section 46 of the "Supreme Court Act."

In short, the point in dispute between the parties may be stated as follows; the appellants contend on the one hand that, if the matter in controversy relates to revenue or sum of money payable to His Ma-

jesty, the court has jurisdiction. The respondents say "no," the matter in controversy must not only relate to revenue or a sum of money payable to His Majesty, but must be a matter *in which rights in future must be bound.* In other words they contend that the words "rights in future might be bound" in this section apply to each of the items, fee of office, duty, rent, revenue, etc.

In my opinion, the case is clearly governed by authority. In 1886, the Supreme Court gave judgment in the case of the *Bank of Toronto* v. *Le Curé, etc. de la Nativité*(1). At that time the provisions of the present section 46 of the "Supreme Court Act" were contained in section 8 of 42 Vict. ch. 39, which reads as follows:—

> No appeal shall be allowed from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of two thousand dollars, unless such matter, if less than that amount, involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an Ordinance or Act of any of the councils or legislative bodies of any of the territories or districts of Canada, or relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound.

In that case Mr. Justice Taschereau analyses this section and makes use of the following language:—

> From the Province of Quebec four classes of cases are only appealable under 42 Vict. ch. 39, sec. 8: 1st, any case wherein the matter in controversy amounts to the sum or value of $2,000; 2ndly, any case wherein the matter in controversy involves the question of the validity of an Act of Parliament, or of any of the local legislatures; 3rdly, any case wherein the matter in controversy relates to any fee or office or any duty or rent or revenue payable to Her

(1) 12 Can. S.C.R. 25.

1917

OLIVIER & VIR v. JOLIN.

The Chief Justice.

Majesty, where the rights in future might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable, but if in an action for a fee of office, the defendant pleads payment, the case is not appealable if under $2,000; 4thly, any case wherein the matter in controversy relates to any title to lands or tenements, or title to annual rents or such like matters or things where the rights in future might be bound.

The statutes were revised in 1886 and section 8 became section 29, R.S.C. ch. 135. The only alteration made in the old section being that the letters (*a*) and (*b*) are made use of to subdivide the two paragraphs which defined the class of cases in which an appeal would lie. In the revision of 1906 the language of the statute of 1886 was verbally reproduced with the same subdivision except that the amendment which was made, in 1893, by 56 Vict. ch. 29 was inserted, viz., the words,

such like matters or things where the rights in future might be bound

were made to read

other matters or things where the rights in future might be bound.

The section was next considered, in 1889, in the case of *Gilbert* v. *Gilman*(1). In that case the court was mainly concerned in construing the words "such like matters or things where rights in future might be bound" in connection with the doctrine of "*noscitur a sociis.*" In that case Strong J. says:—

Not only must future rights be bound by the judgment in order that an appeal may be admitted, when the amount in controversy is less than $2,000, but further the future rights to be so bound must relate to some or one of the matters or things specified in the subsection in question, viz., fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tene-

(1) 16 Can. S.C.R. 189.

ments or to some like matters and things where the same consequence will follow, viz., when future rights will be bound.

Also in *Chagnon* v. *Norman*(1), Sir W. J. Ritchie, speaking for the court, says:—

Neither is the case appealable as relating to a fee of office where the rights in future might be bound.

The decision in *Larivière* v. *School Commissioners of Trois-Rivières*(2), is also instructive because it was decided on the statute after the amendment which substituted "other matters or things, etc.," for "such like matters or things, etc." This amendment was assented to by Parliament on 1st April, 1893, and I find on reference to the records in the Supreme Court office that the action was instituted on 8th April of the same year. In that case the judgment of the court concludes with the following language:—

The words "where rights in future might be bound" in subsection (*b*), section 29, govern the preceding words, "any fee of office. etc."

In these three cases the court in construing the words

fee of office, duty, rent or revenue or sum of money payable to His Majesty, etc.,

held that they were governed by the concluding clause of the paragraph

where the rights in future might be bound.

In view of this uniform jurisprudence of the Supreme Court extending over thirty years even if we were not satisfied with the construction which has been placed upon this section, I do not see that at

(1) 16 Can. S.C.R. 661. (2) 23 Can. S.C.R. 723.

1917

OLIVIER & VIR v. JOLIN.

The Chief Justice.

this late date we are justified in overruling it. I have serious doubts whether in this case there is a matter in controversy which relates to a sum of money payable to the Crown within the meaning of the statute, because all parties agree the tax to be paid on this estate is $1,808.46. It is only a question as to which of these two ladies shall pay the balance of $909.23, but in any event there is certainly no

revenue payable to His Majesty, where rights in future might be bound.

I would grant the motion to quash with costs.

DAVIES J.—Whatever I might think the true construction to be of subsection (*b*) of section 46 of the "Supreme Court Act" if I was called upon to determine it without binding authority—I am of the opinion that such binding authority exists and that it is not now open to us to reverse it. The cases are collected in Mr. Cameron's book of Practice, at pages 211-12. These cases determine that the latter words of the subsection "where rights in future may be bound" apply as well to controversies

relating to any fee of office, duty, rent, ar any sum of money payable to His Majesty

as to the words following "any title to lands, etc.," in other words that they apply to and control the whole subsection.

Parliament has not seen fit since these decisions were given to change the subsection and I feel it is not open now for us to put a different construction upon it from that which in the cases I refer to has been placed upon it.

Under these circumstances, I would allow the

1917

OLIVIER & VIR v. JOLIN.

motion to quash for want of jurisdiction. Costs should follow the result.

Idington J.

IDINGTON J. (dissenting).—The amount in controversy does not entitle the appellant to seek relief here. But the official suing must certainly be held to rest his case upon a claim to revenue payable by appellant to His Majesty and therefore I think the application to quash should be refused with costs.

DUFF J. (dissenting).—This is an appeal from the judgment of the Court of King's Bench in Quebec in which the appellant was adjudged liable to pay a certain sum of money as succession duty under the Quebec statute, 4 Geo. V. ch. 9. The respondent is the collector who sued on behalf of the Crown and the controversy relates to the question of the appellant's responsibility for the sum demanded which he has been adjudged liable to pay under the provisions of the statute. It seems to me to be very clear that the "matter" thus in "controversy"

> relates to a duty * * * revenue or * * * sum of money payable to His Majesty

and that the judgment is consequently appealable under section 46, subsection (*b*) of the "Supreme Court Act." Mr. Belcourt argues, however, that the words

> any fee of office, rent, revenue, or any sum of money payable to His Majesty

are governed by the phrase at the end of the clause

> where rights in future might be bound.

The contention, in my opinion, is quite without substance; and to make that clear it is only necessary to

1917

OLIVIER & VIR v. JOLIN.

Duff J.

reproduce the subsection in full. These are the words:—

> Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

The meaning of these words according to the grammatical construction is unmistakable. The disjunctive "or" separates the whole of what follows from all of the first limb of the subsection succeeding the word "relates." The precise meaning of the subsection would be explicitly given by inserting the word "relates" between the words "or" and "to" in the second line. The phrase relied upon very clearly does not qualify any of the words of the first limb. Strange as it may seem, however, Mr. Belcourt is not without the support of judicial opinion in the contention he raises. As regards the opinions relied upon I will only say that, in my judgment, having regard to the circumstances in which they were expressed, I am under no obligation to give effect to them.

ANGLIN J.—Section 46 of the "Supreme Court Act" restricts, in cases from the Province of Quebec, the general right of appeal conferred by section 36. If untramelled by authority I should certainly hold that the earlier words in clause (*b*) of section 46,

> any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty,

are not governed by its concluding words,

> where rights in future might be bound.

The repetition of the preposition in the unmistakable disjunctive "or to," by which those

earlier words are immediately followed, precludes the application to them of the concluding words of the clause. The arrangement of the corresponding provision of the Quebec Code of Civil Procedure, likewise based on 9 Geo. III. ch. 6, sec. 30, as now found in article 68 of the Code of Civil Procedure, makes it, if possible, still more plain that this is the proper construction of the section.

Nor should I have found any great difficulty in distinguishing the decisions of this court in *Bank of Toronto* v. *Le Curé, etc.*(1); *Gilbert* v. *Gilman*(2), and *Chagnon* v. *Norman*(3), both because of essential differences in the nature of the subject-matters of those cases and because of the material change in the statute made, after they were decided, by 56 Vict. ch. 29, sec. 1, whereby the words of the original section "such like matters or things" were replaced by the words "other matters or things."

After that amendment, however, in *Larivière* v. *Three Rivers*(4), the court refused to allow security for an appeal in an action by a school-mistress to recover $1,243 as fees due to her collected by school Commissioners, holding (*a*) that the position of school-mistress is not an "office" within the section, and (*b*) that, if it were, as the plaintiff had ceased to hold it, no rights in future would be bound, adding that "the words 'when rights in future might be bound' * * * govern the preceding words 'any fee of office.'" With the utmost respect, while the judgment in *Larivière* v. *Three Rivers*(4), was no

(1) 12 Can. S.C.R. 25.
(2) 16 Can. S.C.R. 189.
(3) 16 Can. S.C.R. 661.
(4) 23 Can. S.C.R. 723.

1917

OLIVIER & VIR v. JOLIN.

Anglin J.

doubt right on the first ground, I am of the opinion that the second ground was clearly erroneous. Moreover, it was unnecessary for the disposition of the appeal. Yet, inasmuch as it is distinctly made a *ratio decidendi* by the court it cannot be treated as a mere dictum (*New South Wales Taxation Commissioners* v. *Palmer* (1); *Membery* v. *Great Western Rly. Co.*(2). I therefore reluctantly bow to its authority.

Appeal quashed with costs.

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(1) [1907] A.C. 179, 184. (2) 14 App. Cas. 179, 187.

RICHARD C. BARRY, DOING BUSINESS AS JOHN BARRY & SONS (DEFENDANT)..... APPELLANT;

AND

THE STONEY POINT CANNING COMPANY (PLAINTIFFS)..... RESPONDENTS.

1917
*March 14, 15.
*May 1.

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

Sale of goods—Agency—Agent's authority—Ratification—Secret commission to agent.

In an action against B. claiming damages for refusal to accept goods alleged to have been purchased, it appeared that the contracts for sale were made with one D. who had a desk in B's office, was allowed to use his stationery and the services of his stenographer and signed the contract in his name. The brokers who, for the vendors, procured the contracts from D. agreed to pay him, personally, half of their commission for effecting the sale. B. when asked to pay for the goods repudiated the contracts on the ground that D. was not authorized to purchase.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 522), Fitzpatrick C.J. dissenting, that as the half of the commission promised to D. would be a substantial amount; that as it was not proved that B. knew of it until after the contracts were signed; and as it was not shewn that D. had any expectation of such profit from B. as would prevent the commission from interfering with his duty to the latter; the offer of such payment to D. made the contracts for sale void and it was immaterial whether or not the vendors had knowledge of it.

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 defendant.

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

(1) 36 Ont. L.R. 522.

1917

BARRY v. STONEY POINT CANNING CO.

The circumstances of the case are indicated in the above head-note.

McKay K.C. for the appellant.

Tilley K.C. and *J. G. Kerr* for the respondents.

THE CHIEF JUSTICE (dissenting).—I am by no means satisfied that Durocher, who made the contracts sued on, had not the appellant's authority to enter into them on his behalf. Admittedly the only question is as to the extent to which the appellant was committed to the speculative schemes of Durocher, and if these had been successful, the appellant, at any rate, would never have raised a doubt as to the authority given by him. He admits that Durocher had not a dollar in the goods himself and, questioned as to some more or less dubious methods resorted to by Durocher in his attempted "corner," he says with perhaps unconscious cynicism:

> I had no reason to interfere. If he had been successful, it would have been to my advantage.

A man who enters into speculations of this sort through a close friend ought not to be in the position of taking the profits if it is successful or repudiating the authority of the friend if it fails; still less if, as in the present case, he is obliged to admit the authority to a very large extent and only stops short when failure was clearly in sight. I do not think his bare denial of authority, still less that of his friend, can be entitled to much weight against the facts proved. I do not mean a formal authority, for, of course, he cannot escape liability by denying this however plausibly.

But even if it is assumed that the appellant did not give his express authority, I think there is abundant ground for saying that he is precluded from raising this

defence by having held out his friend as his authorized agent.

It is not necessary for me to go through the evidence in detail to point out the grounds in which I come to this conclusion. They are sufficiently set out in the reasons of the learned judges for the judgment under appeal. Briefly, the appellant, a wholesale dealer in fruit, constituted Durocher his purchaser of all canned goods and left to him the sole management of what was in effect a branch of his business. He housed him at his place of business from which he himself was frequently absent for long periods; allowed him not only to use the firm's stationery with printed headings, but actually to conduct his correspondence in the firm's name and over its signature. Contracts made by Durocher previous to those now sued on were either authorized by him or if, as alleged sometimes, unauthorized, were ratified without complaint and the goods accepted and paid for by the appellant.

The appellant really, I think, held Durocher out as his agent in every possible way.

That the respondent's broker, Wm. Millman, supposed that he was dealing with the appellant through his authorized agent seems indubitable. He would hardly have entered into contracts for sale of the magnitude involved in an attempted corner of an important article of produce with a man not possessed of a dollar and only allowed desk room in the office of a friend. That he would not have dealt with him as an agent for the appellant if he had thought he was not his agent goes without saying. Mr. Millman swears that Durocher told him he was the appellant's agent and that he thought he had his authority.

The contracts, in my opinion, were duly made on behalf of the appellant in the ordinary course of busi-

1917

BARRY v. STONEY POINT CANNING CO.

The Chief Justice.

ness which could hardly be carried on if repudiation were possible under the circumstances of the case.

I do not attach much importance to the fact that the respondent's brother, Mr. Wm. Millman, agreed to split his 2% commission with the appellant's agent Durocher.

The principle that anything in the nature of a bribe by the vendor to the purchaser's agent to neglect his duty to look solely after his principal's interest should invalidate the sale is clear and well established in innumerable cases. Here, however, the payment was not made by the vendors, nor with their money. It cannot be said that it was within the scope of the duties of the vendors' agent to bribe the purchaser's agent. There is no suggestion that the vendors had any knowledge of the arrangement. Presumably Durocher must have said that he could not get any other remuneration himself as the vendors' broker would not have been likely to pay him half his own commission in addition to the commission of a purchaser's agent. Mr. Millman says that it is a common practice in his trade and that he had never thought of any secrecy about the payment. The total amount was comparatively small. We should be going beyond anything decided in the cases with which I am acquainted and unduly straining the widest interpretation of the principle involved if we were to hold these contracts invalid on such ground.

The appeal should, in my opinion, be dismissed with costs.

DAVIES J.—This is an appeal from the judgment of the second Appellate Division of Ontario reversing a judgment of the trial judge (except with respect to a sum of $400 for storage not disputed) on the ground that the contracts of sale sued upon were valid and

binding upon the defendant, now appellant, and that the plaintiffs were entitled to damages for breach thereof.

The trial judge had dismissed the action except with respect to the $400 above mentioned on the grounds that no valid or binding contracts had been entered into by the defendant for the purchase of the goods.

The plaintiffs' claim was for $8,229.68 for loss or damage sustained by them on the sale of goods after defendant's repudiation of the contracts, that sum being the difference between the alleged contract prices and the price which the goods actually realized when sold.

There were two contracts sued on, one for 11,000 cases of canned tomatoes alleged to have been purchased by defendant on or about the 12th of October, 1914, and another for 12,000 alleged to have been purchased by the acceptance of an option dated 7th November, 1914.

The contracts were made and entered into by Millman & Sons, who acted as brokers for the Independent Canners, of which the Stoney Point Canning Company was one, and one Durocher assuming to act for Barry, the defendant.

No controversy arises as to the agency of Millman & Sons to sell the goods. The whole controversy hinges upon the authority of Durocher to purchase them as agent for Barry.

The trial judge after hearing all the witnesses, including Barry, Durocher and Millman, stated in his considered judgment that:—

Mr. Desmarais, who is really the plaintiff, acted, I think, in perfect good faith throughout, supposing that he had in truth made the contract sued upon with Mr. Barry, who was carrying on business under

1917

BARRY v. STONEY POINT CANNING CO.

Davies J.

the name of John Barry & Son. On the other hand, Mr. Barry acted, I think, throughout with perfect honesty, and I accept his evidence without question.

Afterwards he stated his findings on the facts to be—

The situation seems to me plain upon the facts. Durocher never had any authority; there never was any ratification, and there never was any holding out by Barry. This being so, the plaintiff must fail

The learned judge was also of opinion that the action must fail on the ground that:—

Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendor's broker would be entitled to recover.

The learned judges of the Appellate Division who gave reasons for their conclusions while agreeing to reverse the judgment of the trial judge and to hold Barry liable on the alleged contracts, did not agree in their reasons. Meredith C.J. held that:—

It was not a question whether the defendant assented to or did not assent to any particular sale, that narrow view of the case seems to have led to some serious misconceptions of the parties' rights; there was a general power and the authority to use the defendant's name in these operations; they could not have been carried on without that; no one would have wasted an hour upon any scheme that had no more than the credit financially of Arthur Durocher behind it; the defendant knew this; no one concerned in the matter could help knowing it; and in view of the manner in which the correspondence began and was carried on throughout the purchases made by Durocher and treated by the defendant as binding upon him, the opening of the office in Toronto and the defendant's personal participation in the negotiations for the purchase of a controlling interest in the output of the "independent" factories, with a full knowledge of all that had been done and was being done in his name and on his credit, how is it possible for him to escape liability on the contract in question merely because he did not give any specific authorization respecting it?

I understand that the learned Chief Justice in stating that "there was a general power and authority to use the defendant's name in these operations" was merely drawing an inference from the facts and documents proved and not intending to state or imply that there was any such direct or express general power.

His inference may or may not be a proper inference to draw from all of the proved facts. In my judgment it is not.

Later on in his judgment the Chief Justice says:—

I cannot but find upon the whole evidence that the purchases in question were purchases within the authority of the witness Arthur Durocher acting for and in the name of the defendant carrying on business as John Barry & Sons; and that, if that were not so, the defendant is estopped from denying that the contracts in question are his contracts.

Of course, if the purchases were within the authority Barry had given Durocher, there is an end to the controversy. But if they were not within such authority, I fail to find any evidence from which the defendant could be held as

plainly estopped from denying that the contracts in question were his contracts;

that is I assume precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed.

Mr. Justice Lennox, after disposing adversely of the "secret commission" defence by holding that

the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant

went on to deal with the merits at very great length. He says:—

The first branch of the claim for 11,000 cases contracted for on the 5th of October, 1914, can I think be safely determined by a careful examination of Mr. Barry's letter to Durocher on the 8th of October, 1914, in reply to Durocher's letter to him of the day before, the admitted confidential relations, common purpose, and course of dealing established between these two men, and Barry's total inability to account for a liability for 94,000 cases of tomatoes mentioned in his letter without including in the 94,000 cases the 50,000 cases purchased by Durocher on the 5th October, and of which the 11,000 cases sued for is the part allotted to the plaintiff company.

It is quite apparent that the supposed or "unexplained discrepancy," as the learned judge calls it,

1917

BARRY v. STONEY POINT CANNING CO.

Davies J.

with regard to these 94,000 cases, had very great weight in inducing him to come to the conclusion he did that whether Durocher had actual antecedent authority to purchase the 50,000 cases or not, Barry knew and approved of it and included it as a liability when he wrote the letter of the 8th October to Durocher.

It seems to me reasonably clear that the conclusion reached by Lennox J. that of the 94,000 cases of canned goods specifically referred to in the defendant Barry's letter to Durocher of the 8th October, 1914, 50,000 were those purchased by the latter from Millman & Co. as brokers of the plaintiff and others and now in controversy, settled his mind on the vital questions of Barry's knowledge and approval of the purchase, ratification of it if there was an absence of antecedent authority, and general authority of Durocher to make the purchase. If he was right in concluding that these 94,000 cases included the 50,000 cases in controversy, his final conclusion as to Barry's liability would be difficult to dispute. If it was not sufficient proof of an antecedent authority to make the purchase it would be very strong evidence of knowledge and approval of the purchase and ratification of it, and would in addition go very far to discredit Barry's credibility. No such acceptance "without question" by the trial judge of Barry's testimony would in that case have been possible.

Mr. Justice Lennox, however, seems to have overlooked the testimony of Millman, the plaintiff's broker and agent, on the point, who while advancing or accepting as correct the theory as put to him in his main examination of the inclusion of the 50,000 cases in the 94,000 referred to in the letter of the 8th October, when cross-examined seems unqualifiedly to admit that any such theory was not under the facts tenable, and that the 94,000 cases mentioned in that letter of Barry's,

referred to a different and antecedent purchase of 94,000 cases made with his authority, which did not include or have any reference to the 50,000 cases in controversy. I notice that the theory put forward by Mr. Justice Lennox was favourably noticed in his reasons for judgment by the Chief Justice, and no doubt must have had weight with him though, as he said, he preferred putting the defendant's liability on what he called the

ground of the previous general and undisputed authority.

Mr. Justice Masten held that while at the beginning of the purchases of these canned goods Barry was a special agent only with limited authority afterwards but prior to the date of the contract sued on

the business changed and Durocher became in fact the general agent of Barry in the buying and selling of canned tomatoes, peas and other like merchandise. This conclusion, he went on to say, rests on a general course of dealing rather than on any specific act of concurrence. Just precisely when this change took place I think it is impossible to say. It is sufficient that it took place, in my opinion, before the contracts now sued on were entered into.

The learned judge doubted whether there was any such "holding out" to the plaintiff as would make a basis for the liability claimed, and repudiated the contention

that there was anything in the nature of a conspiracy to defraud between Barry and Durocher

but found Barry

liable for the loss in question without any impropriety on his part.

In view of the differences of judicial opinion and feeling some doubt at the conclusion of the argument on the question involved, I found it necessary to read the evidence with much care and have given the case much consideration.

The conclusions I have reached on the evidence written and oral are in general accord with those of the

1917

BARRY v. STONEY POINT CANNING CO.

Davies J.

trial judge, that Durocher never had any authority to enter into or bind Barry by the contracts in question, that the latter never ratified them in any way but that as soon as he reasonably could when they were first brought to his notice on the 28th of November, when the draft for their purchase price was presented, refused payment and repudiated liability—and lastly that there never was any "holding out" of Durocher by Barry as his agent authorized to purchase these goods.

I frankly admit that the circumstances are peculiar. The facts that Barry had in the first instance given Durocher a limited authority to purchase some canned goods; that Durocher had exceeded that authority and had persuaded Barry to approve of and ratify the excess and accept the drafts therefor; the intimate relationship existing between the two parties; the letters which passed between them and the opening by Durocher, with Barry's assent, of a branch office of Barry & Son in Toronto, all afford ground for a strong argument either that there was a holding out of Durocher as an agent authorized to buy for Barry, or that the proper inference from all the facts proved, was that he had been so authorized as a general agent to buy.

But it does seem to me that the evidence taken as a whole is conclusive against any such holding out or any such an inference of general agency. Barry and Durocher both swear positively that no such authority as Durocher usurped ever was given, and Millman, the agent of the plaintiffs, who sold the goods and completed the contracts with Durocher, was obliged to admit in his cross-examination that when he made the contracts with Durocher assuming to act for Barry,

he (Millman) knew he (Durocher) had to go back to Barry and get authority before he could buy.

Nothing could be more unequivocal. There was no qualification to Millman's statement nor was any satisfactory answer given to the argument based upon this witness' statement. It shewed beyond any doubt that the vendor knew Durocher had no authority to buy without going to Barry and getting authority. Now Millman was the plaintiffs' agent who carried on the negotiations for the sale and completed them. How in the face of this unqualified admission it can be successfully argued that there was a holding out of Durocher as Millman's agent or an authority to complete such a purchase as we have here in controversy without going back to Barry and getting authority, I do not understand.

Both parties to the contract, Durocher, the alleged agent of Barry, and Millman, the admitted agent of the plaintiffs, swear, the one that he had not authority, and the other that he knew the person to whom he was selling had to go back to his principal and get authority before he could buy. When to this is added the evidence of Barry accepted by the trial judge "without question" that he never gave Durocher authority but repudiated the contract when it was first brought to his notice, how can it be held that there was authority either special or general?

As to the other defence relied upon, namely, the non-enforceability of the contracts sued upon because of the payments of commission by the vendors' broker to the purchaser's agent, I have had the advantage of reading my brother Anglin's reasons and concur in them.

The appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the trial judge restored.

1917

BARRY v. STONEY POINT CANNING CO.

Idington J.

IDINGTON J.—Assuming that this action is maintainable, upon all the attendant facts and circumstances it is clear that the fundamental facts are that Durocher was employed by the appellant, or permitted by him whilst occupying a desk in his office, to act as if a clerk duly authorized to use the firm name in carrying on that branch of its business correspondence relative to canned goods such as in question, and in short to wear in that regard the semblance throughout from the 2nd of March till the end of November following, of a mere employee of appellant.

I am of the opinion that the giving by the respondent, through its agent, a share in his commission to induce Durocher under such circumstances to contract in said firm's name and on its behalf for the purchase of the goods in question from the respondent was corrupt and corrupting and, unless known to and presumably assented to by the appellant, destroyed any legal right to recover upon the alleged contracts.

Reason, fairness and consistency, alike demand herein that the law which forbids, as does also moral sense, the employment of such means to induce such a departure from duty on the part of any mere employee or trusted friend, in acting on behalf of his employer or friend entrusting business to him, should be applied to determine the liability of the appellant herein, which must rest, if at all, only upon facts and circumstances constituting Durocher an agent of one or either of the classes I refer to.

It is idle to put forward the cases of brokers who in certain localities and classes of business wherein and in relation to which all those dealing by and through them are, by reason of a practice or custom, well known to all such persons, habitually to divide the commission, or indeed in some cases, have become entitled to receive

and demand it from the party the principal has contracted with.

This man Durocher, though possibly calling himself a broker, had in fact no visible means of support and was not employed, as to matters herein referred to, as a broker.

That in truth is what renders the case somewhat difficult on the other issues raised, and enables the respondent to present a plausible argument in order to maintain the action at all, so far as such issues are concerned.

Had the business been conducted through a broker there would not have likely arisen any such complications as exist on the facts. Indeed all, or nearly all, that tends to support the respondent on the issue of authority or no authority could not have had any existence.

The evidence on this point of Mr. Millman, who acted for the respondent and made the offer to share his commission, is as follows:—

Q.—And mentioning it in a telegram would not give you that impression? A.—No, I did not know, only I knew he was with John Barry & Sons.

Q.—And you did not know him as a broker? A.—I never heard of him as a broker.

Q.—Then you thought he was John Barry's agent? A.—He told me he was.

Q.—And you made an agreement to pay him 1%? A.—Yes.

Q.—To the agent of the man? A.—Yes.

Q.—That was buying from you? A.—Yes, he told me it made no difference, Mr. Barry knew what he was doing.

The appellant denies all knowledge of such fact till after his repudiation of those contracts.

The learned trial judge believed him and I see no reason for setting aside his finding. Indeed I see some reasons the other way.

1917

BARRY v. STONEY POINT CANNING CO.

Idington J.

For example, a specimen of how this man was approached is furnished by the following letter:—

27 Front Street, East,
Toronto, Aug. 29th, 1914.

Mr. A. Durocher,
Montreal, Que.

Dear Sir,

On contract number 1493 from ourselves to John Barry & Sons 2500 c/s peas we allow you personally 1% brokerage also on contract number 98 Beaver Canning Co. contract number 99 Ed. McCaw, contract number 100 A. A. Morden & Sons, at Wellington. All these we allow 1% brokerage to yourself when goods are paid for.

Yours very truly,
W. H. Millman & Sons,
Per "M."

This particular letter possibly does not refer to these identical contracts now in question. I quote it only to shew the spirit of the giving and how Durocher was specially and personally addressed, instead of the firm, had it been intended for them. It was not given as sometimes happens between a commission man dealing with a buyer personally and offering to share his commission with him in order to close the deal thus effecting a lowering of the price, though desirous not to call it that. Nor does such a personal address to the agent tend to inspire the belief that the principal knew all about it. In that case it would have been addressed to the first with a polite request to see that poor Arthur got his tip for his civility.

It was not denied in argument that the like commission sharing applied to the contracts in question. I gather that sometimes it was agreed on with Durocher orally. Indeed it seems to be suggested he was the first to hold out his hand and shew how it might be advantageously managed. And it was stated in argument that the total of such gratuities thus paid to Durocher exceeded $1,200.

I suspect but for this bountiful stream we might never have been troubled with the numerous exhibitions of commercial schemes and plotting and contriving which appellant denies he was an actor in but I think evidently quite willing to encourage, or as he, knowing of it, expresses it:—

> I had no reason to interfere. If it had been successful it would have been to my advantage,

and which we have had presented for our serious consideration.

Sometimes fine distinctions have been drawn heretofore as to the intention and the result of such gratuities for which at least in this case I find no warrant, and I respectfully submit there never was a place therefor in law.

The encouragement thus lent as by expressions in the case of *Smith* v. *Sorby* (1), to lessen the rigour and force of the law on the subject and somewhat corrected as Mr. Justice Field pointed out in *Harrington* v. *Victoria Graving Dock Company* (2), at page 552, should neither receive approval or extension.

What he there expressed regarding loose commercial practice has so grown as to be a menace to those trying to adhere to honest practices and continue in business.

The illicit commission must be most rigidly suppressed if honest men who will not stoop to its use are to be given a fair chance for their commercial life in Canada. The proof of knowledge on the part of any one whose agent has yielded rests with him so asserting. An honest business man giving such gratuity will always put beyond peradventure his ability to prove that he had given notice to the principal in the plainest terms.

(1) 3 Q.B.D. 552 (note). (2) 3 Q.B.D. 549.

1917

BARRY v. STONEY POINT CANNING CO.

Idington J.

If such clear proof be required there will not be many gratuities of substantial amount going into the hands of the agent, I imagine.

It seems bordering on childishness to ask in this age for further proof of the motive than the promise of such substantial payment, on the successful accomplishment of its purpose, as implied in above letter.

Nor can I entertain the *pro formâ* submission made that as it was not proven that respondent knew of this splitting of commission it should succeed, although the legal existence of the contract repudiated therefor is gone.

The repudiating of fraud on that ground possibly should have come earlier but *Clough* v. *London and North Western Rly. Co.*(1), will support raising it even at the trial so long as no affirmation of the contract by him defrauded or his estoppel in some other way. And the learned trial judge notes he gave leave at the trial to amend.

I think for these reasons the appeal should be allowed and the judgment of the trial judge restored. I think, however, there should be no costs allowed either party in regard to the appeal below or here. The great weight of the appellate costs here certainly consisted in presenting and arguing about the issue of law and fact in regard to what the appellant does not succeed as to, and I presume the same was the case below.

An apportionment of costs according to the result of the issues hardly fits the case.

To give appellant costs generally when the argument of the point on which he succeeds (if my view adopted) took less than twenty minutes on each side would not be a satisfactory result. The costs allowed

(1) L.R. 7 Ex. 26.

him by the learned trial judge should stand. The item upon which judgment below was allowed by the trial judge with costs fixed at $75 did not trouble us and judgments therefor should also stand and be set off as directed.

MR. JUSTICE DUFF concurs with Mr. Justice Idington's conclusion.

ANGLIN J.—This action is brought to recover damages for breach by the purchaser of two contracts for the sale of canned goods. The defence originally pleaded was that the defendant's alleged agent, Durocher, was not authorized to make the contracts.

Early in the trial, however, the plaintiffs' broker, Millman, deposed that although he understood Durocher to be the defendant's agent, he agreed on Durocher's demand to divide with him his 2% commission from the vendors on sales made to the defendant for the plaintiffs and other canners whom he (Millman) represented. Durocher's share of these commissions (according to a statement of counsel made at bar and not controverted) would amount to the substantial sum of $1,200. Millman's evidence indicates that he was relying upon Durocher to "put the deal through" with Barry, the defendant, and that Durocher was insistent upon being paid the commission. Millman says he made no secret about the commission and that Durocher told him that the defendant knew what he was doing. The defendant denied having had knowledge of any commission arrangement with Millman until some time after the alleged contracts had been made—some time about the end of November—about the time that he repudiated Durocher's authority. Durocher corroborates this testimony.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

The defendant's explanation of his having failed at once to repudiate liability on this ground is that it was then too late to object to the commissi ns as Durocher had received them and probably spent them. The omission from the statement of defence of a plea based on the commission agreement would indicate that, even when giving instructions to his solicitor, Barry did not appreciate its importance and neglected to bring it expressly to the solicitor's attention.

Durocher was largely indebted to the defendant and, while no definite arrangement was made as to the amount of his remuneration, the defendant advanced him money for expenses and says that he expected to pay him for his services. An amendment to the statement of defence alleging voidability because of the payment of commission by Millman to Durocher was allowed at the trial.

Mr. Justice Middleton, who tried the action, has had a large experience as a trial judge. In his judgment he says of the defendant:—

> Mr. Barry acted, I think, throughout with perfect honesty and I accept his evidence without question.

Accepting Barry's evidence, corroborated as it was by that of Durocher, notwithstanding many features of the correspondence in evidence and some circumstances which go far to warrant contrary inferences in regard to some phases of the case, the learned judge expressly found that:—

> Durocher never had any authority; there never was any ratification and there never was any holding out by Barry. This being so, the plaintiffs must fail.

No doubt this conclusion was not a little influenced by the explicit acknowledgment of Millman that, while he regarded and dealt with Durocher as Barry's agent, he also,

knew he (Durocher) had to go back to Barry and get authority before he could buy,

by Barry's explicit denial that he ever authorized or ratified the contracts, and by the absence of any direct evidence of ratification.

If disposing of the case on this aspect of it, notwithstanding the forceful presentation by the learned judges of the Appellate Division of such facts and circumstances in evidence as tend to support their reversal of the findings of the trial judge, I am not satisfied that I should have been prepared to concur in their conclusion. I should not improbably have felt impelled to hold, for the reasons stated by my brother Davies, that, depending, as it necessarily did, almost entirely upon the credit to be attached to the oral evidence of the defendant given in his presence, the opinion of the trial judge on the pure question of fact in issue should not have been disturbed.

But having regard (as Field J. put it in *Harrington* v. *Victoria Graving Dock*(1)), to

how sadly loose commercial practice has become in respect to transactions of this nature,

it seems highly desirable and, on the whole, more satisfactory that this appeal should be disposed of on the other question which it presents, viz., the effect on the enforceability of the contracts sued on of the payment of commission by the vendors' broker to the purchaser's agent. On this branch of the case the trial judge said:—

Upon another branch of the defence the plaintiffs must, I think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendors' broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.

(1) 3 Q.B.D. 549, 552.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

In *Hitchcock* v. *Sykes*(1), I stated my views that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in *Panama Co.* v. *India Rubber Co.*(2), any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity, and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained, and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The learned judge's opinion was substantially approved in this court (3).

That Durocher was the defendant's agent, authorized to bind him by the contracts sued upon is the basis of the plaintiffs' case and of the judgment of the Appellate Division. Speaking of the 1% commission paid Durocher, Millman himself tells us:—

I said you (Durocher) can do what you like with it.

Dealing with this defence in the Appellate Division (4), Meredith C.J., C.P. after disposing of the question of Durocher's authority adversely to the defendant (which involved discrediting utterly Barry's denial of that authority and of all knowledge that Durocher had contracted for him), said:—

After being asked to swallow the camel of the defendant's "innocence" involving more than $8,000, we are urged to strain at the gnat of the divided commission amounting to a few hundred dollars and upset the whole transaction on the ground of fraud in it.

I venture to think that in his necessitous circumstances Durocher did not look upon the $1,200 commission as a mere "gnat." The learned Chief Justice himself subsequently emphasizes its importance to Durocher when, on the assumption that he was not to be remunerated by Barry for his services, he says:—

The defendant knew that the man could not live upon air alone.

(1) 29 Ont. L.R. 6.
(2) 10 Ch. App. 515.
(3) 49 Can. S.C.R. 403.
(4) 36 Ont. L.R. 536.

The Chief Justice proceeds to hold that the payment of commission by Millman to Durocher was innocuous and affords no defence to the plaintiff's claim, because of its comparative insignificance; because the arrangement for it appears in the correspondence; because the evidence does not disclose actual fraudulent intent on the part of Millman; because splitting commissions was customary in the trade; because the commission was received by Durocher "in good faith"; because, not having agreed with Durocher for a definite remuneration for his services, the defendant knew, or must be taken to have known, that he would seek remuneration from "the other side"; because the defence based on the commission agreement should be regarded as only " a solicitor's defence raised at the eleventh hour"; and because the arrangement for the commission was made not by the plaintiffs themselves but by their broker, Millman, and it did not appear that it was made in the course of the plaintiffs' business and for their benefit.

Mr. Justice Lennox discards this defence in three sentences:—

> It is so much a question of fact that no nice point of law arises; and the reliable evidence in this case is documentary. That the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant is manifest from the correspondence. The contracts ought not to be avoided on this ground.

Mr. Justice Masten, who had said:—

> I do not for a moment differ from the learned trial judge in his estimate of the evidence given by the witnesses

and "felt great difficulty" in dealing with this defence, disposed of it by holding that there was no evidence that the commission was paid

> with the view of influencing Durocher to purchase more canned goods or at an enhanced price

1917

BARRY
v.
STONEY POINT CANNING CO.

Anglin J.

and that, because of his expectation of sharing in the defendant's profits from the transaction,

> his interest was immeasurably greatest in the direction of doing the best he could for Barry, and the commission receivable from Millman was not such, * * * either in amount or in the way in which it was received, as to bribe;

We have not the advantage of knowing the grounds on which Mr. Justice Riddell based his concurrence.

These reasons for reversing the judgment of the learned trial judge on this aspect of the case, with respect, appear to me to be based in part on a misunderstanding or erroneous appreciation of the evidence, and in part on a misconception of the effect of the authorities on this branch of English law.

To deal first with Mr. Justice Masten's view:—

There is no evidence whatever that Durocher was to share in the defendant's profits. The evidence is that the defendant "expected to pay him a commission for his services." Neither is there any evidence that the price of the goods sold was enhanced by reason of Durocher sharing in Millman's commission. There is, therefore, nothing to indicate that the substantial interest, directly adverse to that of his principal, created by Durocher having been promised a commission by Millman was in any way, or to the slightest extent, offset by a countervailing interest in prospective profits. No doubt where it is demonstrably obvious on undisputed facts that the advantage promised by "the other side," whatever form it took, could not have created an interest in the agent in conflict with his duty to his principal (as it was in *Rowland* v. *Chapman* (1), cited by the learned judge) the right of repudiation does not arise. But the courts will not undertake an investi-

(1) 17 Times L.R. 669.

gation involving a speculative weighing and balancing of opposing influences in the mind of the agent in order to determine which of them dominated. To do so would be to enter on the prohibited field of inquiry whether the bribe had been effectual. *Parker* v. *McKenna* (1), at pages 118, 124-5; *Harrington* v. *Victoria Graving Dock* (2); *Shipway* v. *Broadwood* (3), at page 373.

All three of the learned appellate judges appear to have shared the opinion that in order to maintain this defence it was necessary for the defendant to establish actual fraudulent or dishonest motive or intent on the part of Millman. The learned Chief Justice speaks of the trial judge having "been carried away" by the contrary view, adding:—

> it need hardly be said that that is not the law. In such cases, it is fraud and fraud only that had that effect,

i.e., of rendering the contract voidable by the principal.

No doubt actual fraud must be shewn when no fiduciary relationship exists (*Lands Allottment Co.* v. *Broad* (4); see, however, the observations on this decision of Collins L.J. in *Grant* v. *Gold Exploration and Development Syndicate* (5), at pp. 249-50). But given that relationship between one principal and the recipient of a secret commission and knowledge of it by the other principal (or his agent), who makes the agreement to pay such commission, it is quite as unnecessary (and it would seem even more clearly immaterial), to prove an actual fraudulent or dishonest motive on the part of the latter as it is to prove that the former was in fact induced by the promise of the commission to betray his trust.

(1) 10 Ch. App. 96.
(2) 3 Q.B.D. 549.
(3) [1899] 1 Q.B. 369.
(4) 13 R. 699; 2 Manson, 470.
(5) [1900] 1 Q.B. 233.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

The fundamental principle in all these cases is that one contracting party shall not be allowed to put the agent of the other in a position which gives him an interest against his duty. The result to the agent's principal is the same whatever the motive which induced the other principal to promise the commission. The former is deprived of the services of an agent free from the bias of an influence conflicting with his duty, for which he had contracted and to which he was entitled. "The tendency of such an agreement as this," said Cockburn C.J. in *Harrington* v. *Victoria Graving Dock* (1), at page 551,

> must be to bias the mind of the agent or other person employed and to lead him to act disloyally to his principal.

As Chitty L.J. said in *Shipway* v. *Broadwood* (2), at page 373:—

> In *Thompson* v. *Havelock*(3) Lord Ellenborough said "no man should be allowed to have an interest against his duty." That great principle has been applied in cases innumerable.

In *Andrews* v. *Ramsay* (4), at page 637, Lord Alverstone quoted with approval the following passage from Story on Agency, page 262, par. 210:—

> In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is, that, in matters touching the agency, agents cannot act as so to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may, and even if impartiality could possibly be presumed on the part of an agent where his own interests were concerned, that is not what the principal bargains for; and in many cases it is the very last thing which would advance his interests. The seller

(1) 3 Q.B.D. 549.
(2) [1899] 1 Q.B. 369.
(3) 1 Camp. 527.
(4) [1903] 2 K.B. 635.

of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may.

Moreover, by whatever sophistry the person who promises the secret benefit may endeavour to persuade himself to the contrary, the instances are rare indeed in which in his inmost heart he does not hope to derive some advantage from it, direct or indirect, which from the nature of the case must involve a dereliction of duty by the agent to his own principal.

For gifts blind the eyes of the wise and change the words of the just. Deut. XVI., 19.

The same doctrine was acted on in *Panama Co.* v. *India Rubber Co.* (1), by Lord Justice James, who said at page 527:—

In this court a surreptitous sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty.

And the Lord Justice speaks of this as

a plain principle of equity which is to be enforced without regard to the particular circumstances of the case * * * You must act upon the general principle from the impossibility in which the court finds itself of ever ascertaining the real truth of the circumstances.

He had already said:—

According to my view of the law of this court I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court.

Romer L.J. in *Hovenden & Sons* v. *Millhoff* (2), at page 43, still more definitely states the rule that the motive which induced the offer of the benefit cannot be considered:—

The courts of law of this country have already strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on

(1) 10 Ch. App. 515. (2) 83 L.T. 41.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

the subject. But some persons undoubtedly hold laxer views. Not that these persons like the ugly word "bribe" or would excuse the giving of a bribe, if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition, I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, *the court will not inquire into the donor's motive in giving the bribe nor allow evidence to be gone into as to the motive.* Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed that the agent was influenced by the bribe; and this presumption is irrebuttable.

Indeed the decision in this case is very much in point. Although a jury had negatived conspiracy between the agent and "the other side", and had estimated the loss of the principal at one farthing, the secret commission was nevertheless unhesitatingly treated by the Court of Appeal as a bribe. See also *Hough* v. *Bolton* (1), at page 789.

In the same judgment in which he laid down the doctrine that the secret benefit to the agent must invariably be regarded as a bribe and the promise of it as a fraud, Lord Justice James added:—

That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him.

These principles of equity, so far as I am aware, have never been departed from or questioned. They have, on the contrary, been frequently recognized, approved and applied.

(1) 2 Times L.R. 788.

Since the contracts sued upon in the present case still remained executory and there had been no laches on the part of the defendant such as might render repudiation inequitable, I am at a loss to understand the applicability of the distinction to which the Chief Justice of the Common Pleas alludes between the right to set aside the transaction and the right of the principal to recover from his agent the commission or other benefit received by him. Speaking generally, when the circumstances do not actually preclude the relief of rescission or render it inequitable, the same facts which will support a claim to recover the commission from the agent and damages from the other principal will justify repudiation of the contract with the latter.

Neither in *Hippisley* v. *Knee Bros.*(1), nor in *Great Western Ins. Co.* v. *Cunliffe* (2), to which the learned Chief Justice refers in this connection, did any question arise as to the effect upon the enforceability of the contract of the receipt by the agent of one of the parties of a secret benefit from the other. In neither case was the transaction in respect of which the agent received a secret allowance or gratuity the making of a contract between his principal and the person who paid such allowance or gratuity. In neither case could the payment or allowance by any possibility have given the agent an interest adverse to his principal in transacting the business for which he was employed.

Moreover, in the *Cunliffe Case* (2) the circumstances were such that the court found that knowledge of the allowance should be imputed to the principal and that with such knowledge he had acquiesced in it. Barry has sworn that the agreement for splitting the commission in the present case was unknown to him. The

(1) [1905] 1 K.B. 1. (2) 9 Ch. App. 525.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

only ground for questioning his statement is the fact that the commission is alluded to in some correspondence concerning the contracts sued upon. But the letters which contain these references were either written by Durocher or addressed to him, or, if addressed to the defendant, were placed in envelopes marked "personal attention of Mr. Durocher," and the evidence of the practice as to the handling and disposing of correspondence in the defendant's office makes it quite probable that he never saw these letters. I have found nothing in the record to justify a reversal of the finding of the learned trial judge that the commission was "secret"—in the sense that Barry was ignorant of it.

Although there is some evidence that it was Millman's practice to split commissions with purchasers' agents, there is no evidence that that custom was so prevalent in the trade that Barry should be charged with knowledge of it—if indeed knowledge of a custom involving such an essential departure from the usual relations of principal and agent could be imputed without proof that it actually existed. *Robinson* v. *Mollett* (1); *Johnson* v. *Kearley* (2), at page 530.

Nor is this a case in which, because he did not himself contemplate remunerating Durocher for his services, Barry must be taken to have expected that he would seek remuneration from the "other side," such as were the cases of *Baring* v. *Stanton* (3), and *Great Western Ins. Co.* v. *Cunliffe* (4), cited by the Chief Justice of the Common Pleas. (See comment of Alverstone C.J. on these two decisions in *Hippisley* v. *Knee Bros.*(5), at page 7.) On the contrary, the evidence of

(1) L.R. 7 H.L. 802.
(2) [1908] 2 K.B. 514.
(3) 3 Ch. D. 502.
(4) 9 Ch. App. 525.
(5) [1905] 1 K.B. 1.

both Barry and Durocher is that, while no definite basis was fixed, it was expected that Barry would pay Durocher for his services. Moreover, Durocher was largely indebted to Barry.

It may be, and not improbably is, quite true that Millman did not intend that the payment of commission to Durocher should be concealed from Barry and that he was deceived by Durocher's assurance that Barry knew what he was doing. But the law is thus stated by Collins L.J. in *Grant* v. *Gold Exploration Co.* (1), at pp. 248, 249,—

> In my opinion, 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, if impeached by the buyer, who had, in fact, had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal. I think it is clearly established that in such circumstances the buyer would be entitled to rescind the purchase; see *Panama Telegraph Co.* v. *India Rubber Works Co.*, where it is pointed out both by Malins V.C. and by the Lords Justices that *bona fides* without disclosure will not suffice to bar rescission * * *
>
> I think that if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal.

As Chitty L.J. said in *Shipway* v. *Broadwood* (2), at page 373:—

> It was the plaintiff's duty to inform the defendant of the promise * * * if he wished to escape the consequences of having made it * * * The real evil is not the payment of the money, but the secrecy attending it.

There was nothing in the present case amounting to acquiescence or waiver by Barry of his right to rescind on account of the payment of the secret commission to his agent. He discovered the commission arrangement only after the contracts sued upon had

(1) [1900] 1 Q.B. 233. (2) [1899] 1 Q.B. 369.

1917

BARRY v. STONEY POINT CANNING CO.

Anglin J.

been entered into. Where that is so a very clear and a very strong case indeed must be made to support an allegation of acquiescence or waiver. *De Bussche* v. *Alt* (1), at page 314; *Bartram & Son* v. *Lloyd* (2).

Nor does the failure to set up the defence based on the secret commission until the facts concerning it had been disclosed at the trial present a formidable obstacle. *Shipway* v. *Broadwood* (3); *Hough* v. *Bolton* (4). Moreover, the trial judge exercised a discretion in allowing the amendment setting up this defence which, in my opinion, should not have been interfered with on appeal.

Finally the fact that the agreement to split the commission was not made by the plaintiffs themselves, but by their agent Millman, is not an answer to the defendant's assertion of his right to repudiate. What Millman did was done while purporting to act within the scope of his employment, and in the course of the service for which he was engaged by the plaintiffs; and it is immaterial that it may have been in his own interest as well as in, or even to the exclusion of, that of the plaintiffs. *Lloyd* v. *Grace, Smith & Co.* (5). The defendant's agent was given the disqualifying adverse interest which made him incapable of binding his principal.

My apology for having dealt with this appeal at what may seem inordinate length is that when a judgment which deals with matter so fundamental is reversed, courtesy to the learned judges who pronounced it demands an adequate statement of the grounds on which it is held to have been erroneous; and also that it is of the utmost importance that it should be clearly

(1) 8 Ch. D. 286.
(2) 90 L.T. 357.
(3) [1899] 1 Q.B. 369.
(4) 1 Times L.R. 606.
(5) [1912] A.C. 716.

understood that in this, the court of last resort in Canada, the rule of equity on which the judgment allowing this appeal rests is regarded as inflexible and its application as universal.

In conclusion I cannot do better than quote some apposite observations from the judgments of Lord Alverstone C.J. and Kennedy J. in *Hippisley* v. *Knee Bros.* (1). Mr. Justice Kennedy said at page 9:—

> If a principal when contracting for the services of an agent, is told that the agent is going to receive a profit out of the agency beyond the remuneration that the principal is to pay, there can be no possible harm in the agent receiving it; but, unless it had been in this way authorized by the principal, the receipt of such a profit is an indefensible act. I quite agree with my Lord that in this case the defendants were only doing what they honestly believed to be right having regard to a general practice; but I should be sorry to say that the practice itself is an honest one, if it is to be taken as extending to cases in which the fact that the profit will be received and kept by the agent is not brought to the knowledge of the employer.

And Lord Alverstone, at page 7:—

> Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such profits ought to be disapproved of by men in an honourable profession, the better it will be for commerce in all its branches.

The appellant is entitled to his costs in this court and in the Appellate Division, and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *Johnston, McKay, Dods & Grant.*

Solicitors for the respondents: *Kerr & McNevin.*

(1) [1905] 1 K.B. 1.

1917

*March 19, 20.

*May 1.

BERNARD SMITH (PLAINTIFF).....APPELLANT;

AND

THOMAS J. DARLING AND OTHERS (DEFENDANTS).....RESPONDENTS.

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

Mortgage—Action to redeem—Disabilities—Ontario "Limitations Act"—Action for recovery of land.

The disability clauses of the Ontario "Limitations Act" (R.S.O. [1914] Ch. 75) do not apply to an action by a mortgagor to redeem, Idington J. dissenting.

Faulds v. *Harper* (9 Ont. App. R. 537; 11 Can. S.C.R. 639) considered. Judgment of the Appellate Division (36 Ont. L.R. 587, affirmed.

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.

The plaintiff's action was to redeem mortgaged land and the "Statute of Limitations" was pleaded in defence. It was admitted that the statute barred the action unless the plaintiff was relieved by the provisions of section 40 of the "Real Property Limitations Act," R.S.O. [1914] ch. 75, which was the only question to be decided on the appeal.

A. B. Cunningham for the appellant cited *Hall* v. *Caldwell*(2), *Faulds* v. *Harper*(3), and *Pearce* v. *Morris* (4).

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

(1) 36 Ont. L.R. 587.
(2) 7 U.C.L.J. 42; 8 U.C.L.J. 93.
(3) 11 Can. S.C.R. 639.
(4) 5 Ch. App. 227.

J. A. Jackson for the respondent Darling, referred to *Pugh* v. *Heath*(1), *Kinsman* v. *Rouse*(2), and *Forster* v. *Patterson*(3).

J. L. Whiting, K.C. for the respondents Toner referred to Fisher on Mortgages (6 ed.) page 1403, *Lake* v. *Thomas*(4), and *Court* v. *Walsh*(5).

THE CHIEF JUSTICE.—The case has been very elaborately considered in the courts below and I do not find it necessary to deal with the arguments at any length.

The appellant admits that unless he is relieved by the provisions of section 40 of the "Limitations Act" because of his disability his claim is barred by the Act. I agree with the conclusion at which the judges of the Appellate Division unanimously arrived that we ought to follow the decision in *Faulds* v. *Harper* (6), to the effect that the disability clauses of the "Real Property Limitation Act" do not apply to actions of redemption. This decision followed the English cases of *Kinsman* v. *Rouse*(2), and *Forster* v. *Patterson*(3), construing the Imperial Act which for material purposes cannot be distinguished from the Ontario statute.

If the Chief Justice of Ontario had been content to rest his judgment upon the authority of this case it would have been unnecessary to say more, but in the course of his lengthy reasons he denies one of the grounds on which *Faulds* v. *Harper*(6), is supported, viz., that an action to redeem is not an action to recover land.

(1) 7 App. Cas. 235.
(2) 17 Ch.D. 104.
(3) 17 Ch.D. 132.
(4) 3 Ves. 17.
(5) 1 O.R. 167.
(6) 9 Ont. App. R. 537.

1917

SMITH v. DARLING.

The Chief Justice.

He says:

It is true that a suit to redeem has been decided to be a suit to recover land.

He does not refer us to any case in which it was so decided and I myself know of none. Reference is made indeed to an *obiter dictum* of Strong J. in *Faulds* v. *Harper*(1), to the effect that the House of Lords having decided in *Pugh* v. *Heath*(2), that a foreclosure suit is an action for the recovery of land, it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land.

I desire to speak with the greatest respect of the distinguished Chief Justice who presided for so long over this court, but the dictum cannot of course carry the same weight as a considered judgment in point. I do not understand how there can be any *sequitur*.

The action of foreclosure is different from the action to redeem in that by the former the mortgagee, who has the land merely as security for his debt, claims in default of payment to be adjudged the owner of the land. The action to redeem on the contrary supposes that the mortgagor is the owner of the property and seeks on payment of the amount of the debt for which it is security to have it discharged of the encumbrance.

I agree with the view expressed by Sir George Jessel M.R. in *Kinsman* v. *Rouse*(3), that

an action to redeem is not, properly speaking, an action to recover land.

Perhaps as Burton J. said in *Faulds* v. *Harper*(1),

a suit to redeem may be in a sense a suit to recover land.

It is not an ordinary action to recover land within the meaning of the "Limitations Act."

(1) 11 Can. S.C.R. 639. (2) 6 Q.B.D. 345; 7 App. Cas. 235.
(3) 17 Ch.D. 104.

1917

SMITH v. DARLING.

The Chief Justice.

The appeal should be dismissed and as I cannot see that the case admits of any doubt the respondents are entitled to their costs both here and in the courts below.

DAVIES J.—I concur with Anglin J.

IDINGTON J. (dissenting)—The question raised herein is whether an infant entitled to redeem and recover mortgaged lands may be barred by the mortgagee's possession for ten years which possibly had begun to run the day after the infant's birth.

It is stoutly maintained in argument and indeed seems to have been held in the court below, that such has been the state of law in Ontario, at least ever since "The Real Property Limitation Amendment Act, 1874" came into force.

I cannot entertain that view as ever having been correct. I need not, as will presently appear, for the purposes of this case, go so far as this rejection, which I express of such view, may imply.

Inasmuch, however, as the respondent's contention is that the "Real Property Limitation Act," as it stood in the R.S.O. of 1897, is what should govern the rights of the parties herein and alleged to be in substance and effect identical with the like Act as it stood in R.S.O. 1877, which was passed upon by the Court of Appeal for Ontario in 1883 in the case of *Faulds* v. *Harper*(1), adversely to the view I hold, I may be permitted to suggest in a few sentences the line of thought which followed up should demonstrate the fundamental error of that decision and the argument now rested thereon.

That court was dealing with the amending Act of 1874 above referred to, which did not come into force till the 1st July, 1877, by which time the legis-

(1) 9 Ont. App. R. 537.

1917
SMITH
v.
DARLING.
Idington J.

lature had passed, on the 2nd March, 1877, the bill for bringing into force the R.S.O. of that year then contemplated save as to the incorporation therein of the legislation of that session.

None of that legislation, so far as I can see, dealt with what we are concerned with herein.

The Legislature had thus provided, before the amending Act came into force at all, for its consolidation and hence for a declaration of the law as contained therein and in the prior relevant Acts thus to be substituted by the consolidation.

Much, I think too much, was made then and is yet of the provision of the Act expressing its purpose, when introducing and providing for enforcing the consolidation as to the latter not being new law.

It seems to me that the gist of the whole section 10 so providing, and which reads as follows:—

> 10. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory, of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted

is in the words "as declaratory of".

True, the official proclamation was not issued till 31st December, 1877. Yet I think the foregoing facts must be considered as relevant to a finding of the actual intentions of the legislature.

Again, the amending Act itself, by section 15 thereof, provided that the Acts so amended should be construed as in force therewith unless so far as inconsistent with the amending Act.

When almost the whole purpose of the amending Act was to shorten the limitation period, as the recital shews, I fail to see why we should find anything inconsistent in reading section 5 thereof as if it had been (using the very words of section 15) "substituted in

1917

SMITH v. DARLING.

Idington J.

such statute," *i.e.*, the Consolidated Statutes of Upper Canada of 1859, for section 45 thereof, which had been in the case of *Hall* v. *Caldwell*(1), so interpreted in the Court of Error and Appeal in accord with what is now urged by appellant as applicable herein.

Be all that as it may, I think the revision of 1877, construed as courts are bound by above quoted section 10 to construe it, as declaratory of the law, should be read as it stands, and so read I see no difficulty in appellant's way.

I may also point out that the clear opinion of this court in same *Fauld's* Case(2), was against the construction adopted by the Court of Appeal for Ontario, although that opinion was perhaps not necessary for the reversal which was granted by the judgment of this court.

The opinion thus expressed has generally been referred to as an *obitur dictum*, but the more carefully one reads the judgment, he is driven to doubt it was not in the last analysis necessary to form such an opinion to maintain the judgment of reversal at all.

Moreover, the decision in *Heath* v. *Pugh*(3), seems to have been relied upon for the opinion so expressed, and conclusively to establish the proposition that a suit for foreclosure is an action to recover lands within the meaning of the words used in the first section of the English "Limitations Act," and in the Ontario Act so far as copied therefrom. Hence I think the correlative suit for redemption must likewise be so held.

As I suggested in argument, I am of the opinion that this case should be decided upon the "Limitations Act," being 10 Edw. VII., ch. 34, passed 10th March,

(1) 7 U.C.L.J. 42; 8 U.C.L.J. 93. (2) 11 Can. S.C.R. 639.
(3) 6 Q.B.D. 345; 7 App. Cas. 235.

1917
SMITH
v.
DARLING.
Idington J.

1910, long before the time had run for respondents to have acquired by possession any title in or right to bar appellant's remedy to recover the lands in question by virtue of any statutory limitation.

That Act was an independent piece of legislation which specifically repealed, by section 60 thereof, all the former Acts bearing in the slightest upon what is in question herein.

As I could not get any answer from counsel for respondent explaining why this statute should not govern, save that the revision of 1897, was in force when possession by his client began to run, I imagine there is no other answer.

I do not think it is a statute of limitation which happened to exist at any time before the title acquired by possession has extinguished that of him claiming, or at all events, barred or taken away his right of recovery, which can be made applicable and enforcible, but only a statute of limitations which either bars the remedy or extinguishes the title of him adversely affected by possession.

Clearly that of 1910 can alone be so depended on by the appellant or respondent, as defining and settling their relative rights.

Then the exception given therein in favour of such persons suffering disability as appellant was, whose rights are saved by section 40 of said Act, which was that in truth which was consolidated in the R.S.O. 1914, and by section 40 thereof, exactly the same (except two words not capable of altering the sense) would seem to me to be almost too clear for argument had we not actual proof of much argument in and about same by means only, however, of harking back to something repealed.

The said section 40, relating, as it expressly does, to the period of ten years or five years (as the case may be) herein limited, I am unable to see how there should be any doubt in regard to the construction of the Act if allowed to stand upon its plain reading without confusing it with other Acts it repealed, and other things which place no limitations upon the language used.

And when, by the revision and consolidation which took place four years later, this Act was consolidated with others in R.S.O. 1914, its adoption in its entirety was such as made of it a continuous uniform statutory definition of the relation of the parties hereto, from the time when that period of time brought in question thereby first began to run, up to the date of the bringing of this action.

Indeed, as already pointed out, virtually all prior Acts on the subject consolidated in chapter 133, R.S.O. 1897, except one section not bearing on what we have to deal with, had stood repealed for four years.

Again, if we consider the scope and purpose of the Act as a piece of independent and all comprehensive legislation on the subject, and we find it providing, as it does by section 24, for the common case of mortgage and other charges on land being barred by ten years after a present right to receive the money had accrued to some person capable of giving a discharge for or release of the same, thus obviously guarding the rights of infants, idiots and lunatics, it puzzles me to understand why the same classes as mortgagors or those who claimed under mortgagors, should intentionally be excluded from the like protection. I am clear it never was so conceived by the legislature.

Certainly there is in the frame of the Act and the language used in the parts involved herein, no resemblance between either of these Acts and that upon which

1917

SMITH v. DARLING.

Idington J.

the late Sir George Jessel or Bacon V.C. proceeded in the respective decisions given by either of them and so much relied upon.

There was more of something akin to analogy between the amending Act which the Court of Appeal for Ontario chose to act upon and the English Act. But why should that trouble us now? Why seek to rest a judgment herein upon the confusion of the past, obviously a possible means of injustice, when the legislature has made all clear and a possible source of injustice has been eliminated?

This is one of many cases wherein English judicial authority must be examined closely in relation to the Act construed in order to see, that the Act professing to deal with the same kind of subject matter as our own legislature may have dealt with, is in truth the same, and its purpose expressed in the same language.

The English decisions on analogous Acts may be most instructive, and no lawyer here should pass them idly by, but often they proceed as in the case before us upon an Act so differently framed that we cannot say they are in such cases authorities we are bound to follow, but rather may say are to be discarded, when found likely to confuse our thought and perpetuate injustice.

I think the appeal should be allowed with costs here and in the Appellate Division as against respondent Darling who should also bear the costs of the Toners.

There is a doubt in my mind as to the exact meaning of the formal judgment as it stands, and, rather than add to the confusion, I think, if the parties cannot agree as to the result flowing from the foregoing result, they should be left to speak to the minutes.

1917

SMITH v. DARLING.

Duff J.

DUFF J.—The single question involved in this appeal can be stated and discussed without reference to any of the facts which have given rise to the litigation. The question is this—do the disability clauses of the "Limitations Act" (Ontario) ch. 75, R.S.O. 1914, (section 40 et seq.) apply in the cases provided for by ss. 20, 21 and 22, relating to the time limit on actions of redemption brought by a mortgagor against a mortgagee who has obtained the possession or the receipt of the profits of some part of the land or the receipt of any rent comprised in his mortgage.

I propose first to consider the provisions of the statute as it now stands in their bearing upon this question, that is to say of Part 1. The leading enactment is section 5, which I quote in full:—

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. 10 Edw. VII. c. 34, s. 5.

Section 6 contains a series of provisions laying down the rule for determining in each of the classes of cases dealt with, when the right to make an entry or distress or bring an action to recover land or rent shall for the purposes of the Act be deemed to have "accrued"; the point of time, that is to say, from which the statutory period is to run in these cases in which, including of course all the cases falling within section 5, the time limit is calculated from the accrual of the right.

These provisions of section 6 obviously are of no assistance for determining the effect or for dictating the application of section 20 or the two succeeding sections,

1917
SMITH
v.
DARLING.
Duff J.

21 and 22; that is so because the time limit fixed by these sections upon the mortgagor's action for redemption in the particular case dealt with, namely, where the mortgagee is in possession of the mortgaged property in whole or in part, is calculated not from the time at which the right to bring an action for redemption accrues to the mortgagor, but from the time when the mortgagee has obtained possession; *Re Metropolis and Counties Building Society*(1), at pages 706-7; and it may be added that although it is not difficult to bring a mortgagee's action of ejectment, or a morgtagee's action for foreclosure within the third subsection of section 6, in order to determine the time of the accrual of his right within the meaning of section 5, it is not easy to find in any of the provisions of section 6 language which appears to contemplate a mortgagor's action for redemption.

Section 20 and the complementary provisions contained in sections 21 and 22 are substantive provisions not organically related to sections 5 and 6, and not depending for their operation upon the ascertainment, through statutory definition or otherwise, of the time when the mortgagor's right to bring an action of redemption "accrues."

Turning now to section 40, that section provides, speaking broadly, that where a disability exists at the date when the right to bring an action to recover land or rent accrues at the expiry of the period of ten years or five years, limited in the preceding sections, the period shall be extended to the end of a further five years or until the time when such disability shall have ceased, whichever happened first.

The application of this section involves the deter-

(1) [1911] 1 Ch. 698.

mination of the time when the right in question accrues; the section is dealing with periods of limitation calculated from that point of time; it connects itself naturally with sections 5 and 6 and fits in with them and it is perfectly obvious that it was framed with direct reference to them.

It is impossible to affirm any such thing as to its relations with section 20. I do not say that it is altogether a misnomer to describe an action of redemption against a mortgagee in possession, as an action for recovery of land. I am inclined to think that from the language used in *Heath* v. *Pugh*(1), at page 352, by Lindley J. (he is alluded to by Lord Selborne in appeal as a judge "especially familiar with equity") he would have thought it was not. It is nevertheless true, that Sir George Jessel had no hesitation in declaring that "action for recovery of land" is not an apt description of an action for redemption, the mortgagee being in possession, *Kinsman* v. *Rouse*(2), and Lord St. Leonards appears to have held the same view. But the most formidable difficulty in the way of connecting section 40 with section 20, arises from the circumstances already mentioned, that section 40 contemplates a period of limitation calculated from the date of accrual of the right of action, while the time limit laid down by section 20 for actions of redemption, is determined by reference to a date which has no necessary relation to the accrual of the right to commence the action. In order to meet this difficulty and to make section 40 applicable to cases arising under section 20, it is necessary to read the words in section 40,—

time at which the right * * * to bring an action * * * first accrues as herein mentioned,

(1) 6 Q.B.D. 345. (2) 17 Ch.D. 104.

1917

SMITH v. DARLING.

Duff J.

as the equivalent of

time from which the periods of limitation herein provided for, begin to run, as herein mentioned,

I think such a construction could not be supported. There is nothing in section 20 or section 40 either in language or substance which justifies the importing into section 20 of a qualification based on section 40. That section and the succeeding sections find their natural and, I think, their full effect when they are applied to cases arising under sections 5 and 6 and to any other cases, if there be such, where the period of limitation begins to run from the date of the accrual of the right of action.

I conclude, therefore, that the statute as it now stands, when due effect is given the structure of the relevant sections, read as a whole, gives no support to the appellant's claim. I should not have found it necessary to examine the history of the legislation, but I have, however, attentively considered the discussion of the subject in the judgment of the Chief Justice of Ontario, which shews very clearly that such an examination would afford confirmatory grounds for the view at which I have arrived.

As to *Faulds* v. *Harper* (1), I have only to repeat that the question upon which we have to pass is still unsolved, after one has reached the conclusion that an action for redemption against a mortgagee in possession may for some purposes, be considered an action for the recovery of land. I should be disposed indeed to think it is so within the meaning of section 16 of the "Limitations Act"; the question, as I have said, is whether it is an action to recover land within the meaning of section 40 of the "Limitations Act," and

(1) 9 Ont. App. R. 537.

that is a question which must, to my thinking, be decided, as I have already said, with reference to the enactments of the statute read as a whole.

ANGLIN J.—The material facts of this case are fully stated in the judgments below, 36 Ont. L.R. 587. All the authorities bearing upon the important question which it presents—whether the disabilities sections of the "Real Property Limitations Act of Ontario" are applicable to "actions to redeem"—are there so fully, and, if I may say so with respect, so ably discussed by the learned Chief Justice of Ontario, that any further detailed reference to them would be supererogatory. It is perhaps needless to add that they have, however, been carefully examined and fully considered.

I agree with the learned Chief Justice that the opinion expressed by Strong and Henry JJ. in *Faulds* v. *Harper*(1), that the disabilities sections apply to actions of redemption—must be regarded as obiter. Mr. Justice Strong, with whom Ritchie C. J., Fournier and Taschereau JJ. concurred, certainly disposed of that appeal on the ground, which had been taken by Spragge C.J.O. in the Court of Appeal(2), that the possession of the defendant was not that of a mortgagee but that of a fraudulent purchaser, and that the case was therefore not within the purview of the section of the statute which limits the time for bringing an action to redeem. There is no English decision upon the question presented which binds us—*Kinsman* v. *Rouse* (3), and *Forster* v. *Patterson*(4), the two authorities relied upon by the appellant, having been decisions of single judges. Nor is there any such well established

(1) 11 Can. S.C.R. 639.
(2) 9 Ont. App. R. 537.
(3) 17 Ch.D. 104.
(4) 17 Ch.D. 132.

1917
SMITH
v.
DARLING.
Anglin J.

line of authority in the Province of Ontario as it would be undesirable that we should disturb. The view which prevailed in the Upper Canada Court of Error and Appeal in *Hall* v. *Caldwell*(1), was not accepted by the Ontario Court of Appeal in *Faulds* v. *Harper*(2), where the majority of the court approved and accepted the decisions in *Kinsman* v. *Rouse*(3) and *Forster* v. *Patterson*(4), overruling a divisional court which had declined to follow them(5). The view of the Court of Appeal was not accepted in this court by Strong and Henry JJ. who preferred that of the Court of Error and Appeal in *Hall* v. *Caldwell*(1). The question may, therefore, be regarded as quite open, if not *res integra*, in this court.

I should here state that there was no material difference between the terms and the collocation of the material sections in ch. 108 of the R.S.O. 1877, with which the courts dealt in *Faulds* v. *Harper*(2) and the corresponding terms and collocation in the Consolidated Statutes of 1859, ch. 88, upon which *Hall v. Caldwell*(1) had been decided. In both statutes the disabilities sections followed the section dealing with actions to redeem, and the "as aforesaid" in section 43 of 1877 was substantially the equivalent of the "hereinbefore mentioned," in section 45 of 1859. As now, in neither statute did the section dealing with actions to redeem contain any reference to disabilities.

Courts of equity, applying the provisions of the statute of 21 Jac., 1 ch. 16, to redemption suits in equity by analogy held plaintiffs therein to be entitled by a like analogy to the benefit of the disabilities section of that Act. *Beckford* v. *Wade*(6), on page 99; *Cook* v.

(1) 8 U.C.L.J. 93.
(2) 9 Ont. App. R. 537.
(3) 17 Ch.D. 104,
(4) 17 Ch.D. 132.
(5) 2 O.R. 405.
(6) 17 Ves. 87.

1917

SMITH v. DARLING.

Anglin J.

Arnham(1), at page 287, note (*w*). But suits in equity were brought directly within the Imperial Limitations statute, 3 & 4 Wm. IV., ch. 27, by sec. 24 thereof, and they were likewise expressly provided for in section 32 of the Upper Canada statute, 4 Wm. IV., ch. 1, which was carried into the Consolidated Statutes of 1859 as section 31 of ch. 88 and continued in the Ontario revision of 1877 as sec. 29 of ch. 108. This section was dropped from the revision of 1887, presumably because thought unnecessary after the introduction of the "Judicature Act" of 1881. Suits for redemption, specially provided for by section 28 of the Imperial Act of 3 & 4 Wm. IV., and by section 36 of the Upper Canada statute, 4 Wm. IV., ch. 1, are still explicitly covered in like terms by section 20 of the present Ontario statute. Since the statute of Wm. IV., it has not been necessary or permissible to deal with them by analogy as was formerly the practice in equity. The period of limitation to which they are subject and any qualifications upon it must be found within the statute.

The history of the Ontario statute under consideration is by no means conclusive upon the question before us. It rather presents different aspects according to the mode of looking at it, one or other of which lends colour to the contention of either party. The collocation of the sections in the Act of 1874 (ch. 16), and the use of the phrase "hereinbefore limited" in the disabilities section (No. 5) thereof made it very clear (as it had been under the Act of 4 Wm. IV., ch. 1) that that section was not meant to apply to the subsequent section dealing with actions of redemption (No. 8). The order of the sections was changed, however, in the revision of 1877, the redemption section (No. 19) being

(1) 3 P. Wms. 283.

1917
SMITH
v.
DARLING.
Anglin J.

then placed before the disabilities section (No. 43) and the words "as aforesaid" replacing the words "hereinbefore limited" in the latter—a restoration of the collocation of the Consolidated Statutes of 1859 on which *Hall* v. *Caldwell*(1) had been decided. That this change might give rise to some uncertainty apparently occurred to the revisors of 1887, because, while they maintained the order of 1877, they substituted for the words, "as aforesaid," in section 43, the words "as in sections 4, 5 and 6 mentioned," thus putting it beyond question that section 43 was intended to apply only to cases within the three sections so enumerated and not to "actions to redeem" specially dealt with by section 19. No change was made in the revision of 1897. A new Act was passed in 1910 (chapter 34) preparatory to the revision of 1914. In view of the terms in which the commission of the revisors was couched (R.S.O. 1914, Vol. III, p. cxxxvii.) and of the fact that "The Limitations Act" was introduced and enacted in 1910 not as part of a revision, but as a separate Act, that statute cannot, I think, be regarded as subject to section 9 (1) of the "Act respecting the Revised Statutes of 1914," (3 & 4 Geo. V., ch. 2), but must be treated as new legislation. In the first of the disabilities sections of this Act (40) the words "as herein mentioned" were substituted for the words of section 43 of the Acts of 1887 and 1897, "as in sections 4, 5 and 6 mentioned," the collocation of the sections being left unchanged. The Revised Statute of 1914, ch. 75, is identical with the Act of 1910. Any uncertainty in the application of the disabilities sections caused by the change in the order of sections made in 1877, which had been so carefully counteracted in 1887, was thus unnecessarily

(1) 8 U.C.L.J. 93.

and, I cannot but think, unfortunately revived. If any section which should have been included was omitted from the enumeration it might have been added.

Without suggesting that there was sufficient ground for such uncertainty, I am, with great respect, unable, in view of the explicit provision of clause (i) of section 29 of the "Interpretation Act" (R.S.O. ch. 1), to assent to the view expressed by the learned Chief Justice of Ontario that "the words 'as herein mentioned'" in section 40 of the Act of 1910 are "the equivalent of the words of the sections in the Revised Statutes of 1887 and 1897 which correspond to section 40, 'as in sections 4, 5 and 6 mentioned.'"

I have made this resumé of the history of the legislation under consideration in order that it may be understood that the effect of the various changes has not been overlooked.

But apart altogether from, and notwithstanding their history and the collocation of the sections in question in the Act of 1910 and the R.S.O. of 1914, ch. 75, I find in the terms of section 40 itself, cogent internal evidence of its inapplicability to section 20—the section dealing with "actions to redeem." The subject matter of section 40, as appears in its introductory terms, is a limitation period computed from

the time at which the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues.

It enables such a proceeding to be instituted

at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability or died, whichever of those two events first happened.

Section 5 prescribes the period within which the right to

make an entry or distress or bring an action to recover any land or rent.

1917
SMITH
v.
DARLING.
Anglin J.

shall be exercisable, and section 6 defines when that right shall be deemed "to have first accrued." The identity of the language used in section 40 with that found in sections 5 and 6 is most significant.

Section 20, on the other hand, deals with a period of limitation reckoned not from the time of the first accrual of the right of action to redeem, but from another and usually an entirely different date, namely,

> the time at which the mortgagee obtained the possession or receipt of the profits in any land or the receipt of any rent comprised in his mortgage,

which it fixes as that from which the period of limitation upon the right of the mortgagor, or any person claiming through him, to bring an action to redeem shall be computed.

The equitable right to sue for redemption accrues as soon as non-fulfilment of the condition or proviso for defeasance has made the estate of the mortgagee absolute at law. It is not from the date of that first accrual of the right to bring an action to redeem that the prescriptive period runs under section 20, but from that of obtaining possession or receipt of the profits of the land. The right of redemption, when that occurs, may not be in

> the person to whom such right first accrued.

Yet it is from the cesser of his disability or his death that the five years' period under section 43 is to be reckoned. These are the incongruous features which seem to me to afford practically conclusive evidence that the provisions of section 40 were not intended to be applicable to the case specially dealt with by section 20. Section 43, as Sir George Jessel said in *Kinsman* v. *Rouse*(1),

> evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed.

(1) 17 Ch.D. 104.

Section 20, on the other hand, deals with cases where a mortgagee has taken the possession to which the terms of his deed entitled him. To quote the learned Chief Justice of Ontario:

> The words, "as herein mentioned," in s. 40 (*i.e.*, of the Revised Statutes of 1914), it will be observed, apply to the time at which "the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues." That is a matter dealt with by sec. 6, which defines the time at which the right first accrues in various cases, none of them being the case of a mortgagor seeking to redeem, and it is, I think, to these provisions that section 40 refers. The mortgage sections do not define the time at which the right to redeem shall be deemed to have first accrued, but the provision is that the action shall not be brought but within ten years next after the time at which the mortgagee obtained possession or receipt of the profits of the land.

Although, as was pointed out by Sir John Beverly Robinson in *Hall* v. *Caldwell*(1), the sole apparent object of making the special provision for mortgagors' actions to redeem, now found in section 20, was to settle the time from which the prescriptive period governing them should be computed (see comment of Patterson J. A. in *Faulds* v. *Harper*(2), at pp. 556-7), and although such actions, especially when the mortgagee is in possession after default, should be regarded as actions to recover lands, the fact that the statute makes such a special and essentially different provision for them takes them out of the operation of sections 5 and 6.

Because the terms in which it is couched in my opinion as clearly preclude its application to cases within section 20 as they make obvious its reference to cases within sections 5 and 6, I respectfully concur in the conclusion of the Appellate Division that the disabilities section (40) with the ancillary sections 41 and 42, does not apply to actions to redeem. But

(1) 8 U.C.L.J. 13. (2) 9 Ont. App. R. 537.

1917
SMITH
v.
DARLING.
Anglin J.

for the respect which I entertain for the eminent judges of this court and of the former Court of Error and Appeal of Upper Canada who held contrary opinions, I should have reached this conclusion without much hesitation.

Appeal dismissed with costs.

Solicitor for the Appellant: *A. B. Cunningham.*
Solicitor for the respondent Darling: *J. A. Jackson.*
Solicitors for the respondents Toner: *Nickle, Farrell and Day.*

GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT ....) APPELLANT;

AND

THE CITY OF CALGARY (PLAINTIFF) RESPONDENT

1917

*Feb. 16.
*June 22.

ON APPEAL FROM THE DISTRICT COURT JUDGE, DISTRICT OF CALGARY.

Municipal corporation—Assessment and taxation—Railway taxation—Acreage or mileage basis—"Roadway"—"Superstructure"—C.O. of the N. W. Territories, 1898, c. 71, s. 3—Crown lands—Equitable ownership—"B.N.A. Act, 1867," s. 125.

A railway company which, having purchased Crown lands and paid part of the price of sale is, by arrangement, entitled to possession and to complete the purchase later, the title remaining in the meantime in the Crown, is properly assessed as the equitable owner and actual occupant of the land.

Smith v. *Vermillion Hills* (49 Can. S.C.R. 563, [1916] 2 A.C. 569, and *Southern Alberta Land Company* and *The Rural Municipality of McLean* (53 Can. S. C. R. 151, followed.

Per Davies J.—The word "superstructure" is intended to mean only the superstructure constituting the line of railway and does not include any buildings or structures upon or adjoining the line of railway, which, though used for railway purposes alone, form no part of that line.

Per Idington J.—The "roadway and superstructure thereon" comprises all the acreage of trackage and superstructure of any kind in use for actual running of the railway and must be assessed on the mileage basis; and the land to be assessed on the acreage basis is the land not in use, but held for prospective use.

Per Duff J. and Brodeur JJ. *dissenting.*—"Roadway" means the continuous strip commonly known as the "right of way."

APPEAL from the judgment of the District Court judge, of the District of Calgary, confirming the assessment made upon the lands of the appellant by the respondent.

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

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

The facts and the issues raised on the present appeal are fully stated in the above headnote and in the judgments now reported.

Geo. H. Ross K.C. for the appellant.

Clinton J. Ford for the respondent.

THE CHIEF JUSTICE.—I concur somewhat reluctantly in the conclusion reached by Sir L. Davies, and by my brother Anglin. My inclination would have been to include in the exemption the tracks running to the roundhouse and the other sidings used for ordinary terminal purposes. I defer, however, to what must be the better opinion of my brethren.

DAVIES J.—This is an appeal from the judgment of the District Court judge confirming the assessment made upon the lands of the appellant in the City of Calgary and occupied and used by them as terminals and station grounds.

The parcel of land in question consists of a large block situate almost in the heart of the city, and in near proximity to its business centre. It contains in all 25.5 acres of which quantity 3.64 acres are comprised in what was assessed as the "roadway" of the railway crossing, through this block or parcel of terminal lands.

This "roadway" was assessed separately at $1,000 per mile under section 3 of ch. 71 Consolidated Ordinances of the North West Territories, 1898.

This part of the assessment is not appealed against, the appeal being only as to the assessment of the remaining portion of the Terminal Block comprising 21.86 at $8,000 per acre.

The facts agreed to by the parties to the appeal were as follows:—

1. The property which forms the subject matter of this appeal is the same property as is specified in the Order-in-Council dated the 27th day of January, 1914, which is, by agreement, made part of the record on appeal herein.

2. The appellant purchased the land in pursuance of the Order-in-Council and has paid $125,000 on account thereof, being one-half the purchase price. The other half of the purchase price should have been paid in June, 1914, but by arrangement with the Dominion Government has been deferred upon the appellant paying interest on the unpaid balance.

The ordinance in question, upon the construction of which this appeal depends, is as follows:—

1. Every railway company whose railway is not exempt from taxation shall annually transmit on or before the first day of February to the secretary-treasurer of every municipality, and to the secretary or other officer of every public school district through which the company's railway may run, a statement to be signed by some authorized official of a company shewing:—

(1) The quantity of land other than the roadway owned or occupied by the company, which is liable to assessment.

(2) The quantity of land occupied by the roadway.

(3) Whether such statement on sec. 1 of this ordinance is placed in the hands of the assessor of any such municipality or school district or not, the assessor of every municipality or school district, as the case may be, shall assess the lands of such railway company and the roadway thereof, and the superstructure of such roadway, and give such notice as is required by sec. 2 hereof:—Provided that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile.

The evidence shewed that the assessor did not ascertain the number of miles of trackage laid down upon the terminal grounds, and the area of land necessary for the proper usage of such trackage lines to roundhouses, warehouses, etc., and assess such area on the basis of $1,000 per mile of trackage or other mileage rate, but that he assessed a 100-foot strip as shewn on the location plan *and that strip only* on the basis of $1,000 per mile. That strip contained 3.64 acres. Another 100-foot strip, running from the eastern boundary of the terminals property to the turntable, comprises an area of 3.64 acres, and is in actual use and still another strip running from the

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Davies J.

eastern boundary of the property to *the station* comprises an area of 4.08 acres.

The whole block of 25.5 acres had been purchased from the Crown in right of the Dominion for the sum of $250,000 of which $125,000 had been paid, and the remainder was still unpaid. The legal title still remains in the Crown, but the Grand Trunk Pacific Company is the equitable owner and the actual occupant.

Its liability, therefore, to be assessed as such equitable owner and actual occupant is under the decisions of this Court unquestionable. See *Calgary and Edmonton Land Co.* v: *Attorney-General of Alberta* (1); *Smith* v. *Vermillion Hills*(2), affirmed on appeal to Privy Council(3); and *Southern Alberta Land Co. v. McLean*(4).

The contention therefore of the appellant that the assessment is void, because it does not assess the interest of the railway company apart from that of the Crown, and that the two interests cannot be separated must fail. The company is properly assessed as the equitable owner and the actual occupant of the land, and there is nothing to warrant a suggestion that any interest of the Crown has been assessed.

The other contention of the appellant that none of the land in question should be assessed as acreage, but only on a mileage basis reckoned, "(*a*) on the distance across the property from east to west; or (*b*) on the number of miles of trackage laid on the land; or (*c*) on the number of miles of trackage laid *or proposed to be laid* on the land" need, in my judgment, only be mentioned to be dismissed. They practically amount to total exemption of the whole block of 25.5 acres,

(1) 45 Can. S.C.R. 170.
(2) 49 Can. S.C.R. 563.
(3) [1916] 2 A.C. 569.
(4) 53 Can. S.C.R. 151.

from the assessment on an acreage basis, and affirm that it all should be assessed on the mileage basis reckoned on one or more of the three plans or bases above mentioned.

The appellants also contended that if the above contentions were rejected, the 4.08 acres comprised in a 100 foot strip of the rail track, running from the eastern extremity of the property to the station, and the 3.64 acres on which the track to the turntable runs, should not be assessed as acreage but only on a mileage basis.

There is much to be said for each and both of these contentions. I have considered carefully alike the English and American cases on this important question of railway taxation which were called to our attention. They are, in a sense, valuable as shewing the view the respective courts took upon the particular statutes authorizing the assessments they were dealing with.

The divergent views expressed in several of the American cases are not surprising when the different language of the statutes is considered.

We must, of course, be guided by the language of the North West Territories Ordinance above quoted, and the question in this appeal in the last analysis is reduced to this: What is the meaning and extent of the words used in that ordinance—"The roadway thereof and the superstructure thereon?"

I agree with the meaning put upon the word "superstructure" by Mr. Justice Scott in *In re Canadian Pacific Railway Co. and Town of Macleod*(1), where, at p. 197, he says:—

> I am of the opinion that the word "superstructure" as it is used therein is intended to mean and include only the superstructure constituting the line of railway, and that it is not intended to include, and

(1) 5 Terr. L.R. 192.

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Davies J.

does not include, any buildings or structures upon or adjoining the line of railway which, though used for railway purposes alone, form no part of that line of railway. In this view the term would include the ties, rails, turntables, bridges, culverts, etc., and (following the principle laid down in *South Wales Rly. Co.* v. *Swansea Local Board*(1), it would also include railway platforms, but it would not include station or office buildings, warehouses, storehouses, or dwellings or lodging houses for employees of the railway. Neither would it, in my opinion, include roundhouses.

I do not wish to be understood in adopting this meaning of the word "superstructure" to include *turntables*, and confess I cannot understand why the learned judge did include them.

I will not attempt any definition of the word "roadway" or what it comprises. I think to a large extent it is a question of fact to be decided in each case.

In the case before us the line of railway track forks as it enters the block of 25 acres of land in question, one fork running to the general station at the south-western corner of the block of land, and the other fork continuing on in a westerly direction through the city.

I am of the opinion that the contention of the appellant is right as to this track to the station being part of the "roadway" and not being assessable as acreage, but on a mileage basis. I cannot see on what reasonable ground it can be excluded, and held not to be part of the roadway. It is the track which conveys all passenger traffic to and from Calgary. I would accept the evidence of Graves, the engineer of the Grand Trunk Pacific Company, as to the necessary width of the road-way. He says:—

> The necessary area you have to have each side of your lead track or your yard tracks, whichever it is, I have figured it here about twenty feet outside of the track.

I understand the acreage comprised in that strip would amount to 4.08 acres, which, in my opinion, has been wrongly assessed on the acreage basis.

(1) 24 L.J.M.C. 30; 4 El. & B. 189.

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Davies J.

I do not accept the contention of the appellant as to the tracks running to the roundhouse being similarly treated, or the other sidings on this block of land which are being used for ordinary railway terminal purposes.

The result, in my opinion, is that the judgment below should be varied by substituting the assessed value of the roadway or line to the station upon a mileage basis of $1,000 a mile, instead of an acreage basis of $8,000 an acre at which it has been assessed, and that such judgment should otherwise be confirmed; the Registrar will make the necessary calculations.

As the area of this part of the roadway comprises 4.08 acres, and the plans filed shew its mileage, there should be no difficulty in making the necessary variation in the judgment by substituting the mileage assessment under the ordinance for the acreage assessment adopted by the judgment appealed from of this line to the station.

There should be no costs, as the appellant, in my view, obtains a small, though a material, modification of the judgment appealed from.

IDINGTON J.—This appeal raises the puzzling question of what is the meaning of that part of the provision in ch. 71, C.O. of the Territories, 1898, intituled "An Ordinance respecting the Assessment of Railways," which reads as follows:—

> Provided that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile, C.O.C. 71, s. 3.

The appellant has been assessed for some 25.5 acres of land in Calgary, of which a strip of a hundred feet wide has been assessed on the basis of $1,000 a mile, and the remainder at $8,000 an acre.

The strip of a hundred feet wide is supposed to

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Idington J.

represent the roadway within the meaning of the words of the provision just quoted.

The Railway Act of Canada then in force, which would seem to be the only one the North West Council could have had in view in enacting as above, provided for railway companies taking for use of railways a width of thirty-three yards, which at stations could be increased to one hundred yards for the length of six hundred and fifty yards. And I imagine such spaces were what the legislation in question probably had in view.

I further imagine they had a wider vision of things than the view which the assessor stands for in his long narrow strip of unvarying width, and that the valuation of $1,000 a mile was intended to cover the varying or various widths so used for the railway.

The nearest I can approach that which was intended to be thus comprehended seems to be to allow the acreage of trackage and superstructure of any kind in use for actual running of the railway, at the point now in question as covered by this low but fixed value, to be applied for assessment purposes.

I would exclude from the benefit thereof, land not in use, but held for prospective use.

There is no principle to guide us in the interpretation of this Act.

A mere arbitrary value is fixed for what common knowledge tells us is probably worth ten times the value fixed.

Roughly speaking the land taken is possibly now, in fact, of the value which was then arbitrarily or as matter of expediency, universally fixed for each twelve acres, yet I imagine far beyond what it was generally speaking likely to be worth at the time of the enactment.

I cannot hold roadbed and roadway as interchangeable terms in this connection. Nobody ever dreamt of assessing the land alongside the actual roadbed within the lines of the right of way.

Nor can I adopt the words "right of way" as convertible into the word "roadway."

Nor can I imagine that the universal exemption of highways from taxation, as we find them now without private ownership, is to be taken as a guide.

The most ardent advocate of the single tax principle, which is possibly right, would not think of taxing such a highway. Then why a railway should be taxed no doubt puzzled some people, and why it should be exempt puzzled more, and hence a mere arbitrary expedient or compromise was resorted to and we have to make the best of the curiosity.

I understood in argument ten acres would cover what I indicate as reasonable interpretation of what is presented.

In other words, seven acres more than the assessor allowed should come under the statutory valuation.

The appeal should therefore be allowed by the reduction of the assessment by $56,000. I doubt if costs should be allowed either party.

DUFF J.—I have not been able to arrive at a conclusion entirely satisfactory to my own mind in this appeal, but on the whole I think the balance of argument inclines in favour of the view that "roadway" means the continuous strip commonly known as the "right of way."

In this view the appeal should be dismissed with costs.

ANGLIN J.—I concur with Mr. Justice Davies.

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Brodeur J.

BRODEUR J.—The questions at issue in this appeal are:—(1) Whether the yards of the appellant company in the limits of the city of Calgary are liable to taxation; (2) If they are liable to taxation, whether they should be assessed on the mileage or acreage basis.

On the first point, the appellant claims that the property belongs to the Crown in right of the Dominion, and that under the provisions of the "B.N.A. Act" those lands cannot be taxed.

The appellant has purchased from the Dominion Government the lands in question and, as the purchase price has not been entirely paid, the legal title is still in the Crown; but the property has been occupied by the appellant company, which has in the lands such interest as may be assessed, and taxed. It does not appear that any attempt has been made to assess the interest of the Crown in respect of those lands, and it has been decided by this Court in the following cases: *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (1), *Smith* v. *Vermillion Hills*(2), affirmed on appeal to the Privy Council (3), and in *McLean* v. *South Alberta Land Co.*(4), that the provincial legislature could authorize the assessment of a person in respect of his occupation of lands of which the bare legal estate is vested in the Crown.

Applying those decisions to the present case, I see that we have nothing before us to shew that the appellant is assessed for the interest of the Crown in the said land; but that assessment simply covers the interest which the appellant company possesses.

On the second point raised by the appellant, *viz.*, that the assessment should be made on the mileage

(1) 45 Can. S.C.R. 170.
(2) 49 Can. S.C.R. 563.
(3) [1916] 2 A.C. 569.
(4) 53 Can. S.C.R. 151.

basis, we have to examine and to construe the provisions of the Ordinance respecting the assessment of railways, ch. 71, "Territories' Act, 1898."

By the provisions of that Act, the railway companies are bound to give to every municipality an annual statement shewing—

1st, the quantity of land other than roadway owned or occupied by the company which is liable to assessment, and 2nd, the quantity of land occupied by the roadway;

and then the assessor of the municipality assesses the lands of those railway companies, and the roadway and the superstructure; and the Ordinance contains a proviso that

the roadway and superstructure thereon shall not be assessed at greater value than $1,000 per mile.

As we see, there is a distinction between the assessment to be placed on the land of a railway company and on its roadbed.

The appellant contends that the roadway would include, not only the one hundred feet right of way mentioned in the "Railway Act," sec. 177, but would include also the land used for sidings, station grounds, yards, freight tracks, freight sheds, turntables, etc., in other words, everything that goes to make up what is strictly railway property.

On the other hand, the City of Calgary contends that the property of a railway company to be assessed on a mileage basis should include simply the right of way.

The word "roadway" in the North West Territories Ordinance is not defined, and it is not defined either in the "Railway Act." Section 177, however, of the "Railway Act" determines what constitutes the right of way, and what property could be acquired by a railway for works, for stations, yards, warehouses, etc. For the right of way proper, 100 feet in breadth is generally allowed to be taken by the railway company.

1917

GRAND TRUNK PACIFIC RWAY. CO. v. CITY OF CALGARY.

Brodeur J.

In cases, however, where land should be required for stations, depots and yards, one mile in length by 500 in breadth, including *the width of the right of way*, could be taken.

These provisions of the "Railway Act," and that determination of what is the right of way should help us in determining what the North West Legislature intended when it spoke of the roadway.

I think that the term "roadway" should be applied to that part of the railway leading from one place to another, and should include the whole right of way where it is used for no other purpose than as a right of way for the railway track. It would not include the yards and the stations, and when the statute speaks of superstructure, it refers, in my opinion, not to the buildings which could be erected, but to the ties and the rails which constitute the railway property.

Bouvier in his dictionary says that the roadway is the right of way which has been held to be the property liable to taxation. That is the interpretation which has been generally accepted in the North West, and which was made the subject of several decisions, *viz.*, in the cases of *Canadian Pacific Railway Co. and Macleod* (1), at p. 197; *In re Edmonton and Canadian Pacific Railway Co.*(2), *Canadian Northern Railway Co.* v. *City of Edmonton.*(3).

I would therefore consider that the assessment made upon the property occupied by the appellant was a proper assessment and that the appeal should be dismissed with costs.

Appeal allowed without costs.

Solicitors for the appellant: *Short, Ross, Selwood, Shaw and Mayhood.*

Solicitor for the respondent: *Clinton J. Ford.*

(1) 5 Terr. L.R. 192. (2) 6 West L.R. 786.
(3) 5 West W.R. 1088.

CLAYTON PETERSON..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1917

*May 16.
*June 22.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Perjury—Evidence—Corroborative evidence—Criminal Code, section 1002.

The appellant was convicted of perjury for swearing that "he did not get from one Frank Brunner a cheque for four thousand dollars." Brunner swore that he gave the cheque in question to the appellant and the only evidence relied on as corroborative of his was that of one Smith, bank manager, who swore that he cashed the cheque for the appellant.

Held, that the evidence of Brunner was "corroborated in some material particular * * * implicating the accused," by the evidence of Smith, as required by section 1002 of the Criminal Code.

APPEAL from the judgment of the Supreme Court of Saskatchewan, rendered on a case reserved for the opinion of the Court by the trial judge.

The facts on which the questions of law for decision depend are sufficiently stated in the above headnote.

H. S. MacDonald K.C. for the appellant.
Sampson K.C. for the respondent.

THE CHIEF JUSTICE.—The appellant was not charged with having, when examined as a witness before the Commission appointed by the Legislative Assembly, denied the receipt by him of a cheque for $4,000 signed by one Brunner. The charge in the indictment is that Clayton Peterson swore he "did not get from Frank Brunner a cheque for four thousand

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

1917

PETERSON v. THE KING.

The Chief Justice.

dollars." Examined as a witness at the trial, the appellant maintained his position. Brunner, on the other hand, swore that he did give the accused the cheque. In these circumstances, one Smith, a bank manager, was examined to prove that he cashed for Peterson a cheque of Brunner for $4,000. That evidence was clearly admissible to prove the possession by Peterson of the cheque in question, which was a fact tending to corroborate in a material particular the actual delivery of the cheque by Brunner to Peterson and that is the gravamen of the perjury charge. Corroboration may result from any evidence which tends to give certainty to the contention in support of which it is advanced. Although the fact that A. is found in possession of B's cheque may not be absolute corroboration of the statement that B. gave A. the cheque, that possession being consistent with the possession obtained otherwise than through B., considered in connection with all the other evidence, the fact of possession may help the jury to come to a conclusion as to the truth or falsity of the statement. I am disposed to think that, although the judge's charge might have been more explicit, the jury could reasonably come to the conclusion they reached and there was no mistrial.

The appeal should be dismissed with costs.

DAVIES J.—The sole question in this criminal appeal is whether the evidence of Frank Brunner, who testified that he had given to the appellant a cheque for $4,000 for or upon account of the Licensed Victuallers Association, was

corroborated in some material particular by evidence implicating the accused

as required by section 1002 of the Criminal Code.

The case reserved for the opinion of the court by the trial judge states that

The accused was convicted of perjury for swearing that "he did not get from Frank Brunner a cheque for four thousand dollars upon the Licensed Victuallers Association."

Brunner swore that he gave the cheque in question to the accused. The only corroborative evidence was that of Smith, the manager of the Bank of Ottawa, who swore that he cashed the cheque for Peterson.

The cheque in question was not Brunner's cheque, but the cheque of the Licensed Victuallers Association, and was signed by Brunner, as treasurer, and one Wilson, the secretary of that Association. Under these circumstances, is the fact that Peterson had this cheque in his possession corroborative evidence that it was given to him by Brunner?

A majority of the Supreme Court of Saskatchewan held that it was, and I agree with them.

In his evidence, Peterson testified, not only that he did not get the $4,000 cheque from Brunner, but that he did not get such a cheque at all or any money, except about $200.

I agree with Chief Justice Haultain that this clear and unequivocal statement by Peterson excludes the theory or inference advanced in argument that he might have got the cheque from some one else than Brunner.

This being so, Smith the bank manager's evidence must be held to be corroborative of Brunner's statement that he gave the cheque in question to Peterson.

Smith swears he received the $4,000 cheque of the Licensed Victuallers Association from Peterson on the 13th December, 1913 (the day Brunner says he gave it to Peterson), and cashed it for him.

I would therefore dismiss the appeal.

IDINGTON J.—I am of the opinion that the evidence of Brunner that he gave appellant the cheque in question was, in the language of section 1002 of the Criminal Code, "corroborated in some material parti-

1917

PETERSON v. THE KING.

Idington J.

cular * * * implicating the accused" by the evidence of Smith, the manager of the bank, that on the same day on which the cheque was dated and alleged to have been given, the appellant was in possession thereof and that it was cashed by him.

I therefore think the appeal should be dismissed.

DUFF J.—The question presented by this appeal as argued before us is really an academic question, because the argument very largely proceeded upon an abstract from the facts, not by any means presenting the full force of the case made by the Crown. The facts I am about to state in themselves shew the contention of the appellant to be beyond the pale of argument.

At a meeting of the executive committee of the Licensed Victuallers' Association in Regina, it was arranged that the appellant Peterson was to use money in connection with the Association's opposition to a bill then before the legislature of Saskatchewan, and the appellant and one Brunner, who was the treasurer of the Association, were authorized to employ the funds of the Association for that purpose. The occurrences at this meeting were proved by the evidence of the witness, George Sharpe. Brunner's evidence is explicit to the effect that on December 13th, 1913, he gave Peterson a cheque for $4,000, a cheque of the Licensed Victuallers' Association, signed by Brunner as treasurer, and by another officer of the Association; and Smith, the bank manager, proves by his evidence that on the same day a cheque answering the description of that which Brunner says he gave the appellant was cashed by the appellant. The evidence of the appellant, upon which the charge is based, was to the effect that he "did not get from Frank Brunner a cheque for $4,000 upon the account of the Licensed Victuallers' Association."

The ground of appeal is alleged non-compliance with the condition of section 1002 of the Criminal Code, which prescribes that upon a charge of perjury, the accused shall not be convicted on the evidence of one witness

unless such witness is corroborated in some material particular by evidence implicating the accused.

It appears to me, as I have already said, that in view of the evidence of Sharp and Smith the contention is not seriously arguable. The principle to be applied is stated by Mr. Justice Wightman in *Reg.* v. *Boyes*(1), at p. 320.

It is not necessary that there should be corroborative evidence as to the very fact, it is enough that there should be such as would confirm the jury in the belief that the accomplice is speaking the truth.

In the circumstances mentioned, Brunner's official position as treasurer of the Association, the authority given by the Association to Peterson and Brunner jointly to employ the funds of the Association, the fact relied upon as corroborative evidence that on the very day on which Brunner says he gave the cheque to Peterson, Peterson had such a cheque and cashed it affords, it appears to me, superabundant corroboration within the requirements of section 1002.

ANGLIN J.—The question on this appeal is whether there was any evidence proper to be submitted to a jury as corroboration of the testimony of Frank Brunner that he had given to the appellant Peterson a cheque for $4,000 upon the account of the Licensed Victuallers Association. Section 1002 of the Criminal Code prescribes that upon an accusation for perjury the accused shall not

(1) 1 B. & S. 311.

1917

PETERSON v. THE KING.

Anglin J.

be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

The appellant was charged with having committed perjury in swearing that he

did not get from Frank Brunner a cheque for $4,000 upon the account of the Licensed Victuallers Association.

The corroboration relied on by the Crown was the testimony of Mr. Smith, manager of the Bank of Ottawa, that the appellant had brought to his bank, on the same day on which Brunner swore that he had given it to him, a cheque for $4,000 on the account of the Licensed Victuallers Association, and that this cheque was cashed and its proceeds handed to the appellant. In my opinion, the facts deposed to by Smith, that on the very day on which Brunner swore he had given Peterson the cheque, the latter was in possession of it and cashed it, was evidence implicating the accused, which the learned trial judge could not properly have withdrawn from the jury as corroborative in material particulars of the testimony of Brunner, within the meaning of section 1002 of the Code. The weight to be attached to it was, of course, entirely for the jury to determine. But that it might confirm the jury in the belief that Brunner was speaking the truth, seems to me not to admit of question; *Reg.* v. *Boyes*(1); *Rex.* v. *Daun*(2); *Rex v. Scheller* (3); *Radford* v. *Macdonald*(4).

Appeal dismissed with costs.

(1) 1 B. & S. 311, 320.
(2) 12 Ont. L.R. 227.
(3) 23 Can. Cr. C. 1; 16 D.L.R. 462.
(4) 18 Ont. App. R. 167.

ETIENNE LEFEBVRE (PLAINTIFF)...APPELLANT;

AND

THE TOWN OF GRAND-MÈRE (DEFENDANT).....RESPONDENT.

1917

*Feb. 26, 27.
*June 22.

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

Negligence—Municipal corporation—Statutory authority—Franchise—Electric transmission—Connecting wires—Public nuisance—Art. 5641 R.S.Q., (1909) s. 11.

The granting of a municipal franchise, to construct and operate an electric lighting system in a town and to use the highways for that purpose, does not entail upon a municipal corporation the duty of supervision of the construction or the operation of the works authorized.

The powers conferred by section 11 of article 5641 R.S.Q., on a municipal corporation to regulate the use of public streets and properties, are legislative or governmental and neither imperative nor ministerial; and injury from a failure to exercise them does not give rise to a right of action except where specifically so provided.

The duty of a municipality to keep its highways free from nuisances is owed only to persons using the highways and not to ratepayers or others upon or in occupation of private properties; and a municipal corporation, which grants a franchise authorized by statute, cannot be held answerable in damages for an injury, sustained by an individual on his own property, ascribable to negligence in the carrying out of the undertaking for which such franchise has been given.

The Chief Justice and Idington J. dissented.

Judgment of the Court of King's Bench (Q.R. 25 K.B. 124), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Superior Court, District of Three Rivers, and dismissing the action with costs.

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

(1) Q.R. 25 K.B. 124.

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

The circumstances in which the action was instituted and the questions in issue on the present appeal are stated in the head-note and in the judgments now reported.

N. K. Laflamme K.C. and *A. Lefebvre* for the appellant.

J. L. Perron K.C. and *Paul St. Germain K.C.* for the respondent.

THE CHIEF JUSTICE. (dissenting)—I agree with Mr. Justice Idington.

IDINGTON J. (dissenting)—The facts, found by the learned trial judge that appellant suffered very serious injuries from an electric current conveyed from an electric lighting plant in respondent town, by means of and by reason of another electric plant's wires unused and out of order having been long tolerated by the respondent on the streets of said town, are not seriously denied.

The first named plant was used for lighting the town and had been erected pursuant to a franchise granted by respondent.

The owners of the secondly named plant had never got authority from any one entitled to give it, but by dint of sheer audacity against which the respondent had formally protested, proceeded to erect poles and wires upon the streets of the town where, connected with the former plant, there had already been erected poles and wires.

The two sets of wires came dangerously close together from the time the second was erected, and as the result of neglect the latter got out of order and in places somewhat delapidated, and very obviously a serious source of danger to those using the highway, as

well as others who might be placed near thereto, as appellant was, when he came in contact with something liable to conduct the current of electricity in use by those operating the first named plant.

This constituted in my opinion a public nuisance upon the highway, which was, as such, under the usual jurisdiction of respondent. But the respondent actually owned the road allowance over which, at that part in question, the highway ran.

Much elaboration in argument is submitted to support the propositions that the toleration of such a public nuisance by respondent was legal, or at least not a breach of duty, and in any event that its failure to use such powers as it had for the abatement thereof, was a mere omission of the observance of duty and hence not actionable.

If the like accident to that in question had happened, as it well might have done, to a traveller on the highway, could respondent have set up the answer put forward herein of the breach of duty being an omission and not a commission?

The duty imposed to maintain the highway in a travellable condition would have been the answer.

The appellant cannot avail himself of that, I imagine, in respect of the lane.

The very undesirable distinction that has grown up in our English law between nonfeasance and malfeasance, on the part of municipal corporations, when it comes to deciding a question of their legal responsibility to those suffering injury, as the result of either, does not seem to me to have so much room for expansion in Quebec if due heed is had to article 1053 and following of the Code.

Be that as it may, I cannot think that under either

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Idington J.

system of law the owner of any property—as respondent was of that in question—can legally tolerate upon his premises a nuisance obviously liable to produce injury to the person or property of another in the vicinity.

That is what respondent clearly was guilty of in relation to the secondly named electric plant being, without the first vestige of legal right, allowed so long to continue in the condition it was and constitute such a nuisance.

I suppose if the same audacious and venturesome spirit as had conceived this enterprise had discovered in the road allowance, owned by the respondent, an excellent specimen of stone and proceeded to quarry it and blasted therein, as a free miner might, from day to day and been enabled by smooth talk to set the council and others to sleep, we would be told, if some neighbour got injured by the flying rocks and sought a remedy against the respondent, that the sleeping officials had never authorized it and hence it was all a matter of omission and the law had no remedy to apply.

I do not think that is the law. I doubt if any one would contend in such a case, that it is. That thing would be too noisy. Electricity moving silently and unobtrusively does not seem to be so effective in rousing the average sleepy official.

Each operation under the circumstances would constitute a nuisance. I cannot in principle distinguish the two cases. The one man would suffer from a shower of flying rocks, and the appellant did suffer from a current of two thousand volts of electricity producing disastrous results.

The article 5641 of the Revised Statutes of Quebec, referred in argument, standing by itself might not avail much; behind that there is a legal principle which is

represented by the maxim *sic utere tuo ut alienum non laedas.*

That article and others gave ample powers to the respondent, if it had seen fit, to use them to have put an end to the wretched condition of things that existed upon property it owned.

Indeed the lawlessness was tolerated when those daring to enter and dig up the streets for their own purposes ought to have been promptly suppressed by an able-bodied constable when mild and courteous protests were of no avail.

Dr. Ricard as a private citizen, owning a franchise, had no other resort than tedious litigation. It was otherwise with respondent that was liable to have been indicted for the continuance of such a nuisance.

The gist of the whole matter is that the respondent alone could have suppressed or abated the nuisance, though a private citizen could not unless he chose to prefer an indictment.

It was just as much at fault as the owner of a falling house and for the like reason as prevails in law in the case of such a house out of repair falling on the neighbour or his property when he, owning such a nuisance, who alone could have averted the loss caused by its fall is held liable.

I am sorry to hear it said that people using the protest form of expressing resentment had no means of knowledge of what they were about. It was an obvious duty under such circumstances as evoked the protest and mild submissions to justice in years of continuous litigation about the very thing that is now in question to have known a great deal more than the respondent pretends to have known and the law will impute that knowledge to it.

As to the want of notice of action, I think it was

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Idington J.

sufficient and the judge's discretion as to its not having been served within the delay mentioned in the statute was properly exercised under the circumstances.

The entire object of such a notice being required by the statute is to avoid stale demands being put forward and to enable the corporation blamed to investigate whilst the facts are present to the minds of those concerned or likely to know the facts.

I think the appeal should be allowed with costs here and below and the judgment of the learned trial judge be restored.

DUFF J.—I concur in the opinion of Mr. Justice Brodeur.

ANGLIN J.—On the facts in evidence I should certainly not be prepared to find that there had been any negligence on the part of the unfortunate plaintiff. Neither do I think that the learned trial judge erroneously exercised in his favour the discretion conferred by Art. 5864 R.S.Q. to excuse the giving of the notice which it prescribed when it is proved that the giving of it was prevented

by irresistible force or for any other reason deemed valid by the court or a judge.

The narrow construction which has been put upon a corresponding clause of the Ontario municipal law does not commend itself to me as so satisfactory that I would hold that the application of the exonerating provision of the Quebec statute, different in its terms and somewhat more elastic, should be equally restricted.

Although convinced that the plaintiff is deserving of sympathy, I know of no legal duty owed to him which the defendant municipality has failed to discharge, breach of which would amount to actionable fault.

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Anglin J.

The granting of a municipal franchise to Dr. Ricard to construct and operate an electric lighting system in the town and to use its highways for that purpose and the recognition of the Phoenix Syndicate as transferee of his rights were admittedly within the statutory powers of the respondent corporation. Its position in regard to third parties injured in the course of the construction or operation of the system for which the franchise was so given was at least as favourable as it would have been had the works been constructed and operated for it by an independent contractor. Whatever its liability might be for injury caused by a danger inherent in the undertaking made the subject of such a contract, as owner it would not be answerable for the effects of collateral negligence on the part of its contractor. The injury sustained by the plaintiff was clearly due to negligence of that kind.

The granting of a franchise, such as was given to Dr. Ricard, does not entail upon a municipal corporation granting it a duty of supervision of the construction or the operation of the works authorized by the franchise. The powers conferred by paragraphs 11, 12 and 16 of Art. 5641 R.S.Q. are clearly legislative or governmental and injury resulting from a failure to exercise them does not give rise to a right of action except where specifically so provided. The liability of the municipality for the bad state of roads, streets, avenues, etc., declared by clause 11, does not cover such a case as this. Clause 16 is more directly applicable, if the Phoenix Syndicate's installation is not taken out of its operation by the saving of existing rights in clause 12. Clause 12 was enacted only in 1903 and was probably inapplicable to the exercise of the franchise powers conferred on Dr. Ricard in 1901 and by him transferred to the Phoenix Syndicate. If

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Anglin J.

applicable, the power conferred by clause 16 is a governmental power to pass by-laws and failure to exercise it, in the absence of specific provision to that effect, cannot form the basis of a right of action.

But it is said that liability of the municipality to the plaintiff arose from a failure to fulfil the duty of keeping its highways free from nuisances and from the presence thereon of things which from their nature or their situation or both were a source of danger. This duty is said to exist both at common law and by virtue of the statutory provision of Art. 5641 R.S.Q., s. 11, already referred to. Any such duty, in my opinion, however, is owed only to persons using the highways—not to ratepayers or others upon or in occupation of private properties. Had the plaintiff been injured while travelling upon or otherwise lawfully using the highway, it is quite possible that he would have had a good cause of action either under the statute or at common law. But I know of no principle of law upon which a municipal corporation, because it grants a franchise authorized by statute, can be held answerable in damages for an injury sustained by an individual on his own property ascribable to negligence in the carrying out of the undertaking for which such franchise has been given. I do not wish to be understood as expressing the opinion that an injury so sustained would give a cause of action against the municipality if ascribable not to negligence in carrying on the undertaking but to danger inherent therein. That question is not before us and there would seem to be not a little to be said for the view that the statutory authorization of the grant of the franchise implies immunity of the municipal corporation from liability even for injury attributable to a danger inseparable from the undertaking.

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Brodeur J.

BRODEUR J.— Nous avons à décider en cette cause si la municipalité intimée est responsable de l'accident dont le demandeur a été victime. Le question présente beaucoup d'intérêt au point de vue de la responsabilité des municipalités. Voici, en deux mots, les faits de la cause:

En 1901, la ville de Grand 'Mêre a concédé à un nommé Ricard le privilège de fournir l'électricité aux contribuables et à cette fin d'ériger des poteaux dans les rues et d'y poser des fils électriques.

Plus tard, savoir le 2 décembre 1905, le gouvernement provincial a accordé une charte à une compagnie appelée "La Compagnie Electrique de Grand'Mêre" et lui a donné le pouvoir de fournir l'électricité dans différentes municipalités, y compris celle de Grand' Mêre. Mais, en outre, de cela, il lui a donné le pouvoir, en autant que la ville de Grand'Mêre était concernée,

de passer partout ou il sera nécessaire et sans autre autorisation que celle résultant des lettres patentes de la dite compagnie dans les, sous les, et au-dessus dcs chemins et places publiques, rues et ruelles de la dite ville de Grand' Mêre.

Armée de cette charte, la Compagnie Electrique de Grand'Mêre est venue poser des poteaux dans les rues de la ville et a commencé à y installer ses fils électriques. La municipalité protesta contre cette action de la compagnie; mais celle ci se réclame d'y avoir été autorisée par le gouvernement provincial. Une action est prise par le concessionnaire du privilège exclusif, Ricard, pour faire enlever les poteaux et les fils de la Compagnie Electrique de Grand'Mêre et la corporation de la ville est mise en cause dans cette poursuite.

Parmi les questions qui one été soulevées dans cette action était celle de savoir si la charte du gouvernement provincial donnait à la compagnie électrique le droit d'installer son système électrique dans la ville de Grand'Mêre était valable.

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Brodeur J.

La Cour Supérieure a, par une injonction interlocutoire, défendu à la Compagnie Electrique de Grand'Mêre de continuer ses opérations dans la ville; et la procès s'est continué pour faire décider définitivement cette question.

Pendant que le procès se faisait, les fils électriques des deux compagnies sont venus un jour en contact et le demandeur, qui se trouvait à proximité d'un fil de La Compagnie Electrique de Grand'Mêre, fut frappé et blessé. De là action contre les deux compagnies électriques et contre la municipalité.

La Cour Supérieure a donné gain de cause au demandeur contre la municipalité; mais ce jugement a été renversé, en tant que le municipalité était concernée, par la Cour d'Appel.

Il s'agit de savoir si la municipalité est responsable.

Par l'article 1053 du Code Civil, on peut être tenu responsable du dommage qu'on cause par sa faute à autrui, soit par son fait, soit par négligence, imprudence ou inhabilité.

L'appelant prétend que la corporation municipale de Grand'Mêre a été négligente parce qu'étant propriétaire des rues, elle devait voir à ce qu'il ne s'y fit pas de nuisances ou à les en faire disparaitre. On prétend qu'elle aurait dû faire enlever les fils de la compagnie électrique qui avaient été placés là illégalement.

Il me paraît bien certain—et c'est admis aujourd'hui par les parties en cause—que le gouvernement provincial avait le droit de permettre à une compagnie d'aller poser ses fils électriques dans les rues de la ville. Il n'aurait, tout de même, peut être pas êté sage pour la corporation de faire enlever ces fils électriques par ses propres officiers sans autorité de justice.

La question est alors soumise aux tribunaux par une poursuite dirigée par Ricard. La corporation est mise en cause ensuite au procès. Il est bien vrai qu'elle ne prend pas de conclusions elle-même et qu'elle s'en rapporte à la justice. Mais à quoi bon multiplier les frais en soulevant elle-même le point lorsque l'une des parties dans la cause allègue que ce privilège accordé par le gouvernement provincial était absolument nul? On ne peut done pas, suivant moi, prétendre qu'il y a eu là négligence de la part de le corporation, négligence telle que sa responsabilité pût en être affectée.

Maintenant, quelle est la responsabilité d'une corporation municipale de ville au sujet des rues? Cette responsabilité est déterminée par l'article 5641, sous-section 11, des statuts refondus de Québec 1909. Cet article donne au conseil le droit de

faire, amender et abroger des règlements:

11. Pour réglementer l'usage des rues, allées, avenues, ponts, ponceaux, terrains publics, places publiques, pavages, trottoirs, traverses, gouttieres, eaux et cours d'eau municipaux, et pour empêcher et faire cesser tout empiètement dans les, sur les, et au-dessus des rues, allées, avenues, terrains publics, places publiques et cours d'eau municipaux, et pour empêcher aussi qu'ils ne soient endommagés ou que l'on en fasse un mauvais usage;—la municipalité étant responsable du mauvais état de ces rues, allées, avenues, ponts, ponceaux, terrains publics et places publiques, pavages, trottoirs, traverses, gouttieres, eaux et cours d'eaux municipaux;

La dernière partie de cette sous-section déclare donc que la municipalité sera responsable du bon entretien des chemins.

Quelle est l'étendue de cette responsabilité? C'est qu'elle doit voir à ce que les chemins soient toujours dans un état qui puisse permettre au public de circular sans danger.

Il n'y avait, dans le cas actuel, aucun obstacle dans le chemin lui-même qui pouvait affecter la circulation du public; mais les deux compagnies électriques avaient placé des poteaux et des fils. L'une avait été

1917

LEFEBVRE v. TOWN OF GRAND-MÈRE.

Brodeur J.

autorisée par la municipalité, l'autre par le gouvernement provincial.

Ces deux compagnies étaient à se battre devant les tribunaux pour faire décider de leurs droits respectifs et notamment pour faire décider si le gouvernement pouvait accorder les pouvoirs qu'il avait accordé à la compagnie. Le procès s'instruit. Pendant ce temps-là, est-ce que la corporation aurait été justifiable d'enlever les poteaux de la Compagnie Electrique de Grand'Mêre? Evidemment non.

Il est possible que les fils de ces deux compagnies fussent placés trop près l'un de l'autre. Mais comment la corporation pouvait-elle être responsable de cela sous les dispositions de la sous-section 11? Je ne crois pas que la responsabilité édictée par le loi couvre un cas comme celui que nous avons à examiner dans cette cause-ci.

Je considère donc que la corporation municipale n'était pas en faute et qu'elle n'a pas engagé sa responsabilité. Une municipalité, qui a le droit d'adopter des règlements, n'est pas nécessairement responsable, si elle n'adopte pas ces règlements-là. Ce sont des questions de discrétion qui ne sauraient engager sa responsabilité.

Tiedeman on municipal corporations dit (p.328):

> Not only are municipal corporations exempt from liability for the non-performance of public, or discretionary duties; but they are likewise exempt from liability from consequences, when they in good faith exercise such powers.

Le jugement de la Cour d'appel doit être confirné avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur Lefebvre.*

Solicitors for the respondent: *St. Germain, Guerin & Raymond.*

GEORGE E. BUCK..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1917

*Feb. 23, 26.
*June 22.

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

Extradition—Specific offence—Conviction for similar offence—"Extradition Act," R.S.C. [1906] *c. 155, s. 32.*

B. was extradited to Canada from the United States on a charge of fraud by instigating the publication in a newspaper, the *News-Telegram*, of a false statement that oil had been struck in a well in which he was interested. He was convicted in Canada of the offence of fraud in concurring in the publication of the same false statement in another newspaper no mention of which was made in the proceedings before the Extradition Commissioner.

Held, Idington and Brodeur JJ. dissenting, that B. was convicted for an offence other than the one on which the warrant for extradition issued and the conviction should be quashed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), confirming, by an equal division of opinion, the conviction of the appellant by the trial judge.

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

A. A. McGillivray for the appellant.

R. C. Smith K.C. and *G. G. Hyde* for the respondent.

THE CHIEF JUSTICE.—The facts of this case are fully set out by my brothers Duff and Anglin. To avoid a wearisome repetition, I refer to their opinions.

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

(1) 27 Can. Cr. Cas. 427.

1917

BUCK
v.
THE KING.

The Chief Justice.

There can, of course, be no doubt, that, under the Treaty with the United States, a fugitive criminal may not be committed for extradition,

> except upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial, if the crime or offence had been there committed.

It is equally certain that the person surrendered shall not be triable for any offence other than the offence for which he was surrendered, until he shall have an opportunity of returning to the country by which he was surrendered.

The nature of the offence for which the accused was extradited must therefore be gathered from the warrant and the depositions filed before the extradition commissioner, and those depositions must disclose the facts which, according to the laws of the place where the person charged is found, amount to the crime for which he is subsequently tried. I was at first disposed to hold that the indictment on which the accused was tried, being drafted in the very terms of the information upon which he had been committed by the police magistrate and subsequently held for extradition, it was impossible to say that he was tried for an offence different from that for which he was extradited. But, having looked at the case of *Reg.* v. *Balfour*, which is unfortunately very imperfectly reported in 30 L.J. News, p. 615, I have come to a different conclusion. In that case certain counts which were challenged as not warranted by the extradition papers were withdrawn by the Crown and the trial and conviction proceeded on the counts not open to this challenge. The inference would appear to be that there is no jurisdiction to try a fugitive criminal in England for any offence not disclosed by the depositions, &c., on which his extradition was obtained.

Reference was made, at the argument, to *United States* v. *Rauscher*(1), but there the prisoner was extradited on a charge of murder and tried for a lesser offence, which was not included in the treaty. The opinion expressed, however, by Mr. Justice Miller, as speaking for the full court, seems to support the contention that the person surrendered may not be prosecuted for an offence which is not mentioned in the demand, that is, in the warrant or depositions. The reason for this rule would seem to be that the demand for extradition is a criminal proceeding and the accused has a right, not only to cross-examine, but to adduce evidence before the magistrate, and in order to enable him to do this effectively he is entitled to be informed of the specific offence with which he is charged. The publication of a statement on one day in a newspaper cannot be said to constitute the same offence as the publication in another newspaper on another day of a statement which may, or may not be to the same effect or identical with the first. On the extradition proceedings, the only statement proved was the one published by Tyron in the *News-Telegram*. At the trial the statement relied upon, which was said to be the subject of the charge, was that published by Creely in the *Albertan*, which was not before the extradition commissioner, and it cannot, therefore, be said that he was extradited for having concurred in the publication of that statement.

I would, therefore, allow the appeal on the short ground, that in view of the fact that the particulars furnished at the trial for the purpose of describing the means by which the offence charged in the indictment was committed, refer to a statement different from the one mentioned in the depositions before the extradition

(1) 119 V.S.R. 407.

1917

BUCK v. THE KING.

The Chief Justice.

commissioner, it cannot be said that this indictment corresponds as it should with the depositions and information used for the application for extradition.

The appeal should be allowed with costs.

IDINGTON J. (dissenting)—The claim that the appellant was tried for some offence for which he was not surrendered by the United States is, in my opinion, unfounded.

We have not, as perhaps we should have, before us the information laid before the United States Commissioner, and therefore, are left to inference regarding its contents.

That I submit is a difficulty in the way of appellant, who has been convicted in a prosecution under and pursuant to the terms of a warrant of surrender which appears to be as follows:—

DEPARTMENT OF STATE.

To all to whom these Presents shall come,

GREETINGS:

Whereas, His Excellency Sir Cecil Arthur Spring-Rice, Ambassador Extraordinary and Plenipotentiary of Great Britain,

Accredited to this Government, has made requisition in conformity with the provisions of existing treaty stipulations between the United States of America and Great Britain for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of George E. Buck, charged with the crime of fraud by a director and officer of a company, committed within the jurisdiction of the British Government;

And whereas, the said George E. Buck has been found within the jurisdiction of the United States, and has, by proper authority and due form of law, been brought before Paul J. Wall, Commissioner in Extradition for the District of Kansas, for examination upon said charge of fraud by a director and officer of a company;

And whereas, the said Commissioner has found and adjudged that the evidence produced against the said George E. Buck is sufficient in law to justify his commitment upon the said charge, and has, therefore, ordered that the said George E. Buck be committed pursuant to the provisions of said treaty stipulations.

Now, therefore, pursuant to the provisions of section 5272 of the Revised Statutes of the United States, these presents are to require

the United States Marshal for the District of Kansas, or any other public officer or person having charge or custody of the aforesaid George E. Buck, to surrender and deliver him up to such person or persons as may be duly authorized by the Government of Great Britain to receive the said George E. Buck to be tried for the crime of which he is so accused.

In testimony whereof, I have hereunto signed my name and caused the Seal of the Department of State to be affixed.

Done at the City of Washington, this 3rd day of July, 1916, and of the Independence of the United States the 140th.

ROBERT LANSING,
Secretary of State.

James Short,
Agent of the Attorney-General.

Surely the fair inference is that the warrant is founded upon and follows in its terms the charge as laid before the Commissioner, and that we have not the right to impute to the Commissioner a neglect of duty in that regard.

Then we have the evidence, put before the Commissioner, of a number of witnesses. That given by Fletcher, proving an admission of the appellant relative to the publication in the *Albertan*, is in general terms and seems wide enough to cover any statement put forth by that newspaper at or about the time in question such as testified by Cheely.

There does not seem to have been anything specifically limiting the inquiry before the Commissioner in the United States who had to consider the demand for the extradition of appellant.

Moreover, the trip of Mr. Cheely to the well in question was testified to by at least one witness whose evidence as well as that of Fletcher appears in the deposition submitted to that officer. And the witness so testifying remarks gravely, when pressed as to the nature of the business in hand on that occasion and the purpose of taking Cheely with others concerned, he did not think Cheely had gone merely for the ride. I agree.

1917

BUCK
v.
THE KING.

Idington J.

There was clearly evidence before the Commissioner bearing upon the offence of which appellant is convicted, such as, if nothing else in the case before the Commissioner, would have entitled him to have certified as required by the statute and the Department of State, which had thereby, before it, a copy of the entire evidence, to have acted in issuing said warrant.

What is a fair presumption, seeing accused was surrendered upon such a warrant?

Is it not that for anything pointed to in the evidence likely to justify a prosecution for the offence set forth it was intended to be covered and he to be tried therefor?

The fact that there were several other charges of a like kind alleged to have taken place about the same time by another issue of falsehood does not help the accused, it seems to me, but rather tends to justify the surrender as related to any or all of them.

Much has been made of an error in relation to these other charges which seems beside what is, in law, involved herein.

It is not such informations, as laid before magistrates in this country, that is the test, but that which appears on the whole case before the Commissioner as containing evidence upon which such a warrant could issue.

The informations laid in this country are but a means for getting evidence in a judicial proceeding which can be said to have been taken under the sanction of an oath and when presented to a foreign Commissioner may, as happened herein, constitute but a part of the entire evidence upon which the Commissioner may act.

I have no manner of doubt, the surrender was intended to cover, and did cover, any of the numerous

offences made to appear in the evidence before him, in such manner as would justify one of our own magistrates committing for trial.

I think, therefore he was convicted of an offence within the grounds upon which he was surrendered, and upon evidence thereof disclosed in the material laid before the Commissioner as expressive of the purposes of those demanding his surrender, and assented to thereby.

The case as presented to us involves no other question within our jurisdiction and hence the appeal should be dismissed with costs.

DUFF J.—The defendant was convicted after a trial at Calgary under section 414 of the Criminal Code of the offence of concurring, as director of a public company, in making, circulating or publishing a statement which he knew to be false in a material particular, with the intent described in the section. The sole ground of appeal which I propose to consider (because, I think, on that ground the appellant is entitled to succeed) consists in the proposition advanced on behalf of the appellant that he, the appellant, having been surrendered by a foreign state, the United States of America, in pursuance of article three of the Extradition Convention of 1889 with that State, has in the proceedings out of which the appeal arises, been convicted of an offence, other than the offence for which he was surrendered in contravention of that article and of section 32 of the "Extradition Act," R.S.C. 1906, ch. 155.

The substance of the conviction is stated in the judgment of the trial judge in the following words:—

That between the 7th and 9th of May, George E. Buck was guilty of the charge as laid, and that he did, in the City of Calgary, concur

1917

BUCK v. THE KING.

Duff J.

in publishing a statement, which statement was known to him to be false in a material particular, with intent to induce persons to become shareholders of the Black Diamond Oil Fields, Ltd.

The prosecution of the appellant was commenced on the fifteenth of October, 1915, when three informations were laid against him before the Police Magistrate at Calgary. By two of these informations, charges of conspiracy were preferred and by the third, a charge that the appellant at the City of Calgary, on or about the 7th of May, 1914, concurred in making a false statement within the meaning of section 414 of the Criminal Code, with the intent there mentioned. In May, 1916, the appellant having been found in the State of Kansas, extradition proceedings were commenced against him on the complaint of the Province of Alberta and by this complaint the appellant was charged with the offences set forth in the three informations already referred to and with nothing else. The appellant was delivered over to the Province of Alberta on the authority of a warrant of the Secretary of State of the United States of America on the third of July, 1916, for trial upon the third of the above-mentioned charges, the charge under section 414 of the Criminal Code, his surrender upon the charge of conspiracy being refused; and the warrant recited that requisition had been made for the delivery of the appellant "*charged* with the crime of fraud by a director and officer of a company" and required the officer having custody of the appellant, to surrender him "to be tried for the crime of which he is so *accused.*"

The appellant's attack upon the proceedings is this. The substance of the charge against him both before the Magistrate in Calgary and before the Extradition Commissioner under section 414 of the Criminal Code was, he avers, that he concurred in the publication on

the 7th of May, of a certain "statement" which was put in evidence consisting of an article in a newspaper published in Calgary, the *News-Telegram*. This, he says, was really the "charge" made against him before the Extradition Commissioner; and the crime so imputed to him, concurring in the publication of the "statement" mentioned on the information, was the crime referred to in the warrant of the Secretary of State as that with which he is there said to be "charged" or "accused" and for trial upon which he was surrendered.

It is not disputed that if the appellant is right in this, the appeal ought to succeed; for it is quite apparent that the learned trial judge acquitted the appellant of any criminal offence in the publication of the 7th of May, in the *News-Telegram* and that the judgment against him in general terms that he concurred in the publication of a false statement between the "7th and 9th of May" is when translated into concrete terms, neither more nor less than judgment against him for the offence of concurring in the publication of a false statement on the 9th of May, having reference to a "statement" published in another newspaper through the instrumentality of other persons and differing in most material particulars from that published on the 7th.

Without attempting to express any general opinion as to the effect of the words "prospectus, statement or account" in section 414 of the Criminal Code, there can, I think, be very little doubt (assuming an offence was committed under that section by publishing or by concurring in publishing the "statement" which appeared in the *Albertan* on the 9th) that this offence was a distinct offence from any committed (if one had been committed) in publishing or concurring in publishing

1917
BUCK
v.
THE KING.
Duff J.

the earlier statement in the *News-Telegram* on the 7th of May. The two statements, as I have mentioned, differ in most material respects, so much so indeed, that the learned trial judge has held that while the publication of the second statement was an offence, the publication of the first statement was not an offence; and it could not plausibly be contended that what was done on the 9th or on the 8th, in procuring the publication of the second statement on the 9th, was only the culminating step in a single offence which originated in the steps taken to procure the publication of the article which had appeared on the 7th.

And it is closely *ad rem* to observe that a charge of publishing the statement which appeared on the 7th, is obviously and admittedly a very different accusation from the charge of publishing the statement which appeared on the 9th; admittedly I say, because of the fact just alluded to, namely that the second was held to be criminal and the first comparatively innocuous.

The appellant then having been convicted of the offence of concurring in the publication of the "statement" which appeared on the 9th, in the *Albertan*, does it appear that he was not surrendered to be tried for that offence? The answer to that question, as the observations already made imply, turns upon the answer to the question, was that the offence or one of the offences with which he was "charged" or "accused" within the meaning of the warrant of surrender? The direction in the extradition warrant is broad enough no doubt, to cover the charge of criminality in the publication of either "statement"; and it would be no valid objection, assuming two offences to have been charged, that they should be both dealt with in one commital, *Re Meunier* (1), and there was, in my judg-

(1) [1894] 2 Q.B. 415 at page 419.

ment, in the depositions before the Extradition Commissioner evidence which would have justified a commital upon a "charge" in respect of the publication of the second "statement" if such a charge had been preferred.

But, was such a "charge" before the Extradition Commissioner? I have already mentioned the fact that the "statement" which appeared in the *News-Telegram* was actually put in evidence in support of the information laid before the Magistrate in Calgary. This was the only "statement" shewn to be false in any particular, of which evidence was offered by the prosecution before the Magistrate. It is quite true that counsel for the defence brought out in cross-examination of one of the witnesses a reference to a remark alleged to have been made by the appellant, which I think the Magistrate might have held amounted to sufficient evidence of an admission that a "statement" had been published in the *Albertan* which was false in a material particular and a criminal statement within section 414. But this isolated passage in the cross-examination of one of the witnesses was not followed up; no fresh information was laid, the existing information was not amended, the article in the *Albertan* was not produced; and when the complaint was made before the Extradition Commissioner, based entirely upon the evidence taken in Calgary, it was laid in terms identical, as regards the charge under section 414, with the terms of the information. When to these circumstances we add the fact that the article published on the 9th, was offered in evidence at the trial, not in proof of the publication of it or the concurring of the publication of it as a substantive offence, but as evidence of acts similar to the acts charged and pointing to the fraudulent intent of the appellant in

1917

BUCK
v.
THE KING.

Duff J.

relation to those acts, the inference seems to be that no "charge" was intended to be laid in relation to the publication of the 9th, until the trial stage, at least, was reached.

By article 10 of the Treaty of 1842, "all persons who being *charged* with" crimes of the kinds specified, "committed within the jurisdiction" of either of the contracting powers "found within the territories of the other" are, on requisition, to be delivered up,

> provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so *charged* shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed.

A surrender under the treaty presupposes a charge within the meaning of this article and although it is perhaps unnecessary to cite authority I refer to pp. 422 & 423 of Moore on Extradition, paragraph 288, in which it is pointed out that it is essential that the offence "charged" should be averred in a manner sufficiently explicit to enable the party accused to understand precisely what he is "charged" with. That was laid down in the case of *Farez* (1), andit is, I think, indisputably correct. It must be assumed that the Extradition Commisioner acted in the spirit of this principle and that the appellant was committed under that "charge" which was clearly laid and in respect of which it is not disputed that there was evidence sufficient to justify a commital and not in respect of something which, it must be inferred, was not intended to be and was not in fact "charged" although suggested with more or less distinctness in the evidence; we must in a word, assume that the Commissioner acted in accordance with the fundamental principle of sound legal procedure, which requires that an accused

(1) 7 Hatchford, 345.

person shall have notice, not only of the evidence against him, but of the nature of the "charge" supposed to be established by the evidence.

In my opinion the appeal ought to succeed.

ANGLIN J.—The substantial question on this appeal, on which the learned judges of the Appellate Division of the Supreme Court of Alberta were equally divided in opinion, is whether the charge on which the accused was convicted is "the offence (the extradition crime) for which he was surrendered" within the meaning of article three of the Extradition Treaty between Great Britain and the United States and within section 32 of "The Extradition Act," R.S.C. [1906], ch. 155.

It is, in my opinion, incontrovertible that "the offence for which (the accused) was surrendered" means the specific offence with the commission of which he was charged before the Extradition Commissioner and in respect of which that official held that a *primâ facie* case had been established and ordered his extradition, and not another offence or crime, though of identical legal character and committed about the same time and under similar circumstances. The Supreme Court of the United States so held in *Re Rauscher* (1). In delivering the judgment of the court Mr. Justice Miller said, at p. 424:—

> That right (of an extradited person), as we understand it, is that he shall be tried for only the offence with which he is charged in the extradition proceedings and for which he was delivered up.

I do not entertain the slightest doubt that this is a correct statement of the law under the present treaty and the Canadian statute, the former of which, in terms restricts the right of trying an extradited person to "the offence for which he was surrendered" while

(1) 119 U.S.R. 407.

1917

BUCK v. THE KING.

Anglin J.

the latter prohibits his prosecution or punishment in Canada, "in contravention of any of the terms of the (extradition) arrangement * * * for any other offence" than the extradition crime of which he was accused or convicted and in respect of which he was surrendered.

It is perhaps worth noting that the stipulation in the Ashburton Treaty of 1842, construed in the *Rauscher Case* (1), was wider than that now in force. It provided against detainer or trial of the person surrendered for any offence committed prior to his surrender, other than the *extradition crime proved by the facts* on which the surrender is grounded.

The defendant has been convicted of an offence against section 414 of the Criminal Code, in having, while president and manager of the Black Diamond Oil Fields Ltd., concurred in the circulation or publication of a *statement* known to him to be false in a material particular, with intent to induce persons to become shareholders in that corporation.

Now it appears in evidence that an article was published in a Calgary newspaper (the *News-Telegram*) on the 7th May, 1914, in which it was falsely stated that the Black Diamond Oil Fields Ltd. had struck oil at their well near Black Diamond, and that the defendant had procured the publication of this article through one Tyron, a reporter on the staff of that newspaper. This was the only "statement" proved on the preliminary investigation before the Police Magistrate into the charges against the defendant.

On the 8th of May, 1914, as appears from the evidence given at the trial, one Cheely, a reporter on the *Albertan*, another Calgary newspaper, was taken by

(1) 119 U.S.R. 407.

the defendant to the Black Diamond Oil Fields and was there imposed upon by a fraudulent demonstration and given false information which led to his writing and publishing in the *Albertan* on the 9th of May, an article containing a similar false statement.

Assuming both these statements to be within the purview of section 414 of the Criminal Code, there is no room to doubt that the defendant's concurrence in the publication of each of them constituted a distinct crime or offence and that proof of conviction or acquittal after trial on a charge in respect of one of them would not support a plea of *autrefois convict* or *autrefois acquit*, as the case might be, to a like charge in respect of the other.

The Cheely article was not before the Magistrate on the preliminary investigation and no proof was made either of its contents or of its publication. The only allusions in the evidence before the Magistrate to an article in the *Albertan* were these incidental statements made by one of the witnesses, Fletcher, which I copy from the factum filed on behalf of the Crown:—

A. He said Tyron of the *News-Telegram* was taken out, but they did not take the matter seriously and they had to get the *Albertan* and he had got a good write up for them, but they had not obtained the monetary results they expected.

Q. From the talking? A. From putting the oil in.

Q. Was there a big strike of oil there? A. According to the *Albertan*.

Q. The *Albertan* is a pretty reliable journal? A. They are when they get reliable information.

Q. Were you present when the *Albertan* ever got any information? A. No, sir.

Q. You don't know anything about it? A. I know Mr. Buck told me he put (it?) over them; that is all I know; and could not over the *News-Telegram*.

Q. When did Mr. Buck tell you that? A. In Medicine Hat, on the 12th of May.

Q. And where were you when he told you? A. I don't know which street.

1917

BUCK
v.
THE KING.

Anglin J.

Q. What day was the big strike? A. The 7th May was the supposed strike.

It will be noticed that this evidence gives no date of publication and, as the appellant's counsel said, it may refer to any one of several articles commendatory of the company's undertaking which the evidence shews appeared in the *Albertan*.

At the trial, counsel for the defendant objected to the admission of evidence relating to the circumstances which led up to the publication of the Cheely article of the 9th May, on the ground that the offence of having concurred in that publication had not been the subject matter of any charge before the Extradition Commissioner. In support of his objection he referred to an affidavit of the Crown prosecutor in which he deposed that the Cheely article had been called to his attention in September, 1916, and that a copy of it was procured for him on the 4th October, 1916, which, he says, "was the first time I have ever seen the article in question in connection with the charge herein." The defendant's extradition had been ordered in July.

Counsel for the Crown met this objection by claiming the right to prove a "similar act" as evidence having "a bearing on the offence for which he (the defendant) was extradited"; and it was in this way, as "additional evidence pertaining to the same charge"—no doubt relevant on the question of intent—that the proof of publication of the Cheely article and of the defendant's concurrence therein was admitted by the trial judge.

Yet it was for his concurrence in the publication of the Cheely article in the *Albertan* that the appellant has been convicted. The trial judge so states, and counsel for the Crown so admits. The learned judge had already intimated that he considered that the

charge, so far as it rested on the Tyron article, had not been proved.

That, apart from evidence of identity and proof of the Canadian law, the only evidence before the Extradition Commissioner was that taken on the preliminary investigation before the Police Magistrate, is also distinctly stated in the factum filed on behalf of the Crown. The only charge under section 414 of the Code investigated by the Police Magistrate, was concurrence in the publication of the Tyron article in the *News-Telegram*, and it was on that charge that extradition was ordered. The Cheely article was unknown to the Crown prosecutor in connection with the charge against Buck, until long after the preliminary investigation and extradition proceedings had been concluded. It had not been proved before the Magistrate and consequently its contents and publication were unknown to the Extradition Commissioner. It is therefore impossible that he should have ordered extradition in respect of the offence committed by the defendant in concurring in that publication. It is only for the offence for which he was surrendered, and not for some other offence, casually and imperfectly disclosed in the evidence which was before the Commissioner, that the person surrendered can be lawfully tried and convicted.

Because the conviction is contrary to the terms of the treaty and contravenes section 32 of the "Extradition Act," I think it cannot be sustained. I reach this conclusion somewhat less reluctantly, because I am not altogether satisfied that persuading a reporter to publish in a newspaper an untrue article such as those before us is an offence within section 414 of the Criminal Code. This I understand to be the view expressed by Mr. Justice Stuart at the conclusion of his judgment, probably sufficiently definitely to constitute a

1917

BUCK v. THE KING.

Anglin J.

ground of dissent of which the appellant can take advantage in this Court.

The defendant is certainly not entitled to any sympathy. That he committed a gross criminal fraud was overwhelmingly proved. He fully deserved the term of imprisonment to which he was sentenced. But much as it is to be regretted that such a scoundrel should escape punishment, it is of vastly greater moment that the good faith of this country shall be scrupulously maintained and a strict observance of its treaty obligations insisted upon.

For these reasons I would allow the appeal.

BRODEUR J. (dissenting)—The only point that we have to examine on this appeal, is, whether the offence for which the appellant has been extradited differs from the one for which he has been tried and convicted.

The appellant was a director of a company called Black Diamond Oil Fields Ltd., a company formed for the purpose of extracting oil near Calgary, in the Province of Alberta. The operations of the company were not as successful as desired by the appellant, and the wells which were being opened and made, did not produce the oil which was expected. The company was then in a very serious financial embarassment; when in the month of May, 1914, the appellant decided to put some oil in the well, which was being opened, and to arrange to bring newspaper reporters who would, after having inspected the well, publish statements shewing that oil had been struck.

He tried that at first with a Mr. Tyron, who was connected with the *News-Telegram* of Calgary; but the publication was not made to the satisfaction of the appellant.

Then he tried with another newspaper called the

Albertan, and this time was successful. Mr. Cheely, the reporter of that newspaper, was taken to the well in the automobile of the appellant; the derrick was worked in his presence; oil was drawn from the well; and a statement of the appellant that oil had been struck was published in that newspaper, in an article written by Cheely.

A charge of fraud by a director was made under section 414 of the Criminal Code, against Buck. He was committed to trial on that charge, and among the witnesses examined at the preliminary examination, was a man by the name of Fletcher, to whom the appellant admitted that he was responsible for the statement which had been published in the *Albertan*.

The accused then fled to the United States and he was extradited on the charge of having committed a fraud as a director and manager of a company.

When the trial took place, the charge of fraud was proved mostly by the evidence of Cheely, and by the statements which were made by Buck to the latter.

It is claimed now that Cheely had never been mentioned in the proceedings before the Extradition Commissioner, but that the statements which were mentioned against him, though substantially the same, were made to some other person.

The offence for which the appellant was extradited and convicted was having concurred in the publication of a statement, that oil had been found in the wells of the company of which Buck was a director. It is true that the statement made to Cheely was not specifically mentioned in the proceedings before the Extradition Commissioner; but the evidence of Fletcher, on which the Extradition Commissioner passed judgment, shews conclusively that the appellant concurred in the publica-

1917

BUCK
v.
THE KING.

Brodeur J.

tion of the fraudulent statements of the *Albertan*. The offence and the charge which were preferred against the appellant were general in their character, and it seems to me that the Crown was perfectly well justified in proving by different ways and by different circumstances how the fraud was committed and what statements were published.

It was not then a question of a charge being different from the one on which the extradition took place; it was the same offence and the same charge which were considered in both cases, except that on the trial, the evidence was more specific and was proved more efficiently.

I cannot say then, in those circumstances, that the appellant was tried for a different offence, and I am of the opinion that he was rightly convicted, and that the appeal should be dismissed with costs.

Appeal allowed with costs.

THE CORPORATION OF THE CITY OF TORONTO..... APPELLANT;

AND

THE J. F. BROWN COMPANY.....RESPONDENT.

1917

*March 7, 8, 9.

*May 2.

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

Municipal corporation—Exercise of statutory powers—Erection of lavatories—User—Damage to adjoining land—Injurious affection—R.S.O., 1914, c. 192, s. 325—Cons. Mun. Act, 1908, s. 437.

Depreciation in the selling or leasing value of land caused by the construction and maintenance, by the Municipal Corporation in the exercise of its powers, of lavatories on the highway is "injurious affection" within the meaning of section 437 of "The Consolidated Municipal Act" of 1908 (Ont.), and the owner is entitled to compensation, though none of his land is taken and no right or privilege attached thereto interfered with. Davies J. dissenting.

Judgment of the Appellate Division (36 Ont. L.R. 189, 29 affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming by an equal division the award of the Official Arbitrator.

This is an arbitration brought by the respondent to determine what compensation, if any, was payable to it by the appellant by reason of alleged damage to its property at the south-west corner of Queen and Parliament Streets, Toronto. The respondent owns a parcel of land on this corner having a frontage of 104 feet on Queen Street by a depth of 125 feet on Parlia-

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 36 Ont. L.R. 189.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

ment Street, a street of much less importance than Queen Street. On the easterly 40 feet of the parcel is erected a large three-storey brick store 40 feet by 100 feet wherein tenants of the respondent carry on a weekly payment business in furnishings, clothes, etc. The store's only business entrance is on Queen Street, in the centre of the building, and there are large show windows on Queen Street and for some distance south on Parliament Street.

In the year 1912 the appellant, with a view of providing much-needed lavatory accommodation for the public, constructed a lavatory for men and women at this corner, it being a street car transfer point, and a place of public concourse, and, therefore, a logical situation for such a convenience. The lavatory was constructed underground and about fifty feet apart were stairways leading to the same, with metal hoods over them similar to those over a subway entrance in a large city. These entrances were distant eight feet from the building of the respondent, being midway between the curbing and the street line, which space was completely concreted so as to form an extended sidewalk. Half way between the entrances was a small structure of inconspicuous appearance used as a breather.

The claim of the respondent was mainly based upon the circumstance that a structure used as a lavatory had been placed near its property, causing a diminution in value thereof. In addition, however, some evidence was tendered that bad odours arose from the same. The learned arbitrator, however, found against this contention.

A claim was also made for damage from "seepage" based on a theory that the disturbance of the sub-soil

during the construction of the lavatory caused the cellar walls of the respondent's building to be damp.

The learned arbitrator found that the mere presence of a structure used as a lavatory in the vicinity of the respondent's property was sufficient to depreciate it in value and that the appellant was legally responsible therefor, and awarded the respondent $9,000 in respect of such diminution in value. He found that such damage was confined to the property occupied by the building upon the lands and did not extend south or west thereof.

He also accepted the respondents' theory of "seepage" into the cellar of the building in question and awarded it $1,200 in respect of the same.

The appellant appealed to an Appellate Division of the Supreme Court of Ontario, composed of Chief Justice R. M. Meredith, Mr. Justice Riddell, Mr. Justice Lennox and Mr. Justice Masten, upon the ground that it was not legally liable to pay either amount awarded. The respondent cross-appealed on several questions of fact.

On March 17th, 1916, the Appellate Division delivered judgment unanimously dismissing the cross-appeal, but dividing equally upon the main appeal, Chief Justice Meredith and Mr. Justice Riddell being in favour of allowing the same and setting aside the award and Mr. Justice Lennox and Mr. Justice Masten being opposed in opinion. As to the $1,200 item, Mr. Justice Masten thought it was properly awarded, but Mr. Justice Lennox says (p. 214): "It would better accord with the views I entertain as a matter of technical exactness to reduce the award to $9,000, leaving the company to sue for the $1,200 as damages. Counsel for the City does not ask for this." The appellant

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

submits that the learned judge misunderstood the position as to this item of its counsel in the lower court.

The court being equally divided, the award was confirmed and from this order both parties now appeal to this court.

Hellmuth K.C. and *Fairty* for the appellant. The respondents' claim may be actionable, but is not a matter for arbitration. See *Mudge* v. *Penge Urban Council*(1).

The lavatories do not in themselves constitute a nuisance. *British Canadian Securities Co.* v. *City of Vancouver*(2).

Canadian Northern Ontario Railway Co. v. *Holditch* (3), *Horton* v. *Colwyn Bay*(4); and Cripps on Compensation (5 ed.) 302, were also referred to.

Tilley K.C. and *G. W. Mason* for the respondents cited *Griffith* v. *Clay*(5), *Lingke* v. *Christchurch*(6), and *Pastoral Finance Asso.* v. *The Minister*(7).

DAVIES J. (dissenting)—The respondent in this appeal claimed compensation under the 325th section of "The Municipal Institutions Act," R.S.O. 1914, c. 192, for alleged injuries to his premises, located at the southwest corner of Parliament and Queen Streets, caused by the erection and maintenance of public lavatories for men and women by the Corporation of Toronto under Parliament Street, which runs along the side of his shop fronting on Queen Street. The claim came before the Official Arbitrator, who, after hearing a great deal of evidence, awarded the claimant $10,200 in full satis-

(1) 86 L.J. Ch. 126.
(2) 16 B.C. Rep. 441.
(3) 50 Can. S.C.R. 265; [1916] 1 A.C. 536.
(4) [1908] 1 K.B. 327.
(5) [1912] 2 Ch. 291.
(6) [1912] 3 K.B. 595.
(7) [1914] A.C. 1083.

faction for the injuries complained of. Of this amount the arbitrator allowed $9,000 on account of the lavatories as such, and $1,200 caused by water, or seepage, claimed as having escaped from the lavatories into the cellar of plaintiff's building.

The arbitrator in his written reasons for his award, finds as a fact that

> no land of the claimant was taken

and that

> he did not think it could be contended that *access* is really interfered with.

He seems mainly to base his conclusion as to claimants' right to compensation under the statute upon the fact that a lavatory constructed under the street, and near to claimants' store and premises, "injuriously affected" claimants' premises within the meaning of section 325 of the Act above cited.

There was some evidence that bad odours arose from the lavatories, but the arbitrator found against this, and rested his conclusion upon the depreciation of the value of claimants' shop and premises arising from the use of these lavatories as such.

He says:—

> The outstanding feature of the whole claim is *the user* of the structures, the fact that they are lavatories. This is particularly emphasized by all the claimants' witnesses.

It is clear, therefore, that the damage, exclusive of the seepage, was not caused by the construction of the lavatories but, if at all, by their subsequent use, and it seems equally clear upon the evidence, and the award, that it was this use which influenced the witnesses in estimating the damages and depreciation of the value of the claimants' premises and the arbitrator in awarding the damages. The lavatories being under ground, and not interfering with access to claimants'

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

premises, would not as mere structures depreciate the value of those premises, however much they might injure his trade. The arbitrator did not find that the depreciation he awarded damages for arose apart from any injury to claimants' trade.

On appeal from the award to the Second Division of the Supreme Court, that tribunal was equally divided, Chief Justice R. Meredith and Riddell J. holding that as no land of the plaintiff had been expropriated, and no legal right or easement therein interfered with, he had no claim enforceable by arbitration for injurious affection of his lands under the compensation clauses referred to, while Lennox and Masten JJ. were of a contrary opinion and sustained the award.

The Chief Justice and Riddell J. were both of the opinion that as under section 433 of the said "Municipal Institutions Act"

> the soil and freehold of every highway were vested in the Corporation of the Municipality

such corporation had a common law right as owner to construct such lavatories in such places under the streets as they determined were necessary in the public interest, subject of course to the paramount rights of the public over the highway.

Chief Justice Meredith says:—

> Is the injury, if any, made lawful only by the enactment which provides for compensation? My unhesitating answer is:—No. The construction of such conveniences would be lawful and proper under the rights and duties of municipal corporations respecting highways and traffic. The wide character of those rights and duties is not everywhere understood. In this Province not only does the duty to keep all highways in repair devolve upon the municipal corporation; and not only are they made answerable in damages for neglect of such duty; but they have complete jurisdiction over them and even the soil and freehold of them is vested in such corporations and they may sell for their own benefit the timber and minerals in them. They have these rights, subject of course to the paramount purposes of highways, as their duties respecting the repair of them make plain; but it would be idle to say that

as conservators of such public ways their powers are not very extensive; that they may not do largely as they deem best with them as long as there is no curtailment of the right of way over them. No one will deny their right to turn a mud road into a paved street with sidewalks, kerbs and gutters, street lights and other needs and conveniences for traffic; can any one with any more reason deny their right to build in the soil under the highway, closets and urinals, such as the needs of man imperatively demand? Provided, of course, that there is no substantial obstruction of the rights of traffic which there need never be. The need of such conveniences is in a way greater than the need of raised sidewalks. No case has been referred to that conflicts with this view of the rights and duties of municipal corporations under the laws of this Province.

I must say that I am strongly inclined to take the same view of the corporation rights in the streets of which the soil and freehold is vested in them with respect to the construction of lavatories and urinals as expressed by the Chief Justice, and more shortly by Riddell J.

But I prefer to assume that these lavatories were constructed, and are used under the statutory powers of the corporation contained in the "Municipal Institutions Act," and to deal with the award on that assumption.

In the last analysis it seems to me that the question of the claimants' right to recover damages depends upon the true construction of section 325 (1) before referred to. It reads as follows:—

Where the land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated or, where it is injuriously affected by the exercise of such powers, for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

These compensation clauses for land taken and injuriously affected have been present in many statutes

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

passed by the Parliament of Great Britain, and very many decisions of the courts have been given as to their true meaning and extent. There is some difference in the language used in the different Acts, but I think after reading all of those referred to in the argument, and the cases cited at bar, and in the judgments below as to their proper construction, I am justified in saying that while there were at first great differences of judicial opinion even in the cases carried to the House of Lords as to what damages could be awarded under the compensatory clauses for "injurious affection" only, where no land was taken and no legal right, or easement appurtenant to the land was interfered with or obstructed, these differences were finally set at rest. It was held as the recognized rule of law applicable to compensation sections such as that now before us that such compensation can only be awarded where some physical interference is caused to the lands of the claimant or to some legal right or attribute attaching to these lands such as access or ancient lights, etc. Where no lands have been taken and no such legal rights or attributes or easement attached to land interfered with, no compensation can be given even though a man's property may be greatly depreciated in value by the exercise of the statutory rights granted to a company or a corporation. If part of an owner's lands have been taken, however, an entirely different result follows and damages are allowed not only for the lands taken, but for the remainder of claimant's lands connected with or belonging to the lands actually taken and for injuries thereto. The taking of any part of claimant's lands opens the door for the right to claim all damages actually sustained by the owner for the lands taken, and also for all his other lands connected with those taken.

It has, for instance, long been settled by the decision of the House of Lords in *Hammersmith* v. *Brand*, 1869 (1), that an owner of land, no part of which has been taken by a railway company and no right connected with which interfered with, cannot recover damages for "vibration" arising from the running of the railway without negligence, no matter what extent such damages may extend to. The headnote reads:—

> The "Lands Clauses Consolidation Act" and the "Railway Clauses Consolidation Act" do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby. (Diss. Lord Cairns.)
>
> The right of action for such damage is taken away.
>
> *Rex* v. *Pease*(2), and *Vaughan* v. *The Taff Vale Railway Co* (3), approved.

When I speak of damages I do so, however, with the well understood limitation that they must be an injury to lands and not a personal injury or an injury to trade, and also that they must be occasioned by the *construction* of the authorized works and not by their user, and must be of such a character as would have made them actionable, but for the statutory power.

Wherever a legal right has been interfered with by the exercise of statutory powers, all the damages done to the owner as a consequence of that interference is the subject of compensation. Cripps on Compensation, (5th ed.) p. 140, and the cases there cited.

In the present case it appears to me that the finding of the arbitrator, that there has been no physical interference with the claimants' property or with the access to and from their premises, is conclusive.

(1) L.R. 4. H.L. 171. (2) 4 B. & Ad. 30.
(3) 5 H. & N. 679.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

It is the use of the structure as a lavatory that causes damage in the opinion of the arbitrator, based upon the evidence given before him, in which I fully concur, and statutory compensation cannot be awarded for damages caused him by the use of works constructed in accordance with statutory powers, and without negligence, unless expressly given by statute.

If the works are not so constructed, then the injured party may have an action for damages caused either by reason of excess beyond the powers, or from bad or improper construction of the works, but has no right of compensation under the compensating clause.

Nothing of the kind is suggested here except with regard to seepage damages with respect to which, if any, (on which I express no opinion) are the subject matter of an action, and not damages under the compensation clause for injurious affection. They are caused, if at all, by the improper or negligent exercise of the statutory powers, and do not necessarily result from their proper exercise.

The expression "injuriously affected by the exercise of the powers" given by the Act now under discussion or of any general or special Act, is copied from the English Acts to which reference has been made. They are technical words to which a legal meaning has been attached by the courts, and when used by the legislature as in this compensation section, should have that meaning given them by our courts.

I need hardly say that if any more extensive meaning was intended to be given to them when used in this "Municipal Institutions Act," one would have found language expressive of that intention. I fail to find any such language.

In the absence of any such words shewing a different meaning, I feel myself compelled to follow the

English authorities, and I may say that I do so without any reluctance, because I share with Chief Justice Meredith the feeling that any such extension or enlargement might, and probably would, have results which would prevent the construction of these necessary public utilities altogether. If the claimants in this case can recover $9,000 or $10,000 damages because a urinal for men and women is placed beneath the surface of the street on which their business premises abuts where no part of their land is taken, and no easement or right in or attached to it is affected, then it follows that every other land owner in the vicinity would have a similar right to damages, greater or lesser than the amount awarded in this case, depending upon the facts of each case with the further result that the exercise of these powers would have to be discontinued because of the excessive cost of their exercise.

It cannot be contended that because the other land owners have not plate glass windows in their buildings fronting on the street, and because their business or trade is not injured by the turning away of the tide of customers, which might flow to them, but for the construction and maintenance of the lavatories, that their claims would be different.

The loss of trade is not a damage which can be allowed under the compensation clause, and it appears to me that is just what has been allowed in this case.

The principle that the use of the lavatory causes depreciation in the value of the adjoining lands is applicable in a more or less degree to all neighbouring land owners, and they certainly would all make claims. As was said in *Ricket* v. *Metropolitan Railway Co.* (1), at page 199, by Lord Cranworth:—

(1) L.R. 2 H.L. 175.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but if it affects more or less all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on.

The cases of *Corporation of Parkdale* v. *West*(1), and *North Shore Railway Co.* v. *Pion*(2), were relied upon in the Court of Appeal largely by Mr. Justice Masten. I cannot see what application these cases can have to the one before us. In each of them the owner's right of access to and from their land, to the street in the *Parkdale Case*(1) and to a navigable river in the *Pion Case*(2) was obstructed and interfered with, and "in both cases alike," as the Lord Chancellor said, p. 626 of the report of the *Pion Case*(2):

the damage to the plaintiff's property was a necessary, patent and obvious consequence of the execution of the work.

The actions were held properly brought to recover damages on the ground that the company in the one case, and the corporation in the other, did not take the steps necessary under the respective statutes under which they professed to act to

vest in them the power to exercise the right or do the thing

for which if those steps had been duly taken compensation would have been due to the respondents (owners) under the Act.

But the thing done which in each of these cases made the works of the company and the corporation actionable was the depriving of the owners of their right of access to and from their lands.

Both of the learned judges who decided the case in the Divisional Appeal Court quoted at length from the judgment of the learned judge who decided the

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.

cases of *Vernon* v. *Vestry of St. James*(1), and *Cowper-Essex* v. *Local Board for Acton*(2), and speak of them as "illuminative" and "instructive" and no doubt they are with respect to facts at all similar to those dealt with in those cases. I fail, however, to find that they afford any assistance to such cases as we have now before us. The Court of Appeal in the *Vernon Case*(1) simply held that as the erection of an urinal was not necessarily a nuisance, the statute authorizing its erection did not empower the Vestry to erect one where it would be a nuisance to the owners of adjoining property and that on the facts of that case the Vestry *had exceeded their powers in placing the urinal where they did* and the court granted the injunction asked for accordingly.

No contention is made here, or could be made, of any excess in the exercise of the powers of the Corporation of Toronto in placing the lavatory and urinal where they did. On the contrary, the claimants' submission in the appeal is based entirely upon the exercise by the Corporation of its legal right under the statute, and the claimed correlative right of the claimants to damages under the 325th section of the Act because their lands were "injuriously affected" by the exercise of the Corporation's statutory powers.

The *Cowper-Essex Case*(2) decided that *part of the plaintiff's land having been taken for sewage works* compensation might be awarded for damage by reason of it injuriously affecting his "other lands" connected with those taken not only by the construction of the sewage works but by their use.

These "other lands" of the plaintiffs were divided from the lands taken by a railway, but the court held

(1) 13 Ch. D. 449. (2) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

that notwithstanding the division they were "other lands" within the meaning of the compensation clause of the statute they were considering, the "Lands Clauses Consolidation Act, 1845."

In that *Cowper-Essex Case*(1), the Lord Chancellor Halsbury said, with reference to the different principles of compensation applicable, where part of the owner's land has been taken from cases where no part has been taken, but where it is claimed the lands have nevertheless been "injuriously affected:"

> With reference to the main question I have had less difficulty since I take it that two propositions have now been conclusively established. One is, that land taken under the powers of the "Lands Clauses Act" and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established, and that is that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.
>
> It may seem at first sight a little strange that what is injurious affecting in one should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor from whom some portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

And Lord Watson said (p. 164):—

> In the case of a proprietor from whom nothing has been taken by the promoters, it has been settled by a series of decisions in this House, that, although his lands in the vicinity will necessarily be injured by the use of their works, yet it is not thereby "injuriously affected" within the meaning of the Act of 1845; and that he is not entitled to statutory compensation for injury so occasioned,

and on p. 165 His Lordship goes on to point out the distinction between cases where "land has been taken"

(1) 14 App. Cas. 153.

and those where it has not, but is claimed as having been injuriously affected. He says:—

In *Buccleuch* v. *Metropolitan Board of Works*(1), Lord Chelmsford, in whose judgment Lord Colonsay concurred, said (2), with reference to *Brand's Case*(3), and the subsequent case of *City of Glasgow Union Railway Co.* v. *Hunter*(4): "In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains."

After citing other cases he says:—

It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers.

I am quite unable to see how the judgment in this case appealed from can in any way be sustained by the *Cowper-Essex Case*(5) or by the reasons given therefor by their Lordships. The principle laid down in that case as having been "finally settled" respecting the broad distinction between the compensation which can be awarded for injurious affection in cases where part of an owner's land has been taken and cases where no part has been taken seems to me strongly against the judgment now in appeal.

Metropolitan Board of Works v. *McCarthy*(6), is an authority referred to in many cases not only because of its peculiar facts but because of the adoption by the House of Lords of that test submitted by Mr. Thesiger, as one which would explain and reconcile apparently conflicting cases, viz.:—

(1) L.R. 5 H.L. 418.
(2) L.R. 5 H.L. 458.
(3) L.R. 4 H.L. 171.
(4) L.R. 2 H.L. Sc. 78.
(5) 14 App. Cas. 153.
(6) L.R. 7 H.L. 243.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

That where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his property, he is entitled to compensation if, by reason of such interference, his own property is injured.

In that case there was a "special case" submitted to the court in which it was stated:—

That by reason of the dock adjoining the River Thames, and the destruction thereby of the access to, and from the Thames, the plaintiff's premises became and were as premises either to sell or occupy permanently damaged and diminished in value.

Their Lordships held that the plaintiff was entitled to compensation because his right of access to his premises to and from the River Thames had been destroyed, and his lands consequently depreciated in value, but that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the land of the claimant considered independently of any particular trade that the claimant may have carried on upon it.

The recent case of *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Co.*(1), determined by the Judicial Committee of the Privy Council on the proper construction of the "Dominion Railway Act, 1906," secs. 47, 15 and 237(3), seems to me to apply the same principles to the construction of our Railway Act as have been applied by the House of Lords to the various English Acts as to lands taken or injuriously affected under statutory powers. That case should go a long way to govern the one before us. In delivering the judgment of their Lordships, Lord Shaw says:—

These respondents are frontagers, that is to say, owners of properties in the streets named, and it is not difficult to understand how they are, and possibly also how the municipality itself is, seriously affected by the location of the railway as proposed and sanctioned.

(1) [1912] A.C. 224.

It appears, however, that many of the properties in question are neither taken or injuriously affected in the sense of the English railway law as interpreted by *The Hammersmith, etc., Ry. Co.* v. *Brand*, 1869 (1), a decision which has been followed in Canada in *Re Devlin and the Hamilton and Lake Erie Ry. Co.* 1876(2). It is in no way surprising to find that the Board, giving a sanction for the construction of a railway through the municipality, should make the condition that the compensation to be paid for that privilege should fully equate with the injury done "to all persons interested"; that is to say, that the compensation should be recoverable in respect not only of the construction of the railway as settled by *Brand's Case*(1), but also for all damage sustained in respect of its "location."

The pith of the judgment, as I understand it, is that the power given by the statute to award damages was in respect of construction only, and not to damages arising from location, and that the power to award compensation is limited to matters specifically referred to in the statute, and could not be extended by the Board of Railway Commissioners as was attempted to be done in their order approving the *location* of the railway conditionally on the company

making full compensation to all parties interested for all damage sustained by reason thereof.

In other words, the Board could not by an order authorizing the location of the road along certain streets in the City of Fort William extend the compensation clauses beyond the matters specifically referred to in the statute, and that the "location" of the road was not one of those matters.

The case of *The King* v. *McArthur*(3), decided by this court in 1904, appears to me applicable in principle to the one now before us. I was one of the judges by whom that case was decided, and I know it received, owing to the apparent conflict between several of the English cases, a great deal of consideration. The

(1) L.R. 4 H.L. 171. (2) 40 U.C. Q.B. 160.
(3) 34 Can. S.C.R. 570.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

conclusions there reached unanimously by this court apply with great force to the one now before us.

I have compared carefully the compensation clause 325 of the Act, respecting municipal institutions, with those in the English Acts on which the decisions I have above referred to in the courts were given. I am not able to find any *substantial* differences between this clause (325) and the compensation clauses of the "Lands Clauses Act, 1845," sec. 68; the "Railway Clauses Act, 1845," secs. 6 and 16; the "Waterworks Clauses Act, 1847," secs. 6-12, and the "Public Health Act, 1875," sec. 308. I say substantial differences, because, of course, there are verbal ones, but for all purposes of this appeal I construe the compensation clause of the "Municipal Institutions Act" now before us as having the same meaning and object as the compensation clauses in the various English Acts I have referred to. These decisions in the House of Lords are, of course, binding upon us and with great respect I cannot see the use of quoting from the judgments of the dissenting law lords, however distinguished, as to this meaning and object, as has been done by the learned judges who gave the judgment in the courts below.

These decisions lay down a clear and definite rule with respect to the damages allowable for injurious affection where no land of the claimants or right or interest therein has been taken or obstructed. Being unable to distinguish between the section we are dealing with and those of the English Acts referred to, I feel bound to apply that rule to this case, and doing so, have reached the conclusion that the damages awarded cannot be sustained and that the appeal should be allowed with costs in all the courts, including the arbitrator's, and the claim of the respondents dismissed.

1917.

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

IDINGTON J.—The appellant in 1912 erected two lavatories, urinals and water-closets on Parliament Street, Toronto, in the exercise of the powers conferred by sec. 552, sub-sec. 1, of the "Consolidated Municipal Act," 3 Ed. VII., ch. 18, which is as follows:—

552 (1) The Councils of cities or towns may provide and maintain lavatories, urinals and water-closets, and like conveniences, in situations where they deem such accommodation to be required, either upon the public streets or elsewhere, and may supply the same with water, and may defray the expenses thereof, and of keeping the same in repair and good order.

The respondent then owned a parcel of land on the north-west corner of Queen and Parliament Streets, on which was erected a large building suitable and used for carrying on therein the business of dealing in furniture and house furnishings, and also clothing, millinery and furs.

These urinals and a separate structure called a breather, occupied a considerable part of the side of Parliament Street, next to said building and about only seven feet distant therefrom.

They were separated from each other so that the entire space so occupied was not continuous, but permitted public travel between them.

I assume that no allowance could be made for damage to the business, as such, and it is only the depreciation in the market value of this property of the respondent for which he can claim compensation under sec. 437 of said Act, which is as follows:—

Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

This section being that in force when proceedings began, must be held to govern what is here in dispute.

And let us clear our minds by realizing that the construction put upon another Act, less simple than this, and very differently worded, in any single section, and conceived in another atmosphere, when modern England had got born again, as it were, and was grappling with new problems, may not fit the situation confronting our legislatures. I submit that we better eliminate from the section all that is superfluous in relation to the facts and claims in question herein and read the section as follows:—

> Every Council shall make to the owners * * * of * * * real property * * * injuriously affected by the exercise of its powers, due compensation for any damages * * * necessarily resulting from the exercise of such powers.

We have long been told by eminent judges and others, that when the language used by the legislature is precise and unambiguous, a court of law at the present day has only to expound the words in their natural and ordinary sense.

There is no ambiguity about this legislative expression.

Nor is there any ambiguity in the language of the power I have quoted above, which enabled the appellant's council

> to provide and maintain lavatories, urinals and water-closets,

etc., on Parliament Street alongside respondent's building.

Nor do I feel that there is the slightest doubt as to the probable conception which the average business man seeking a corner such as the one in question, would have, relative to the market value of such a property, before and after the exercise of power, that provided and maintained such conveniences.

The plain ordinary meaning of the language used seems to me expressly to require that the owner should be compensated according to the conception of such business men relative to such values before and after the execution of the power.

Then comes the difficulty and to my mind the only difficulty in the problem presented to those concerned.

But the solution of that problem is by the statute dealing therewith, expressly relegated to the judgment of an officer with which, unless he clearly has proceeded upon an erroneous apprehension of the principles which should have governed him, we have no right to interfere, or upon the evidence properly adduced his allowance has been so grossly excessive or inadequate as to call for a review thereof.

Excess of damages is not made a ground of this appeal and hence we are relieved from an analysis of the evidence and careful consideration of the results derivable therefrom.

Assuming he proceeded upon the plain unambiguous nature of the language used in the statute, I see no ground for interference.

All that has been urged as to the cases decided in England under the "Lands Clauses Consolidation Act," and the cases resting thereon, so much relied upon, seems to me beside the question.

That Act is so entirely different from the Act upon which we must proceed, that it seems a waste of time to dwell thereon.

The decision in *Brand* v. *Hammersmith*(1), needed the consideration of four clauses of the "Lands Clauses Consolidation Act," together with two of the "Railway

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

Act," to be expressly linked up with it, and the frame of the former Act, in order to be able to arrive at it.

And the substance of the whole matter turned upon the supposed necessity of shewing that some part of the owner's land had been taken in order to permit of injurious affection being considered at all, despite the weighty opinions to the contrary effect of Lord Cairns and three of the four judges to whom the question had been submitted.

That mode of thought dominated many later cases even under other statutes, when the condition precedent thus established as necessary to relief under that particular statute existed no longer as a barrier. Thus, indirectly, it seems to have come about that in later times some imagined the word "injuriously" must be held to import something technical as *injuria* as a condition precedent to the allowance of damages for injurious affection.

Later than the *Hammersmith Case*(1), Lord Blackburn, the dissenting judge of the four to whom the question had been submitted in that case, saw his way in the case of *Buccleuch* v. *Metropolitan Board of Works*(2), 1870, at page 244, to hold that

> a part of the premises being taken it let in the claimant to have damages assessed for everything.

We have no such condition imposed in the Act now in question, and I see no reason why we should engraft upon the ordinary meaning of the words used something that is not there, and can only be imported there by giving to the word "injuriously" a highly technical meaning which Lord Blackburn, and others, including Lord Cairns in the case lastly cited, did not find.

(1) L.R. 4 H.L. 171. (2) L.R. 5 Ex. 221.

Nor did Lord Selborne in the case of *Brierley Hill Local Board* v. *Pearsall* (1), which turned upon sec. 308 of the "Public Health Act, 1875," where the expression used is "damages" seem to imagine it was necessary to prove a right of action for the wrong done but treats the language in its plain ordinary sense.

Nor did we, or any one else concerned in the recent case of *Vancouver West* v. *Ramsay*(2), imagine that it was necessary to enable a plaintiff suing on an award for damages caused to his property by narrowing the street to shew that independently of the provision for compensation he would have had a right of action.

Why should we? It is answered some other Acts having used the word "injuriously" cases decided thereon should be followed.

But the case of *Horton* v. *Colwyn Bay* (3), so much relied upon in argument of counsel for appellant, turned upon a section of the "Public Health Act," which did not use the word "injuriously" at all.

That brings us back to the proposition that legal damages are implied in such legislation, though I think the case is distinguishable on other grounds upon which I need not enlarge.

It is exceedingly difficult to reconcile all the numerous cases bearing more or less upon the question. I doubt if everything decided in England upon merely analogous statutes and cases binds us.

We, of course, receive such decisions with the greatest respect, but when it comes to a question of the construction of one of our own statutes, neither identical in language nor even fitted to the like conditions, we must give our statute the meaning probably attached to it by the legislature enacting it.

(1) 9 App. Cas. 595. (2) 53 Can. S.C.R. 459.
(3) [1908] 1 K.B. 327.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

But even if we are bound to apply the word "injuriously" in the technical sense that there has been something done for, or in respect of, which an action would lie, I see no difficulty in this case.

Let us assume for a moment that without legal authority, the appellant had, or to put it more broadly, some one else had, presumed to erect and maintain such structures, either for such uses or not, on such a street in such close proximity to the respondent's premises as appears in the case presented, I have no manner of doubt the respondent would have had a right of action as one suffering beyond the general public by reason thereof, and could have successfully maintained a claim for injunction or damages.

Everything in such a case must depend upon the surrounding circumstances, and the use, or possible use a proprietor may be making, or desire to make, of his premises.

For example, a farmer might not be able to maintain such an action arising from the erection of such a structure on a country road alongside his farm, so long as his entrance, or probable entrance, to his premises was not obstructed or otherwise interfered with.

But here the proprietor not only for the present uses he is putting his property to, but the evident possible use he might find it advantageous to put his property to by making entrance thereto from Parliament Street, does suffer loss and injury beyond the rest of the public.

In short, as one of the appellant's own witnesses puts it, he is deprived of the value inherent in a corner lot.

There are some reasons why, apart from the technical reasons which rest upon the right to bring an action for the nuisance, the adoption of such a test

may be of value in guiding an arbitrator who has to solve the problem of diminution of value.

If the proprietor suffers no such damage as would entitle him to bring an action, then, roughly speaking, the probability may be that he suffers no damages, or at least such as he should trouble any one about. And again there are conceivable cases where the institution of some establishment might tend to lessen the value of property in a whole town or district thereof, and for practical purposes a proprietor might be suffering no more than the rest of the public and hence any assessment of damages would be but taking it out of one pocket to put it into another by reason of his having to pay in his rates a share of what each similarly situate might be awarded.

Hence, in either way we look at the construction of the statute, I think the appellant fails.

A question is raised as to an item of $1,200 of damages caused by the erection being only matter of the negligent exercise of the power and hence possibly not within the reference.

I cannot, however, see the clear evidence of negligence, nor does it seem to me the case was fought out on that line before the arbitrator. It was separated from the total merely upon the point being taken accidentally in argument.

As to the cross-appeal, I think the damages allowed ample compensation even if the whole of the respondent's property is to be considered instead of merely one shop at the corner as possibly a correct view to take, and therefore the cross-appeal should also be dismissed.

I think the appeal should be dismissed with costs.

DUFF J.—The authority for the construction of lavatories under which the appellant municipality

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

acted is that given by sec. 552, sub-sec. 1, of the "Consolidated Municipal Act, 1903," and the compensation clause applicable is sec. 437 of that Act. Some doubt was expressed on the argument on this point, the suggestion being that the rights of the parties were perhaps governed by the provisions of the "Consolidated Municipal Act of 1913." But it seems to be undisputed that before that Act came in force, on the first day of July, 1913, the lavatories had been provided. It appears to be a case in which sec. 14, sub-sec. *c.*, ch. 1, R. S. O. 1914, of the "Interpretation Act" applies; and that the change in the law, if there was any, could not affect any "right, obligation or liability acquired, accrued, accruing or incurred" under the Act of 1903.

Compensation for "damages" caused by the exercise of the powers of the municipality is provided for by sec. 437 as follows:—

> Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used, by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.

It is conceded that the necessary result of the construction and maintenance of the lavatories is to diminish the value for selling and letting of the respondent company's property. An essential condition, however, of the company's right to recover compensation under the enactment above quoted is that its property is "injuriously affected" by this "exercise of the powers" of the municipality; and, on behalf of the municipality, it is contended that the property has

not been "injuriously affected" within the meaning of this section.

The phrase "injuriously affected" was a subject of much controversy, but more than 50 years ago it was settled that as used in sec. 6 of the "Railway Clauses Consolidation Act" (1845) and in sec. 68 of the "Lands Clauses Consolidation Act" (1845) the phrase imports something which if done without the authority of the legislature, would have given rise to a cause of action. *Ricket* v. *The Directors of the Metropolitan Ry. Co.*(1), *The Metropolitan Board of Works* v. *McCarthy*(2), *Caledonian Ry. Co.* v. *Walker's Trustees*(3). It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected," it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; *Ricket* v. *Metropolitan Railway Co.*(1); and further that the damage complained of must be in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put: *Beckett* v. *Midland Rly. Co.*(4), at pages 94 and 95.

It is undeniable and admitted in fact that the learned arbitrator in assessing the compensation has limited his attention to depreciation in value of the building and depreciation in value of the land.

The appellant municipality's contentions are, first, that the compensation clause above quoted gives a right to compensation only for damages caused by the construction as distinguished from the maintenance of the conveniences in use, that is to say, the damages

(1) L.R. 2 H.L. 175.
(2) L.R. 7 H.L. 243.
(3) 7 App. Cas. 259.
(4) L.R. 3 C.P. 82.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

occasioned by the structural form of the works without reference to the use to which they are put, or to the concomitants of them as public lavatories; secondly, that the first condition of the claimant's right is unfulfilled, namely, that the injury suffered by him should be one for which an action could be maintained in the absence of statutory authority for what the municipality has done; and thirdly, if such an action could have been maintained, another condition, namely, that the damage complained of should have been the necessary result of the exercise of the lawful statutory powers of the municipality, is absent because the section under which the municipality professed to act (sec. 552, s.s. 1) does not authorize the creation of a nuisance.

It should first be noted that section 437 provides for the payment of compensation in respect of harm done through the exercise of a great variety of powers; and that its language, when read without reference to judicial decision in relation to other statutes or to practice under other statutes and without preconception originating in familiarity with some such course of decision or practice, does not justify any restriction upon the scope of the remedy given; there being nothing here which even remotely suggests that for the purpose of determining what is due compensation to the sufferer from the exercise of a municipal power to "provide and maintain lavatories," a lavatory provided under that power to be maintained under that power is to be regarded only as a physical construction interrupting the continuity of the surface of a public street. "To provide and maintain public lavatories" involves the provision of conveniences which the public are invited and expected to use and the "damages" resulting therefrom are, if the words are to be given their natural and ordinary meaning, damages arising

from the execution of the powers to "provide and maintain."

It is contended that the language of section 437 closely resembles the language of section 68 of the "Lands Clauses Consolidation Act" and of sections 6 and 16 of the "Railway Clauses Consolidation Act," and that a long series of decisions in the English courts by which the rule has been developed that the right of compensation given by these sections and like enactments has been held to be limited to loss arising from the construction as distinct from the the subsequent user of the works, has been applied in this country to Canadian enactments which differ from those enactments as much as section 437 does, and that in view of this course of decision something more explicit than anything to be found in section 437 is required to shew that the legislature intended "damages" for "injurious affection" to be awarded under that section on any other principle.

In examining this argument, the first point to consider is; are the decisions of the English courts under the two Acts specifically mentioned decisions which ought to govern the construction of the statute we have to construe? Sections 6 and 16 of the "Railway Clauses Consolidation Act" were authoritatively interpreted and applied in *Hammersmith* v. *Brand*(1), and it was there held that the proviso of the last mentioned section requiring "satisfaction" to be made to all

> parties interested * * * for all damage by them sustained by reason of the exercise of such powers

must be read with reference to the initial words of the section, which were held to shew that all the powers specifically conferred by that section were to be exer-

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

cised exclusively for the "purpose of constructing the railway" (see judgment of Lord Chelmsford at page 205); and that the proviso must be limited to "damage sustained" through the exercise of the powers conferred by that section; and consequently that the proviso had no relation to "damage" sustained by reason of the exercise of the authority given by the 86th section of the Act to "use and employ locomotive engines" upon the railway. As regards the somewhat similar words used in the 6th section, it was held that the generality of the terms must be restricted by reference to the "heading" of a group of clauses in which that section, as well as the 16th section occurs, and this "heading" was considered to manifest that the legislature was dealing with the subject, in that group of sections, of the construction of the railway alone.

In *Brand's Case*(1) their Lordships rejected the view pressed by Lord Cairns, that when compensation is to be awarded for damage caused by the construction of a railway, regard must be had to the character of the thing authorized as it was contemplated by the legisation, not a physical thing made once for all, but a railway in operation. Similar reasoning led to the same result in the interpretation of section 68 of the "Lands Clauses Consolidation Act," by which compensation in respect of "injurious affection" is to be given where lands are "injuriously affected" by the "execution of the work."

This reasoning, which proceeds upon the particular words of these enactments, and upon a very strict view of the words "construction" and "execution" as applied to works of the description authorized, has obviously no kind of relevancy in itself to the question of the effect of the broad language of section 437.

(1) L.R. 4 H.L. 171.

So much for the decisions on these specific sections. There are authorities upon the effect of sections 49 and 63 of the "Lands Clauses Consolidation Act," however, that may usefully be referred to as emphasizing the inutility of the decisions on the sections first mentioned as precedents in questions involving interpretation of statutes couched in such general terms as those of section 437. Sections 49 and 63 of the "Lands Clauses Act," deal with the case of "severance" and in that case the owner is to be paid not only the value of that part of his land which has been taken, but he is also to receive compensation for damage sustained by him by "severance" or by "otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act."

Damage * * * by otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act

are words not in themselves distinguishable in effect from those employed in section 437, so far at least as affects the question now before us; and the law is very clearly settled that in cases governed by sections 49 and 63 compensation is assessable in respect of damage caused by subsequent user. *Duke of Buccleuch* v. *Metropolitan*(1). The effect of section 63 is fully discussed in the judgment of Montague Smith J. speaking for Willes and Brett JJ. as well as himself (2), at page 252 *et seq.*, and by the law Lords in *Essex v. Local Board for Acton*(3), at pages 162, 165, 166 and 167. There are some observations of Lord Macnaghten at pages 177 and 178, illustrating the view their Lordships held of the effect of the general language of sections 49 and 63:—

(1) L.R. 5 H.L. 418. (2) L.R. 5 Ex. 221.
(3) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

Where land is required for public purposes, the injury, if any, to the owner's adjoining property depends mainly on the character of the undertaking. There are various purposes for which local boards may be authorized to take land. They may take land for pleasure grounds. They may take land for sewage purposes. But before putting in force any of the powers of the "Lands Clauses Consolidation Act," a local board is bound to publish the nature of the proposed undertaking, to define the lands required, and to collect, as far as possible, the views of all persons interested in those lands. Then comes a public inquiry, to be followed in due course by a provisional order, and an Act confirming it. These elaborate provisions, designed apparently for the protection of private, as well as public interests, would be something of a mockery if a person from whom land is taken is to be told, when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm.

It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance or prejudice or fancy; the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly.

The promoters of an undertaking can only take lands for the purpose authorized by their Act. When the lands are taken, the promoters can only use them for that purpose. It is the purpose of the undertaking and that alone, which justifies its existence, and directs and controls the exercise of its powers. And yet it is said that on a question of disputed compensation the arbitrators or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking, and to make believe that the intended works are some innocent and meaningless folly.

The decisions upon sections 49 and 63 of the "Lands Clauses Act" negative conclusively the theory that some general principle of construction has been established applicable to compensation statutes by which the effect of general words such as those of section 437 (not distinguishable, as I have said, from those of sections 49 and 63) can, in the absence of some qualifying context, be restricted in the way suggested.

This is aptly illustrated by an authority referred to on the argument, *Fletcher* v. *Birkenhead*(1). The controversy there related to the right to compensation

(1) [1906] 1 K.B. 605.

under certain clauses of the "Waterworks Clauses Act, 1847, "compensation being demanded for what was conceded for the purposes of the decision to be maintenance or user as distinguished from construction of the works. The defence relied upon *Brand's Case*(1), and I quote the observation of Bray J. at page 611:—

> It seems to me quite sufficient to say that the sections are not similar, and that it is wholly misleading to try and construe one Act by another Act, and on the ground that the differences between the two are small. The safest course is to construe the Act by its own language.

In the Court of Appeal(2), the provisions of the "Waterworks Clauses Act" were compared and contrasted elaborately with those of the "Railway Clauses Consolidation Act" by the Master of the Rolls, who pointed out what has already been indicated above as touching the grounds of that decision. The Lords Justices (Cozens-Hardy and Farwell L.JJ.) emphasized the distinction between a railway as conceived by the majority of their Lordships in *Brand's Case*(1)

> a causeway or embankment with rails laid upon it, and nothing more, a thing which was made once for all,

and the subject matter of the Act they had to construe works which are described as waterworks

> consisting of a well and pumping station by which water is obtained, a reservoir in which it is stored, and pipes by which it is carried to and from that reservoir;

and Farwell L.J. says at page 217:—

> It must be remembered that the case of *Hammersmith & City Ry. Co.* v. *Brand*(1), determined no question of principle. It dealt merely with the construction of a particular Act, and not with the Act with which we are dealing. Moreover, the Act upon which that decision turned dealt with a subject-matter so different from that with which the Act now in question deals, that it is obvious that the construction of one statute can be little or no guide to the construction of the other.

It is quite true that the "Waterworks Clauses Act" in express words gives a right to compensation for

(1) L.R. 4 H.L. 171. (2) [1907] 1 K.B. 205.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

damages arising from "construction and maintenance"; but the observations of their Lordships afford strong confirmation of the conclusion above indicated that no such general principle as that contended for is established by the English decisions on the two Acts referred to.

A brief reference to the decisions under section 308 of the "Public Health Act" is perhaps not out of place. The enactment provides that

> where any person sustains any damage by reason of the exercise of any of the powers of this Act * * * full compensation shall be made to such person by the local authority exercising such powers.

It was long ago settled that the right given by this section is available only where the act giving rise to the damage in respect of which compensation is claimed would be actionable in the absence of statutory authority. *Lingke* v. *Christchurch*(1). But subject to that it has been broadly held, to quote the language of Lord Esher in *Re Bater and Birkenhead*(2), at page 79, that

> the words * * * must include any pecuniary loss which a man suffers when he is not himself in default.

Hobbs v. *Winchester*(3), *Walshaw* v. *Brighouse*(4), *In re Davies and Rhondda Urban Council*(5); and accordingly compensation has been held to be awardable under them for damages suffered by reason of user as distinguished from the construction of the sewage works. *Durrant* v. *Banksome*(6), at pages 298, 300, 304 and 305; *Uttley* v. *Local Board of Health of Todmorden*(7), at page 23. *Horton* v. *Colwyn Bay*(8), which was pressed upon us by the appellant municipality is also a decision under section 308

(1) [1912] 3 K.B. 595.
(2) [1893] 2 Q.B. 77.
(3) [1910] 2 K.B. 471.
(4) [1899] 2 K.B. 236.
(5) 80 L.T. 696.
(6) [1897] 2 Ch. 291.
(7) 44 L.J.C.P. 19.
(8) [1908] 1 K.B. 327.

of the "Public Health Act," and it is sufficiently evident when the case is understood, that it has very little relevancy to any question before us. The defendants there acting under the "Public Health Act," had constructed a sewer, pumping station and sewage reservoir, forming one scheme of sewerage. The sewers were in part constructed on the property of the claimant; the pumping station and the reservoir on the property of other persons. The present value of part of the claimant's lands was depreciated by reason of the contemplated user of these works for sewage purposes and in respect of this depreciation he claimed compensation.

The decisive consideration rested upon the fact stated at page 342 in the judgment of Buckley L.J. that the erection and user of the pumping station and reservoir would be no actionable wrong as against the claimant; of this there seems to have been no dispute and *primâ facie*, therefore, section 308 of the "Public Health Act" had no application.

An ingenious attempt to get over the difficulty by appealing to some rather sweeping observations made in *In re London, Tilbury, etc. Railway Co. and Gowers Walk Schools*(1), and applying them to the fact that the system was a system in part constructed on the claimant's land failed; it would serve no useful purpose to follow the discussion on this last mentioned point.

We have now to consider the decisions upon the Canadian statutes. First, there is a series of authorities in the Ontario courts on the "Dominion Railway Act" in which it was held that the effect of the compensation clauses of that Act as touching the point now in question was the same as that attributed to

(1) 24 Q.B.D. 326.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

secs. 6 and 16 of the "Railway Clauses Consolidation Act" in *Brand's Case*(1) and these decisions of the Ontario Courts were assumed in the *Fort William Case* (2), to have settled the law under the "Dominion Railway Act." In *Holditch* v. *Canadian Northern Ry. Co.*(3), the Judicial Committee of the Privy Council, as I read the judgment, held (see p. 554) that no importance can be attached to any difference in language between section 155 of the "Dominion Railway Act" and the proviso to section 16 of the "Railway Clauses Consolidation Act" of 1845, and their Lordships' language seems to imply that they approve of the view that the construction of section 155 as regards the point now in question is governed by the decision in *Brand's Case*(1).

Now it is too clear for dispute that if section 155 of the "Dominion Railway Act" was to be construed apart from its context, it could be given no narrower effect than the language of section 437 of the "Municipal Act." On the other hand, section 155 is found in a group of sections, which, like the group of sections in which section 16 of the "Railway Consolidation Clauses Act" occurs, has the heading "construction" and (although sub-section (*f*) of section 151 in that same group of sections deals with the manner of operation as regards motive power and otherwise) it is, I think, a proper conclusion from the whole tenor of their Lordships' remarks at page 554 in the *Holditch Case*(3) that the foundation of their Lordships' view was that the language of section 155 when read with the context in which that section is found, sufficiently evidences an intention to adopt the law of *Brand's Case*(1).

(1) L.R. 4 H.L. 171. (2) [1912] A.C. 224.
(3) [1916] A.C. 536.

The other Canadian decisions to which I shall refer concern the effect of section 47 of the "Exchequer Court Act" and of provisions of the Dominion Government Railways Act of 1881.

The King v. *McArthur*(1), a decision of this court at first sight is a formidable obstacle for the respondent company.

The court was there governed by the provisions of the Dominion statutes, the "Expropriation Act," and section 47 of the "Exchequer Court Act." There is in these enactments no explicit statement of any specific rule or principle upon which compensation is to be awarded, although some right to compensation (when property is taken or injured) is necessarily implied.

The court in the case just mentioned appears to have assumed, without argument on the point, that the rules developed by the English courts in compensation cases under the "Railway Clauses Act" and the "Lands Clauses Act," were proper guides for the interpretation of the "Exchequer Court Act" and the "Expropriation Act." The decision can therefore have no weight as an authority on the construction of section 437. If the court had been dealing with section 437 of the "Municipal Act" another question might have arisen; although in view of the course of this court in its decisions upon article 1054 C.C., see *Vandry* v. *Quebec Light, Heat and Power Co.*(2), of Lord Blackburn's observations in *Brand's Case*(3), and of the decision of the Privy Council in *The Queen* v. *Hughes*(4), I should not have felt myself constrained to do violence to the language of the statute by a decision in which the point in question had passed *sub silentio*. The

(1) 34 Can. S.C.R. 570.
(2) 53 Can. S.C.R. 72.
(3) L.R. 4 H.L. 171.
(4) L.R. 1 P.C. 81.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

statute in question in that case was, however, another statute, and as the decision cannot be said to establish any principle, we are not bound to give effect to everything which may appear to be a logical consequence of it. *Ex parte Blaiberg*(1), at page 258; *Spencer* v. *Metropolitan* (2), at page 157; *Admiralty Commissioners* v. *S.S. America* (3), at pages 42 and 43.

In *Paradis* v. *The Queen*(4) Taschereau J. observed at page 193 that " our statute," meaning the Government Railways Act of 1881, was but a re-enactment of the "Imperial Statutes" on the subject of compensation and it followed, of course, that the decisions on the English statutes were considered to be authoritative. The particular clauses of the "Government Railways Act," to which Taschereau J. referred, have since disappeared from the statute, but I am afraid I am unable to agree with the assumption that they were a mere reproduction of the "Imperial Statutes."

On the whole my conclusion is that there is nothing in the decisions of this court on the Dominion statutes, which constrains us to give section 437 an effect not justified by the words themselves which the legislature has selected for the expression of its intention.

The point being settled that the right of compensation given by section 437 extends to cases where property is "injuriously affected" by the exercise of powers of maintenance and user of works as distinct from the power to construct works, in the narrower sense of those words, the next question to be considered is whether the first of the conditions above mentioned has been satisfied, namely, that the depreciation in value of the respondent's property which admittedly has taken place is the result of acts

(1) 23 Ch.D. 254.
(2) 22 Ch.D. 142.
(3) [1917] A.C. 38.
(4) 1 Ex. C.R. 191.

which in the absence of statutory authority would have been wrongful and actionable.

I shall not repeat the reasons given by Mr. Justice Masten in which I concur for thinking that the openings and the railings about them constitute illegal and indictable obstructions to the public right of passage in the highway. The general principle that an illegal and indictable act is wrongful as against an individual and actionable at his suit if it has occasioned to him some particular loss more than that sustained by the rest of the public, has been applied frequently in compensation cases: *Metropolitan Board of Works* v. *McCarthy* (1), at pages 263 and 266; *Chamberlain* v. *West End of London* (2); and especially in the exposition of Mr. Justice Willes in *Beckett* v. *The Midland Railway Co.* (3), beginning at page 97. There is a distinction, however, between this case as regards the relation between the obstruction and the loss suffered by the respondent company, and all the other compensation cases in which, as far as I have seen, the principle has been held to be operative. As I view the facts there is no warrant for holding that any loss has fallen upon the respondent company through any direct effect upon the value of its property of these obstructions as obstructions, because, in other words, of any interference with the public right of passage occasioned by them; and it may be added that the learned arbitrator has in substance found, I think, and I should find without hesitation that there is no invasion of the respondent company's right of access, the private right that is to say incidental to its ownership.

The depreciation in value for which compensation is awarded is occasioned by the fact that the presence

(1) L.R. 7 H.L. 243. (2) 2 B. & S. 636.
(3) L.R. 3 C.P. 82.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

of such conveniences makes the property less desirable from the point of view of possible purchasers and lessees, and therefore diminishes its selling and letting value. Does the circumstance that the loss is not due to the obstructions as such affect the application of the principle? If an illegal act causes damage to an individual, which is particular damage, that is to say, which affects him particularly over and above any harm it may cause to the public generally, and that damage is the natural and probable consequence of the act, reparation for such damage is, I think, recoverable, and I do not see why the law breaker should escape this consequence because of the fact that the injurious results (the natural and probable results) of his concrete illegal act are not connected by any causal relation with the particular circumstances giving the act its specific illegal character. The point has been dealt with in *Campbell* v. *Paddington*(1), in which it was held that an erection in a highway, unlawful as an obstruction to the public right of passage which also interfered with the view from the plaintiff's windows and thus deprived her of the opportunity of letting some rooms for the purpose of viewing a procession, was actionable at her suit although she was not specially affected by the obstruction as an obstruction to the right of passage. See also *Griffith* v. *Clay*(2).

But the question arises, is it sufficient that the depreciation should have been the result of something which would have been an actionable public nuisance, but for the statutory authority? That it should be actionable is a condition, but is it sufficient? Lord Cairns' words in *McCarthy's Case*(3), at page 252, have frequently been quoted:—

(1) [1911] 1 K.B. 869. (2) [1912] 2 Ch. 291.
(3) L.R. 7 H.L. 243.

In the observations I am about to make to your Lordships, I propose entirely to accept the test which has been applied both in this House and elsewhere, as to the proper meaning of those words as giving a right to compensation, namely, that the proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the work had not been authorized by Act of Parliament.

Lord Hatherly's language is to the same effect at page 260 and in *McCarthy's Case*(1), the decision of the Exchequer Chamber in *Chamberlain's Case*(2), at page 605, and the decision of the Court of Common Pleas in *Beckett* v. *Midland Railway Co.*(3), at page 82, are explicitly approved in which it was held that depreciation in value caused by an obstruction giving a right of action by reason of such depreciation would afford a sufficient ground for compensation. Certain earlier cases, notably *Caledonian Railway Co.* v. *Ogilvy*,(4) in which a claim for damages occasioned by a railway crossing at highway level was disallowed, are explained on the ground that no depreciation of value or other injurious effects upon the claimant's property was shewn.

A difficulty, however, may seem to arise from the language of the Lord Chancellor (Lord Cairns) and of Lord Chelmsford in *McCarthy's Case*(1), and the application made of that language by this court in *The King* v. *McArthur*(5). Lord Cairns appears to have accepted, although it may be doubted whether he intended to lay it down finally as a "definition," the test proposed in the form of a "definition" by Mr. Thesiger in argument. Lord Cairns formulates that test at page 253 in these words:—

Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is

(1) L.R. 7 H.L. 243.
(2) 2 B. & S. 636.
(3) L.R. 3 C.P. 82.
(4) 2 Macq. 229.
(5) 34 Can. S.C.R. 570.

1917
THE CITY OF TORONTO v. J. F. BROWN CO.
Duff J.

physical interference with any right, public or private, which the owners or occupiers of property are by right entitled to make use of, in connection with such property, and which right gives an additional value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value.

Lord Chelmsford restates the "test" in slightly different language at page 256. Now there is a fallacy in applying this "test" where the claim is for damages caused by maintenance and user as distinguished from construction simply. In *McCarthy's Case*(1) their Lordships were applying the 68th section of the "Lands Clauses Consolidation Act," which comes into operation only where property is injuriously affected by the "execution of the works." And in view of the decision of the House in *Brand's Case*(2), all their observations were, of course, directed to a discussion of the point raised by a claim for the injurious affecting of property as the result of the physical construction. It is too obvious for argument that a claim for compensation for damages caused by vibration, in the working of a railway for example, is not within the purview of the language quoted. This being the proper construction of the language, it may no doubt have been rightly applied by this court in *McArthur's Case*(3), on the assumption upon which that decision proceeded, namely, that the statute under which compensation was claimed, had no application to the injurious consequences of user as distinguished from construction.

It is proper at this stage to notice an argument of Mr. Tilley, which was to the following effect. Assuming section 437 to have no application to cases in which no property is taken, and no property is injuriously

(1) L.R. 7 H.L. 243. (2) L.R. 4 H.L. 171.
(3) 34 Can. S.C.R. 570.

affected by construction, the depreciation in value ought, nevertheless, in part, on the evidence to be attributed to the existence of the obstruction to the right of passage occasioned by the openings in the surface of the highway independently of their connection with the conveniences; and that the compensation clause having once "attached," even though no land was taken, compensation must be assessed for the whole of the resulting damage arising from use as well as from construction.

I have already said that in my view the premises fail on the facts; but assuming the premises the conclusion is, I think, to say the very least, extremely doubtful. Section 437 gives compensation for

any damage necessarily resulting from the exercise of such powers,

"such powers" being those in the exercise of which land has been "entered upon, taken or used," or by the exercise of which land has been "injuriously affected. If "injuriously affected by the exercise of any of its powers" contemplates powers of construction only, then it must follow that where compensation is claimed for injuriously affecting lands it must be shewn that this results from construction. That seems necessarily involved in the acceptance of the interpretation of the statute put forward on behalf of the respondent. That interpretation given, there is no foothold for a claim in respect of damages occasioned by user.

Mr. Tilley's contention, moreover, is founded on certain English decisions, which, when closely examined, are seen to be *non ad rem*. I have already mentioned that in the *Cowper-Essex Case*(1), their Lordships had to apply sections 49 and 63 of the "Lands Clauses Consolidation Act." The language of those clauses is discussed above and the effect of them noted in their application to

(1) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

circumstances such as those their Lordships had before them in the *Cowper-Essex Case*(1), where part of a landowner's property is severed from the rest. Their Lordships followed the decision in the *Duke of Buccleuch's Case*(2) where the majority of the law Lords proceeded on the ground that land had been taken. The right of access to the river, moreover, along the whole of the river front, was invaded and access destroyed, and I should not be disposed to think that this was distinguishable from the taking of land, the right of access being not an easement, but one of the rights *jure naturæ* incidental to ownership. *Lyon* v. *Fishmonger's Co.*(3); *Kensit* v. *Great Eastern Ry. Co.*(4); *North Shore Ry. Co.* v. *Pion*(5), at page 621. See Lord Cairn's judgment in the *Duke of Buccleuch's Case*(2), at page 462. *In re Tilbury*(6), at page 326, is a case which seemed at first sight to support the contention, and the language used by the Lords Justices is very broad. At page 333, for example, Lopes L.J., says:—

> That principle I understand to be, that when the compensation clauses of the statute attach, the party who is injuriously affected is to be entitled to recover full compensation for all damage in respect of the determination in value of his property.

When, however, one considers what their Lordships had to decide, and what their Lordships did decide, one sees that they were only dealing with the case in which property is injuriously affected by construction. The ground of the claim was that certain buildings constructed by the railway company injuriously affected the claimant's property in the obstruction of certain ancient lights, and that this obstruction, which, but for the statutory powers of the railway company, would

(1) 14 App. Cas. 153.
(2) L.R. 5 H.L. 418.
(3) 1 App. Cas. 662.
(4) 27 Ch. D. 122.
(5) 14 App. Cas. 612.
(6) 24 Q.B.D. 326.

have been unlawful and actionable, at the same time had the effect of interrupting the access of light to windows in respect of which the claimant had acquired no easement of light. Their Lordships applied and construed section 16 of the "Railway Clauses Consolidation Act, 1845," in relation to these facts. I have already pointed out that under the decision in *Brand's Case*(1) the proviso to that section requiring the promoters

> to make full satisfaction * * * for all damage * * * sustained by reason of the exercise of such powers

applies only where the damage is sustained in consequence of construction as distinguished from user, and this is the section which their Lordships applied. The damage for which compensation was claimed was in its entirety attributable to construction.

There is, I think, no decision under the "Railway Clauses Act," or under the "Lands Clauses Act" in which it is held, or in which it is laid down that where land is not taken compensation can be recovered for damages arising from the injurious affecting of it by subsequent user as distinguished from construction; that no doubt is because there is nothing in the provisions of those Acts to give support to such a claim. There is one circumstance, moreover, which tells very powerfully against any such view. In *Brand's Case*(1) a claim was made, and allowed for damages for interrupting the access of light and air, and if the contention I am considering were sound, that would have afforded a basis for a claim to compensation for damage caused by vibration, which was disallowed. The point was not discussed by the law Lords, and not referred to in argument, but attention had been called to it in the judgment

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

of Montague Smith J.(1), and though perhaps as Lord Blackburn afterwards observed, the decision of the law Lords cannot be regarded as concluding the point, it is at least clear that Sir Roundell Palmer who appeared unsuccessfully for the respondent (and probably Lord Cairns, who thought the respondent ought to succeed), regarded the point as of no consequence.

I now come to the last point upon which Mr. Hellmuth, I think, chiefly relies, and that is that on the hypothesis upon which the respondent's case rests, the action of the municipality in providing and maintaining the conveniences exceeded any authority conferred by the "Municipal Act," and that consequently no right to compensation arises. I concur with the view advanced by Mr. Hellmuth, that if the municipal by-law was beyond the powers of the council no right to compensation under the statute would arise; but I have not sufficiently considered the provisions of the "Municipal Act" in relation to the procedure in compensation cases to enable me to form an opinion whether such an objection (postulating as this does an abuse of the powers of the council) could properly be taken as this objection was taken for the first time after the evidence had all been heard.

I am satisfied that there is nothing before us to justify the conclusion that the council exceeded their powers. Mr. Hellmuth's point is that the appellant municipality could not validly exercise its authority in relation to the providing of public lavatories in such a way as to create a nuisance prejudicially affecting private property.

Now there is a sense in which that proposition is perfectly sound. The municipality must exercise this

(1) L.R. 2 Q.B. 223.

power in a proper manner, that is to say, it must not by acts of collateral negligence by improper construction, for example, create a nuisance, and for a nuisance occasioned by such negligence, the municipality is undoubtedly responsible in an action for damages and that is the proper remedy. But the respondent company does not claim compensation for anything of the kind. It claims compensation for damages arising from the existence of these conveniences, and from concomitants of them which are inevitable, and from the harmful consequences necessarily resulting from the lavatories being where they are placed. It is argued that the municipality can have no authority under the statute to place such a convenience in such a situation as to produce such injurious consequences to a private individual. I think that proposition is not well founded. The authorities relied upon are *Vernon* v. St. *James*(1), *Metropolitan Asylum Dist.* v. *Hill*(2). These cases have been fully dealt with in a judgment of Lord Macnaghten, speaking for the Judicial Committee in *East Fremantle* v. *Annois*(3), which enunciates clearly and succinctly the principle upon which such questions must be decided, namely, by ascertaining the answer to the question: What is the proper construction of the statute from which the power is derived? I limit myself to quoting the most directly relevant passages:—

> The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute * * *
>
> In a word the only question is, has the power been exceeded? Abuse is only one form of excess.

(1) 16 Ch.D. 449. (2) 6 App. Cas. 193.
(3) [1902] A.C. 213.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

Their Lordships are of opinion that the principles laid down by Lord Kenyon and Abbott C.J. have not been in the slightest degree modified by the more recent cases referred to by Hensman J. They were all cases where, upon the true construction of the particular statute under consideration, the Court held that there was no intention of authorizing interference with private rights * * *

In *Metropolitan Asylum District* v. *Hill*(1), the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes: "What was the intention of the Legislature in any particular Act is a question in the construction of the Act?" There it was held, as Lord Selborne pointed out, that there was no statutory right to commit a nuisance, and that no use of any land which must necessarily be a nuisance at common law was authorized. As Lord Blackburn observed in a later case, *Truman* v. *London, Brighton and South Coast Rly. Co.*(2), quoting Bowen L.J., there was not to be found in the Act under consideration in *Metropolitan Asylum District* v. *Hill*(1) "any element of compulsion, or any indication of an intention to interfere with private rights."

In *Vernon* v. *Vestry of St. James*(3), in the very sentence quoted by Hensman J., James L.J. went on to say that he was of opinion that there was no legislation in the case authorizing the vestry to interfere with private rights. In an earlier part of his judgment, the Lord Justice had observed, "there are no words here that authorize the vestry to commit a nuisance."

The question is then—Has the legislature endowed the council with authority to select a site for such conveniences, subject to the obligation to pay compensation where private rights of property are injuriously affected? Municipal councils invested with very large powers must be presumed to act not only with due regard to the public interest, but with due consideration for individual rights and interests in such matters. But the question is: Is a discretion committed to the council which enables it to select a site where private property will inevitably be damaged when it deems the public interest so to require?

"An Act of Parliament," said Bowen L.J., in *Truman*

(1) 6 App. Cas. 193. (2) 11 App. Cas. 45, at page 64.
(3) 16 Ch.D. 449.

v. *London, Brighton and South Coast Rly. Co.*(1), at page 108,

may authorize a nuisance, and if it does so, then the nuisance which it authorizes may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorizing a nuisance.

It may be an authority to do certain works provided that they can be done without causing a nuisance, and whether the authority falls within that category is again a question of construction. Again the authority given by Parliament may be to carry out the works without a nuisance, if they can be so carried out, but in the last resort to authorize a nuisance if it is necessary for the construction of the works.

Nobody would deny that the municipality has authority to expropriate land for the purpose of establishing lavatories; therefore the scheme of the Act is certainly not to require the municipality, in the exercise of this power, to refrain from interfering with private rights; it contemplates, on the contrary, interference with private rights, subject, of course, to paying compensation. But in my judgment, to accept the view advanced by the municipality would nullify the utility of this power.

I will not elaborate the point; my conclusion is that where private rights are affected the compensation clause attaches. This is not to say that the municipal council may act in a wholly fantastic manner passing, for example, a by-law which

reasonable persons, acting in good faith, could not sanction.

Slattery v. *Naylor*(2). For such conduct the law affords ample remedy.

For these reasons I have come to the conclusion that the conditions of the claimant's right to compensation under the compensation clause of the "Municipal Act" construed by the light of the relevant judicial decisions, are fulfilled, and that the main appeal should therefore be dismissed.

(1) 29 Ch.D. 89.

(2) 13 App. Cas. 446.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

As to the cross-appeal, it involves questions of fact only, and upon these questions the arbitrator's findings have been affirmed by the Appellate Division, and ought not therefore to be disturbed in this court unless it is quite clear that they are founded upon some specific mistake. That has not been shewn.

ANGLIN J.—The facts are so fully set out, and the authorities so thoroughly discussed in the judgment of my brothers, Davies and Duff, which I have had the advantage of reading, and in those of the learned judges of the Appellate Division(1), that it seems quite unnecessary to do more than state the conclusions I have reached, and to indicate the grounds on which they are based.

The crucial questions appear to me to be these:—

1 Is the construction and maintenance of a public lavatory, which would otherwise be within the authorization of section 552 (1) of the "Municipal Act, 1903," or section 406(8) of the "Municipal Act, 1913," (identical provisions) excluded therefrom because it entails conditions which, if not so authorized, would amount to a nuisance?

2. Are the lands of the respondent company "injuriously affected" by the exercise of the powers conferred on the appellant municipality within the meaning of section 437 of the "Municipal Act, 1903," or section 325 of the Municipal Act, 1913 ? " I regard both these provisions as substantially the same, but I agree with my brother Duff that the Act of 1903 governs, the works having been constructed before the 1st of July, 1913.

3. Do the powers, for damages occasioned by the exercise of which compensation is thereby provided,

(1) 36 Ont. L.R. 189.

include the maintenance, in the sense of carrying on or conducting public lavatories, or are they confined to the original providing (*i.e.*, the construction) of them and subsequent maintenance merely in the sense of repairs or betterments?

(1) I entertain no doubt whatever that the fact that the existence of a public lavatory causes conditions which would at common law amount to a nuisance, if those conditions are a necessary concomitant of its erection and maintenance, whether it is constructed on expropriated lands or on the city streets, does not exclude it from the authorization of the statute. In specifically authorizing the construction and maintenance of public lavatories, and providing for compensation for resultant injury the legislature contemplated that such conditions, productive of damage to adjacent private properties, might ensue. The city is entrusted with a discretion as to the location of such lavatories, and its judgment, honestly exercised, is not subject to curial control or review. The causing of damage which is not a necessary result of the exercise of the statutory power—which due care in its exercise would avoid—is not within the statutory authority. It is an excess or abuse of the power; and damage so caused is not a subject for compensation, but for action. But the construction and maintenance of a lavatory, with all proper precautions to avoid unnecessary injury is authorized by the statute, even though it should entail conditions which would, if not so authorized, amount to an indictable or actionable nuisance. The statute substitutes money compensation for some of the benefits and advantages of and incidental to ownership of property, in so far as it is "injuriously affected" by the exercise of the corporate powers.

(2) The construction of the words "injuriously

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

affected" as applied to lands in compensation Acts, is too well established to admit of controversy. It imports an affection of the lands themselves (apart from any particular use to which they may be put or any personal inconvenience suffered by the owner) entailing appreciable damage. It also implies an *injuria* known to the law, *i.e.*, the doing of an act which, if not authorized by the statute, would be actionable—that the loss sustained must not be *damnum absque injuria*. Once an actionable injury is established, however, all the damage sustained in consequence of the exercise of the statutory power is to be compensated for. Thus, if the *injuria* consists in the blocking of lights to the enjoyment of which the land-owner has a legal right, prescriptive or contractual, he is entitled to compensation for interference with other existing lights to the enjoyment of which he has not a legal title. The *Tilbury Case*(1); *Horton* v. *Colwyn Bay*(2) at page 341; *Griffiths* v. *Clay*(3).

Moreover, if the act done be illegal (as Mr. Justice Masten has, to me at least, satisfactorily demonstrated the erection of the lavatory in question, but for the statutory authorization, would have been, because of the partial obstruction of the highway involved) damages which are its natural and probable consequences, may be recovered, although no actual damage can be shewn attributable to the feature of the act which renders it illegal, or, but for the statutory authorization, would have made it so. *Campbell* v. *Paddington*(4), cited by my brother Duff, illustrates this phase of the law. I agree that the affirmance of the judgment in appeal involves the acceptance of the principle of the *Paddington Case*(4).

(1) 24 Q.B.D. 326.
(2) [1908] 1 K.B. 327.
(3) [1912] 2 Ch. 291.
(4) [1911] 1 K.B. 869.

1917

OF THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

(3) I have no doubt that the word "maintain" in section 552(1) of the Act of 1903, is used in the sense of "carry on" and that the power conferred was not merely to erect lavatories, and keep them in repair, but to conduct and operate them as municipal enterprises, *Fletcher* v. *Birkenhead* (1), at pages 610-11;(2), at pages 213, 216-17, 218, seems to me to be very much in point.

In dealing with section 437 of the "Municipal Act, 1903," we are not embarrassed by the restrictive effect of a heading of a fasciculus of sections such as led to the decisions in *Brand's Case*(3) and the series of English cases following it. The language of section 437 is obviously wide enough to cover compensation for injury due to user as well as to erection, once it is established that carrying on or conducting the lavatory is an exercise of the statutory power conferred by the word "maintain," as I have no doubt that it is. My brother Duff has clearly pointed out the distinction between the construction placed by the English courts on section 68 of the "Lands Clauses Consolidation Act" and sections 6 and 16 of the "Railway Clauses Consolidation Act," and that given to sections 49 and 63 of the former Act, and the grounds on which that distinction rests. I agree in his conclusion that the construction of section 552(1) and section 437 of the "Ontario Municipal Act, 1903," is governed by the decisions on sections 49 and 63 of the "Lands Clauses Consolidation Act." There is nothing in the "Municipal Act" which requires a more restricted application of section 437 than its language *ex facie* calls for.

(1) [1906] 1 K.B. 605. (2) [1907] 1 K.B. 205.

(3) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

Compensation for damages due to user having been expressly provided for by the statute, and injurious affection, resulting from an act illegal but for statutory authorization, having been shewn, nothing more, in my opinion, is required to establish the claimant's right to recover.

I have not overlooked the argument made on behalf of the appellant, based on the fact that title to the land occupied by the highway is now vested in the city under the "Municipal Act, 1913." When the lavatory was built, however, and the respondent's right to compensation accrued, the title was in the Crown, and the appellant cannot invoke the Act of 1913, which is not made retrospective. But, although the title to the soil under Parliament Street is now vested in the City, having regard to the trust upon which it is held, it cannot, in my opinion, be lawfully used without statutory authority as a site for a lavatory. The lavatory was not erected, and is not maintained, under any such pretended common law right of proprietorship, but in the exercise of the powers conferred by the statute; and for injury to land sustained as the result of the exercise of those powers, the legislature has given the right to compensation.

I am, for these reasons, of the opinion that the award as to the item of $9,000, no complaint having been made as to the quantum, should be sustained.

As to the item of $1,200 allowed for damage due to seepage, I find no evidence in the record of any negligence in the planning or construction of the works, such as would be an abuse of the statutory powers or without the protection they afford. It may be that by additional works (Mr. Justice Riddell suggests a coat of waterproof cement on the walls of the claimant's shop) the seepage complained of could have been

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

prevented. But the municipality's failure to undertake such additional works did not render it liable to an action for damages. The injury caused by the seepage seems to have "necessarily resulted" from the exercise of the statutory powers of the municipal corporation within the meaning of section 437. On this branch of the case I agree with the views expressed by Mr. Justice Masten.

No case was made for increasing the amount of the award as claimed by the cross-appeal. Indeed any error in the assessment of compensation would seem to me to be clearly in favour of the claimant. A more moderate award might have been accepted without appeal. The allowance of excessive compensation in cases such as this is calculated to discourage the undertaking of important public improvements.

BRODEUR J.—I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor of the appellant: *William Johnston.*

Solicitors for the respondents: *Macdonald, Shepley, Donald & Mason.*

1917

*March 20, 21.

*June 22.

GEORGE CRAIN (DEFENDANT).....APPELLANT;

AND

OSCAR WADE, LIQUIDATOR OF THE EXCELSIOR BRICK COMPANY (PLAINTIFF).....RESPONDENT.

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

Contract—Sale of brickyard—Default—Repossession—Ownership of bricks—Set-off—Mutual debts—"Ontario Judicature Act," R.S.O. [1914] c. 50, s. 126—"Winding-up Act," R.S.C. [1906] c. 144, s. 71.

B., owner of a brickyard, gave an option of purchase to V. part of the price to be paid in debentures and stocks of a company formed at the time. The option was assigned to and exercised by said company, which made default in the payments and afterwards went into liquidation under the Dominion Winding-up Act. B., under the terms of the option agreement, re-entered into possession of the brickyard and of the bricks manufactured and in process of manufacture. W., liquidator of the company, brought action against B. for the value of said bricks.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 402,) that the manufactured bricks were the property of the Company and B. was liable to account for their value.

Held, also, that B. was not entitled to set-off against the liquidator's claim the amount of the debentures of the company transferred to him as part of the price of the property.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated in the above headnote.

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

(1) 35 Ont. L.R. 402.

Chrysler K.C. and *McClemont* for the appellant.

A. C. McMaster for the respondent.

THE CHIEF JUSTICE.—I take no part in this judgment having been absent from court during a great portion of the argument.

DAVIES J.—I concur in the reasons of Mr. Justice Anglin for dismissing this appeal.

IDINGTON J.—The correct construction of the agreement in question, whether considered as an option or actual purchase, seems to me to fail to give the appellant, on its termination, any title to the bricks manufactured by the respondent company.

The appellant in taking possession of the lands upon which these bricks were situated was doing what he was rightly entitled to do, and his merely doing so did not assert, and I am by no means certain that in anything else he did relevant thereto he asserted, such dominion over the bricks in question as to be liable in trover.

His acts in completing the burning of such bricks as were being burnt in the kilns may have been of such a character as consistent with another view than that arising from such an assertion of dominion over them as to render him liable in trover.

Even if he might be found so liable it would not render the property his until the respondent liquidator had assented thereto as the correct interpretation of what had transpired.

The liquidator served a demand for the possession of property which as such he was entitled to, and failed to receive a delivery pursuant thereto by appellant.

1917

CRAIN v. WADE.

Idington J.

At least such I take to be the facts, though strangely enough counsel for the appellant has alleged in his factum that there was no evidence of service of the demand, yet inconsistently in a previous part of the same factum, at page 6 thereof, the statement of events appears in which I find the following:—

> On or about the 25th day of April, the plaintiff Wade, hereinafter referred to as the liquidator, served upon the defendant a demand of possession of all the assets belonging to the estate of the Excelsior Brick Company.

I have no doubt that at the trial when counsel for respondent stated the fact of service and filed notice everyone concerned proceeded upon the assumption that it had been served as stated. It is now rather late to start the inquiry anew for express proof.

I am of the opinion that an action so founded and established, resulting in an assessment of damages and judgment therefor in favour of a liquidator, under the "Winding-Up Act," does not in its result constitute a debt which may, under section 71 of said Act, be held one for the recovery of that which was "due at the commencement of the winding-up."

The claim to set off in respect thereof seems therefore, as does also that in respect of the notes for machinery, to be clearly untenable under said section.

The fact that under the "Judicature Act" a counterclaim, when established, may be set off against something allowed a plaintiff in same action, does not help appellant herein when the liquidator as trustee is limited to, and bound by, the express provision of the said section 71 to observe only such rules of set off as usually understood arising from the mutual relations of the company and its creditors or debtors as existent at the commencement of the winding-up proceedings.

It might, at the option of the company before that

event, have been quite competent for it to have waived the tort if committed as urged in March, and sued for goods sold and delivered, but it was not compellable to adopt that course, and could have sued in tort when set off, as usually understood, would have been as to damages recovered in such a suit, out of the question.

In any way I can look at the matter there is no room for the application "of the law of set off as administered by the courts" of Ontario within the meaning of the said section 71.

As to the other clauses incidentally, as it were, set up in regard to a number of items, I see no reason for interfering therewith as finally disposed of by the courts below.

The appeal should be dismissed with costs.

DUFF J.—I see no reason to doubt that the substance of the brick, whether manufactured, or in the course of manufacture, had become so completely separated from the soil, and had been dealt with in such a manner as to give them the character of personal property, and the consequence follows, I think, that they were the property of the Excelsior Brick Co. The agreement of sale imposed upon the company the duty of carrying on the business which comprised, not only the manufacture, but the selling of brick; and it must have been contemplated that the purchasers should be entitled to deal with the brick once they had assumed that character as their own. Indeed, putting out of view any question as to other rights, and without attempting precisely to characterize the right of the company in the land derived from the agreement, it is perfectly clear that the company at least was entitled to possession, and to take clay for the purpose of making brick, and to manufacture it into

1917

CRAIN v. WADE.

Duff J.

brick. Putting this right at the lowest, treating it as mere *profit à prendre*, it would confer upon the company a title to what was taken as soon, at least, as that was devoted to the purpose to which the company was entitled to apply it after actual separation from the soil. It would not follow that an amorphous heap of clay lying on the surface would become the property of the company, but to clay shaped into the form of bricks, and actually in process of manufacture, as such, the company would have a title. That being so, Mr. McMaster's argument convinces me that there was no error in Mr. Justice Middleton's estimate of the amount of damages to which the liquidator is entitled for conversion.

The important question in controversy is whether section 71 of the "Winding-Up Act" entitled the appellant to set off as against the liquidator's claim for conversion moneys due to him in respect of his debentures. Section 71 is in the following words:—

> The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. R.S., ch. 129, sec. 57.

The first condition which the appellant's claim must satisfy is that the claim the liquidator seeks to enforce was a claim due or accruing due at the commencement of the winding-up proceedings. I have come to the conclusion that this condition is fulfilled. The decision of the point turns on the question whether the evidence establishes wrongful conversion of the company's chattels before the commencement of the winding-up by the appellant. The appellant, acting within his rights under the agreement, by virtue of which the Excelsior Brick Co. occupied the premises on which

the bricks were made, and from which the material was taken for making them, rightfully took possession of those premises, and was in possession of them when the winding-up proceedings began. It is an undisputed fact that when the appellant assumed possession of the premises, the chattel property in respect of the conversion of which the liquidator has recovered judgment for damages against him, passed into his physical control, indeed in a qualified sense passed into his possession.

That, I say, is indubitable. But here the critical point is, did he take possession of the chattels in this sense that the control he exercised over them was a control excluding recognition of the true owner's rights? It is obvious enough that complete possession of the premises might very well involve control over the chattels as against persons having no rightful authority to interfere with them without creating any impediment in the way of the owner in exercising his rights or involving any denial of those rights because the right of Crain to assume possession of the premises on default of payment of the purchase money would in the ordinary course lead, in the exercise of it, to such control over the chattels as would exclude trespassers from interfering with them until the company (the owner) should remove them. Repossessing himself therefore of the premises on which the chattels were, and thereby acquiring *detentio* in respect of the chattels is in itself, for our present purpose, a neutral circumstance.

If, however, with this circumstance there are coupled circumstances shewing an intention on Crain's part to reduce the chattels into his possession and to exclude the true owner therefrom existing at the time he repossessed himself of the land on which they

1917

CRAIN v. WADE.

Duff J.

were, then all the elements of the wrong of conversion are present; because every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of any one else, and the act of assuming physical control, if done with the object of assuming possession as against persons rightfully entitled to possession and having possession in fact, is a taking within the meaning of the rule: *Wilbraham* v. *Snow*(1); and it makes no difference, I think, whether the conduct of the taker relied upon to establish the existence at the critical moment of the *animus possidendi* is contemporaneous or subsequent conduct.

The conduct of the appellant disclosed by the evidence in the present case manifests very clearly an intention on his part to take possession, not merely of the land, but of the chattels as well, under a belief and a claim that they belonged to him and a cause of action for conversion thereupon immediately accrued to the company, although at the moment, the available evidence in support of it may have been scanty or insufficient.

It is, moreover, I think, immaterial that the claim is made and properly enough made by the liquidator in his own name. The liquidator sues in a fiduciary capacity. As Mr. Chrysler pointed out in his very able and most valuable argument, the *persona* of the company does not disappear upon the granting of the winding-up order or on the appointment of a liquidator (sec. 20 "Winding-Up Act"), and the liquidator sues as trustee for the company.

I have been forced to the conclusion, however, that under a proper application of the provisions of the

(1) 2 Saun. 47*a*.

"Ontario Judicature Act," and Rules relating to set off and counterclaim, this case is not within section 71. I agree that there is much to be said in favour of the view that the substantial difference between the right of set off and the right of counterclaim has been greatly reduced by the Ontario rules. Where the object of both the action and the counterclaim is to enforce a pecuniary demand, and both are tried at the same time or proceedings either in the action or on the counteraction, there being no defence, are stayed until after the trial of the other, judgment is eventually given in favour of the plaintiff or defendant, as the case may be, for the difference between the sums severally recovered. On the other hand, claims which might be the subject matter of counterclaim cannot be set up by way of defence, unless they fall also within the scope of the classes of claims which may be the subject of set off by force of the provisions of the "Judicature Act" (secs. 126-128). Still an undefended action where a counterclaim is set up may in the discretion of the court be stayed until the trial of the counterclaim. The authority of the court to stay is, of course, like every judicial authority to be exercised on principle, and it may therefore be said that in such cases the defendant has a right if in the circumstances it is, in the judgment of the court, just and convenient to have the undefended action stayed until the counterclaim is disposed of; and that being done he is entitled as of right to have the amount recovered on the counterclaim deducted, if it be the lesser sum, from the amount to which the plaintiff is entitled in the action.

It is nevertheless true that under the Ontario rules a defendant is not entitled *ex debito justitiæ* to set up either in form or in substance by way of defence claims

1917
CRAIN
v.
WADE.
Duff J.

which, though proper subjects for counterclaim, are not permitted to be made subjects of set off. The right as regards the latter, on the other hand, does not rest in discretion of the court, but is *ex debito justitiæ*. It is no answer, I think, to this to say that the court has inherently and by express enactment in the "Judicature Act" and Rules power to strike out and otherwise deal with pleadings and issues as justice and convenience dictate. Set off in this regard seems to be upon the same footing as any other defence; and under the Ontario procedure the court would have no authority to strike out a defence set up by the pleadings or to postpone the consideration of such a defence until after judgment, except on the ground that the defence had no foundation in law or that the defendant was by the operation of some legal rule or principle precluded from relying upon it or on the ground that it was frivolous or vexatious. I think that cannot be affirmed of counterclaim without qualification.

Turning now to section 71, I think the use of the word "debts" is not without significance. It rather points, I think, to the strict sense of the word "set off" as fixing the scope of the section.

I agree that the appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals from the judgment of the Appellate Division (unanimously affirming the judgment of Middleton J.) on two chief grounds: (1) that he is not liable for the sum of $6,300 awarded as damages for wrongful conversion of a quantity of brick, wrongfully held, he contends, to have been the property of the plaintiff company; and (2) that, if he is, he is entitled to set off against such liability the indebtedness to him of the plaintiff company in respect of

$24,000 worth of debentures held by him and for a sum of $546.05 for which that company has been held liable to him in respect of certain other claims.

In view of the position taken throughout the trial by counsel representing him, viz., that he was liable to account to the plaintiffs or to pay damages for the bricks as having been admittedly wrongfully taken by him, I think the first ground of appeal is not open to the appellant. If it were, on the true construction of the agreement between him and Major Vane, I incline to the view that the manufactured brick on the premises belonged to the plaintiff company, and was not subject to the right of repossession which the defendant had in respect of the realty and other property.

For the appellant it was contended subsidiarily that he had been charged with damages for taking brick in course of manufacture whereas, according to his pretension, only brick of which the manufacture had been completed belonged to the plaintiff company, and brick in process of manufacture, at whatever stage, remained the property of the defendant and liable to seizure and re-possession by him under the terms of the Vane agreement. But it is abundantly clear that no allowance was in fact made to the plaintiffs for brick in process of manufacture because, although the total quantity of brick manufactured, and in course of manufacture, at the time of the seizure was shewn to be 691,000, the plaintiffs recovered only for 600,000 brick which was less than the quantity fully manufactured.

The right of set off asserted by the defendant in my opinion does not exist, both because the claim for damages for the conversion arose after the liquidation began, and therefore accrued to the liquidator, and also because, if it should be regarded as having arisen earlier in favour of the company, it and the defendant's

1917
CRAIN
v.
WADE.
Anglin J.

claims against the company did not constitute "mutual debts" within the right of set off under secs. 126 and 127 of the "Judicature Act," R.S.O. 1914, ch. 56. Notwithstanding the freedom allowed by the Ontario Rules of Practice in regard to matters of set-off and counterclaim, they remain in their essential nature different in that province, as is pointed out by Mr. Justice Osler in a very valuable judgment in *Gates* v. *Seagram*(1), In Ontario, as elsewhere, only "mutual debts" which are properly the subject of set-off as distinguished from counterclaim fall within sec. 71 of the Dominion "Winding-Up Act."

I am, for these reasons, of the opinion that the appeal fails on both grounds and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. McClemont.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Co.*

(1) 19 Ont. L.R. 216 at page 223.

GEORGE CRAIN (PLAINTIFF)..... APPELLANT;

AND

J. H. HOFFMAN (DEFENDANT)..... RESPONDENT.

1917

*March 21.
*June 22.

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

Surety—Sale of goods—Guarantee of payment—Repossession and use by vendor—Impairment of surety's rights.

C. sold a brick-making plant to a company, the contract providing that on default in payment of any portion of the price he could cancel the agreement and retake possession of the property. He afterwards sold them a brick press, for the price of which a note was given and payment guaranteed by H., the contract with H. providing that if the note was not paid C. could take possession of the press and sell it, applying the proceeds on the note. The company made default in payments on the plant and on the note, and C. re-entered into possession of the property and used the press in manufacturing bricks. In an action against H. on his guarantee,

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 412,) Duff J. dissenting, that C., by electing to use the press instead of selling it to help pay the note, as provided by the contract, had so interfered with the right of H. to have the security of the machine that the latter was discharged from his liability as guarantor.

Per Duff J.—H. was not discharged from liability, but C. should account to him for the value of the press at the date on which he retook possession of it.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming, by an equal division of opinion, the judgment at the trial in favour of the defendant.

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

(1) 35 Ont. L.R. 412.

1917

CRAIN v. HOFFMAN.

The facts are sufficiently stated in the above headnote.

Chrysler K.C. and *McClemont* for the appellant.

Bradford K.C. for the respondent.

THE CHIEF JUSTICE.—I take no part in this judgment having been absent from court during part of the argument.

DAVIES J.—I think this appeal must be dismissed. The defendant was a surety for the payment of a note to the plaintiff by the Excelsior Brick Co. (now being wound up) for the price of a four mould Boyd brick press sold by plaintiff to that company.

The defendant's guarantee was expressly limited to the payment of the note upon maturity "in accordance with the terms thereof." Those terms were as follows:—

> This note is given in payment of four mould Boyd brick press, being number . The title of the above property for which this note is given is not to pass, but to remain in the payee of this note until the note is paid, and in case of default in payment the payee shall be at liberty, without process of law, to take possession of and sell the said property and apply the proceeds upon this note, after deducting all costs of taking possession and sale.

The respondent had agreed to sell a brickyard plant, machinery, &c., to the Excelsior Company on certain terms and under those terms had some months after the company had taken possession and operated the brick works under the agreement, dispossessed them for default in payment of some of the instalments of the purchase money and re-entered into possession.

The brick press for which the note in question was given had been installed by the company as part of its plant and was at the time of plaintiff's re-entry being

used by the company on the premises as part of its plant in the manufacture of brick.

The plaintiff having dispossessed the company and entered into possession continued operating the brick works and the brick press for which the note in question was given as part of his plant and property. The title or property in this "press" had never passed from him.

He then, having both the title and the possession of the press, sued the surety as guarantor of the note claiming to have entered and possessed himself of the brick press not by virtue of the terms of sale under which he had sold it to the Excelsior Brick Company but under and by virtue of the terms of the agreement of sale of the brick works and premises made to that company, and having done so continued to use the four mould Boyd brick press in operating the brickyard.

His claim, as I understand it, is that having so re-entered and repossessed himself of the brickyard and plant including the brick press he became its possessor, not by virtue of any act by him under the terms of the sale of the brick press, but by virtue of the terms of the sale of the brickyard and plant to the company and that the terms of the sale of the brick press had no application to the property which he took possession of under his agreement with the Excelsior Company. In this way he seeks to avoid the terms of the defendant's guarantee which was expressly limited to the terms of the sale of the brick press.

By one of such terms plaintiff was entitled without process of law to "take possession of and sell" the brick press in case of default in payment and apply the proceeds upon the note.

The defendant's contention is shortly that the plaintiff Crain has, by his conduct, after repossessing himself of the brick press, released him as surety from his

1917

CRAIN v. HOFFMAN.

Davies J.

liability on his guarantee and that Crain cannot under the circumstances hold the title and possession of the brick press and use and dispose of it as he pleases, while at the same time enforcing from him as surety the payment of its price.

He contends that, when Crain dispossessed the Excelsior Company and assumed the exclusive possession of the brick works, including the press, it became his duty under his contract with the defendant surety, not to continue the user of the brick press as part of the plant of the brick works, but as between him as vendor and defendant as guarantor to comply with the specific terms of the sale of the brick press as guaranteed and having repossessed himself either to hold it intact for the surety on payment of his obligation as surety or to sell it and apply the proceeds upon the note guaranteed.

In other words, that if Crain intended to look to the surety for the payment of the price of the press which he had guaranteed, he was bound to conform to the terms of the surety's contract guaranteeing the payment of the price and so bound to give the surety the "press" which he had repossessed or to sell it and apply the proceeds upon the note.

I do not see how Crain can successfully deprive the surety of one of the most important terms on which he became surety by saying: I did not repossess myself of the press the price of which you guaranteed by virtue of any of the terms of that guarantee but under my rights under another contract I had with the Excelsior Company to whom I had sold the press.

When he had repossessed himself of the machine it does seem to me that before he can successfully sue the surety for the price he must shew compliance with the

express terms of the surety's contract, which was a conditional one.

Instead of doing so, he continued to use the press machine as part of his plant and thus while repossessing and enjoying the machine at the same time seeks to compel the surety to pay the price for which he sold it and payment of which the surety had conditionally guaranteed.

His conduct in continuing to use the press machine after he had repossessed himself of it instead of either holding it ready to hand over to the surety on payment of the price he had guaranteed or reselling it and crediting the proceeds upon the note guaranteed, operated as a substantial impairment of the sureties' rights, and being, as it seems to me, against equity and good conscience, discharged the surety from further liability.

Costs should, of course, follow the result.

IDINGTON J.—This case presents some novel features in its relevant facts, but it seems to me that having due regard to well recognized principles governing the rights of a surety and the relations between him and the creditor to whom he has guaranteed payment, the problem presented is not difficult of solution.

It is elementary law that one guaranteed is bound in law upon payment of the debt to transfer to the surety all the securities he may have ever held for the payment of the debt. If he has lost through neglect, or destroyed, any such security, he has lost thereby, *pro tanto* at least, his right to look to the surety.

The appellant here sold, conditionally, to a company of which the respondent was a director, a machine which he was, upon default of the terms of sale being complied with, entitled to repossess himself of and resell.

1917

CRAIN v. HOFFMAN.

Idington J.

Instead of holding himself in readiness to transfer this right to the surety and deliver up the machine to him on payment, he stoutly refuses to recognize this plain right of subrogation and insists upon the surety paying the debt and foregoing his right of subrogation.

That right of subrogation would carry with it the right of respondent on payment to remove the machine.

The matter would perhaps have been made clearer if the surety had tendered the money and demanded the delivery of the machine which had been in possession of the appellant for ten months before this action, and continued so thereafter.

The appellant's action in using the machine and attitude of claiming throughout that he had become the owner thereof by virtue of some bargain he had made with a company cognizant of all the facts, I must hold to constitute a waiver of his right to a tender of the money.

The respondent pleads this conduct and assertion of ownership, and appellant takes issue thereon. The learned trial judge has found these facts against him.

Had appellant replied and proved that he was ready and willing to hand over the machine in as good state as it was at the time he became repossessed of it and insisted by such reply upon payment, I think he might have been entitled to succeed.

He neither pleaded nor proved such a state of facts; indeed proof had become impossible by reason of the continuous use of the machine by appellant meantime.

The respondent was not entitled to complain of the result of the company's use of the machine, or even its impairment by such use, for the respondent had full knowledge of the purpose for which it was bought and must have contemplated the probable consequences attendant upon such use.

Had it even been accidentally destroyed by fire for example, in course of such use by the company, the respondent probably could not have been heard to complain or set up such fact in defence. It is only in relation to such use and its consequences that the fact of the respondent having been a director of the company is of the slighest importance in the case.

The questions involved herein have been needlessly confused by introducing the obligation of the company to the appellant as if the respondent and the company were identical parties, which in law they were not.

If the appellant had called upon the respondent at any time during the use of the machine by the company and he had chosen to pay them he would have been fully entitled to insist upon the transfer of the appellant's rights to remove it and getting that would have been entitled to remove the machine and have it sold as agreed.

No bargain between the corporate company and appellant could have been set up in answer to the exercise of such right.

The same result would have flowed from such a conditional bargain at common law when all concerned had full knowledge as here of the whole business and all relating thereto.

The only bearing of the "Conditional Sales Act" in such matters is to make clear that such rights existed whether those affixing such a machine to the real estate had such notice and knowledge or not as that Act imputes to parties so acting under such circumstances as attendant upon a sale within the meaning and operation of the Act.

The appellant claims he had in his agreement which passed to the company a provision for the premises

1917
CRAIN
v.
HOFFMAN.
Idington J.

being kept up and if default made to be so returned in good condition and hence as it needs this machine to complete that condition and fulfil the terms nominated in the bond it must be held by him on the premises so as to preserve him from suffering, no matter who is hurt.

If that was his purpose he should not have made a conditional, but an absolute, sale of the machine and then there might have ensued in law exactly what he contends for.

But, if he had tried that, the respondent, who is described as being a barrister, probably would have had enough knowledge of law to have refused to guarantee the notes in question under any such circumstances.

The appellant cannot have everything his own way and hope to succeed by binding separate parties by means of conflicting agreements or what in law applicable to the resultant facts should constitute them conflicting agreements.

Other people must be supposed to have some rights as well as those who want to have everything work out only their way.

I think the appeal must be dismissed with costs.

DUFF J. (dissenting)—It will simplify the explanation of my view of this appeal to state, first, my opinion that the appellant had by force of the agreement of March, 1913, the right in taking possession of the plant and premises of the Excelsior Brick Co. Ltd. to take and retain as against the company the brick press for the price of which the promissory notes sued upon were given. Nor can there be any doubt that Crain, in retaining possession of this machine did so in professed and intended exercise of his rights under that agree-

ment and not in professed or intended exercise of any rights given by the agreement under which the brick press was sold and delivered to the Excelsior Company.

The next point to be emphasized is this: In putting into effect his rights under the agreement of March, by retaining and using the machine as part of the plant of which he entered into possession, Crain was doing nothing inconsistent with any rights of the Excelsior Company created by the agreement under which the machine was sold or with the continued subsistence of the obligations of the company under that agreement.

All the parties to the last mentioned agreement including the sureties were, of course, aware of the agreement of March, and the provisions of it. Hoffman and Vane were both directors of the company. Crain had stipulated according to a common practice for the personal guarantee of these two directors and it was, of course, quite well understood that the machine was to be affixed to the premises in substitution for another machine, part of the plant which had become delapidated. The obligation of the company under the agreement of March, to maintain the plant and the right of Crain to take over the plant on default in its condition when default should occur were well understood by everybody. In these circumstances the machine was delivered by Crain to the company, under an agreement that the property was to remain his, until full payment of the purchase price, and that in default in payment of any instalment, he was to be entitled to resume possession and to sell the machine and to apply the proceeds on the unpaid balance. In all this there is implied a right on the part of the purchaser to retain possession of the machine until Crain takes possession pursuant to right expressly stipulated for in the contract or until the contract is, for some

1917
CRAIN
v.
HOFFMAN.
Duff J.

just cause, rescinded: so long as the contract remains on foot the company continues to be liable for the purchase price and has a right to retain possession until the contractual power of sale is put into operation. That, I think, is the effect of the contract: it is enough for our present purpose, however, to notice that, at all events, the contract contemplates possession of the machine on part of the purchaser and the right to use it so long as it remains in his possession and I am inclined to think there is nothing in the contract inconsistent with the transfer by the purchaser to a sub-purchaser of possession, subject to the rights of the seller and that such sub-purchaser would, so long as he remained in undisturbed possession, be acting within his rights in making use of the machine in the ordinary way. It is clear, at all events, that all parties intended that this machine should become part of the plant and that, as such, it should be affected by the agreement of March subject to any special rights of the sureties. The user by Crain, therefore, after taking over the plant in no way infringed as between himself and the company the rights of the company under the agreement for the sale of the machine, or impaired his own right to payment by the company of the price of it.

This being so, the respondent Hoffman, is not entitled to relief from the obligation of his contract of suretyship on the ground that the principal contract has been altered either explicitly or by the conduct of the parties or that it has ceased to be operative; and my conclusion is therefore that the judgment of the court below, by which the action was dismissed, cannot be sustained.

It does not follow, however, that the respondent surety is not entitled to some relief. I think it is very clear that he is entitled to relief on the principle of

Pearl v. *Deacon* (1), as stated in the judgment of Turner L.J. at p. 463. The surety was, of course, *primâ facie*, entitled to the benefit of the security provided by the contractual right of sale which Crain had reserved and that being so "it is clear" to use the language of Turner L.J. that the appellant

> could not have released the property comprised in that security without losing his remedy against the surety, and if he could not have released it, could he by the exercise of a paramount right destroy the benefit of it?

There is nothing in the circumstances above mentioned in view of which all the parties must be supposed to have contracted and no doubt, in fact, did contract implying any abandonment on the part of the surety of his right to the benefit of the seller's power of sale or implying any subordination of the surety's rights (as distinguished from the company's) to Crain's rights under the agreement of March. The result is that Crain is under an obligation to account to the surety for the value of the machine (*Taylor* v. *Bank of New South Wales*(2)), at pp. 602-603, in the condition in which it was at the time he first asserted his right to appropriate it as part of his plant freed from the rights created by the agreement of sale; the date, that is to say, when possession of the plant was taken under the agreement of March.

ANGLIN J.—When the plaintiff took possession of the Boyd press machine for the payment of the price of which the defendant was a guarantor, he merely exercised an undoubted right either under his contract with the Excelsior Brick Company in respect of the machine itself or under his contract with Major Vane (transferred to that company) for the sale of the brick-

(1) 1 DeG. & J. 461. (2) 11 App. Cas. 596.

1917
CRAIN
v.
HOFFMAN.
Anglin J.

yard, plant and premises. Had he done nothing more the defendant would have remained liable on his guarantee. Neither do I think it material under which contract possession was taken, because the liability of the defendant must in either case be determined by the terms of the only contract to which he was a party—the contract of guarantee itself.

The defendant guaranteed payment of the sale note "in accordance with the terms thereof," which I deem the equivalent of "on the faith of" the principal contract or an express embodiment of its terms in the contract of suretyship. Where a surety so contracts all the terms of the principal contract become material as between him and the creditor, and any departure therefrom will discharge the surety without proof that his position has been thereby materially prejudiced or impaired, unless indeed it be self-evident without inquiry that the departure has been actually beneficial to him or at least immaterial. *Holme* v. *Bronskill* (1), at pages 504-5. Now a term of the contract guaranteed was that on default the vendor (plaintiff) should have the right

> to take possession of and sell the said property and apply the proceeds upon this note.

He could undoubtedly have done so and looked to the surety to pay any balance unsatisfied by such application. But when he proceeded instead of selling to make use of the machine as part of his own plant, he probably elected to disaffirm the contract of sale, and he certainly did something inconsistent with the rights of the defendant as a surety. Either because he should be deemed to have then intentionally elected to abandon his claim against the defendant for pay-

(1) 3 Q.B.D. 495.

ment of the price of the machine, or because, though not so intending, he unwarrantably interfered with the right of the defendant as surety, the latter, in my opinion, has been released. His right was to have the machine sold and the proceeds applied in reduction of the amount due on the guaranteed note. He was entitled to insist that the course prescribed by the contract should not be departed from without his consent. It cannot be suggested that the departure was to his advantage and it is not self-evident that it in nowise impaired his position. On the contrary, use of the machine would probably entail deterioration in its saleable value.

Moreover, I am by no means satisfied that the user of the machine by the plaintiff and the assumption of the rights of unqualified ownership involved therein did not release the Excelsior Brick Company from liability on the note and preclude the plaintiff from ranking on its estate in liquidation,—a right to which the defendant on payment would be entitled to be subrogated. If that was its effect the release of the surety would follow as a matter of course. *Hewison* v. *Ricketts* (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. McClemont.*
Solicitors for the respondent: *Mercer & Bradford.*

(1) 63 L.J.Q.B. 711.

1917

*May 11, 14.
*June 22.

BAWLF GRAIN COMPANY (PLAINTIFF) APPELLANT;

AND

T. W. ROSS (DEFENDANT) ..... RESPONDENT.

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

Contract—Validity—Ratification—Drunkenness—Void or voidable contract.

The contract entered into by a man whilst in a state of drunkenness is not void but only voidable, and is therefore capable of ratification by him, when he becomes sober; and the failure to repudiate such contract within a reasonable time, where the circumstances are such that in justice the right of option should be exercised with promptness, should be deemed tantamount to an express ratification. Duff J. dissented.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge, by which the plaintiff's action was maintained with costs.

The issues raised on the present appeal are stated in the judgments now reported.

Symington K.C. for the appellant.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—There appears to have been considerable divergence of opinion in the courts at different times as to the validity of a contract entered into by a man whilst in a state of intoxication. This is pointed out in a note to the case in the House of Lords of *Butler* v. *Mulvihill*(1).

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

(1) 1 Bligh 137.

The law as laid down in the Co. Litt. 247*a* is that as to a person who, by his own vicious act, depriveth himself of his memory and understanding, as he that is drunk,—that kind of *non compos mentis* shall give no privilege or benefit to him or his heirs.

But in *Cooke & Clayworth*(1), the Master of the Rolls said, he apprehended that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason would be invalid at law. This was followed in other cases.

However, I think the law must be taken now to be as laid down in *Matthews* v. *Baxter* (2), that the contract of a drunken man is not void but voidable only.

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co.* v. *Ayscough*(3), the defence was that the contract was induced by fraud and Lord Campbell C.J. said:—

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded. There is nothing on this record to shew that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends: and he may have intended to do so. The plea, therefore, should go further and shew, not only that he was induced to become a shareholder through fraud, but that on discovering the fraud he disaffirmed the transfer of the shares to him. In *Newry and Enniskillen Railway Co.* v. *Coombe* (4), the plea was infancy, and that the defendant, whilst an infant, disaffirmed the transfer. It was held that, if the defendant, after coming of age, affirmed the transfer, that would be a matter for replication, and need not be negatived in the plea; but there, the plea shewed the transfer void, unless an affirmative act were done to render it valid; here it shews the transfer valid, unless an act was done to avoid it."

In *Oakes* v. *Turquand* (5), which was also a case of fraud, it was held that a party defrauded may

(1) 18 Ves. 12 at page 16.
(2) L.R. 8 Ex. 132.
(3) 6 E. & B. 761.
(4) 3 Ex. 565.
(5) L. R. 2. H. L. 325.

1917

BAWLF GRAIN CO. v. ROSS.

The Chief Justice.

rescind the contract, but he must do so within a reasonable time.

The courts can look with no favour on the defence of incapacity through drunkenness, and will certainly extend to the defendant in such case no greater privilege than to one induced to enter into the contract through fraud.

The respondent, if he meant to avail himself of the privilege allowed him by the law of avoiding the contract by pleading "his own vicious act," was bound to disaffirm and to do so promptly. The fact is that he did nothing for more than a month. He was not entitled to wait and see whether the price of wheat went up or down, and disaffirm or affirm the contract accordingly.

The appeal should be allowed with costs.

DAVIES J.—Ever since the case of *Matthews* v. *Baxter*(1), in 1873 was decided, the law has been settled that the contract of a man too drunk to know what he was about when entering into it, is voidable and not void, and therefore capable of ratification by him when he becomes sober.

Such a contract is on the same footing as a contract made by a person of unsound mind, whose mental incapacity, in order to avoid the contract, must be known to the other of the contracting parties. *Imperial Loan Co.* v. *Stone*(2).

In the case before us the respondent entered into a contract with the appellants for the sale to them of a quantity of wheat for future delivery at a certain price, and it was found by the trial judge as a fact that, when he did so, he was drunk to the knowledge of the

(1) L.R. 8 Ex. 132. (2) [1892] 1 Q.B. 599.

agent with whom he made the contract in the sense of not being capable of fully appreciating the transaction.

The question on this appeal therefore was whether he had elected not to repudiate the contract within a reasonable time after he became sober and had full knowledge of his contract.

The contract being voidable only and full knowledge of its nature and terms, and that he had entered into it being brought home to him the day after he entered into it when he was perfectly sober, he was bound, in my opinion, within a reasonable time thereafter to repudiate it if he desired to do so, or at any rate if he delayed making any election with regard to it to do so at his peril if such delay causes loss or damage to the other party.

The contract was one relating to the sale of grain, a commodity varying in price from day to day, and this necessarily constitutes an important element in determining what would be an unreasonable time for him to wait before attempting to repudiate. He had knowledge on the third or fourth of October, some days after he entered into the contract, that the plaintiffs considered the contract a good and binding one. He knew all about wheat, its varying price in the market, and what a speculative contract he had entered into.

Later in the month of October he was again advised by the plaintiffs as to the shipment of the grain he had agreed to sell. He took no action for delivery, evidently awaiting to see what the market price would be. If the price of grain fell, he stood to win by holding to the contract. If it rose in price he stood to lose. He waited till the sixth of November, when the price had

1917

BAWLF GRAIN CO. v. ROSS.

Davies J.

gone up substantially, and then he took his first step towards repudiating.

In my opinion, looking to the speculative character of the article he had agreed to sell and deliver at a future date, he was then too late. By his continued silence during the whole month of October, and up to the sixth of November, he must, in my opinion, under the facts as proved, be taken to have affirmed the contract originally voidable.

If the market had fallen I cannot entertain a doubt that he would have elected to affirm and claim the price his contract called for.

He waited an unreasonable time under the circumstances before repudiating, and will be held therefore to have affirmed.

But it is contended that the defendant, having been found to have entered into the contract while drunk, with the knowledge of the plaintiffs' agent, the contract must be held to have been obtained by fraud and had not been affirmed.

In cases of contracts obtained by fraud it was held by the Exchequer Chamber in *Clough* v. *London and North Western Railway Co.*(1), at p. 35, that:—

> the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

They go on to say:——

> We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.

Now I cannot doubt in this case that even if it was held that defendant's conduct up to the time of the

(1) L.R. 7 Ex. 26.

sale by the plaintiffs did not amount to an election one way or the other the consequence of his delay seriously affected and prejudiced the plaintiffs, who, in the ordinary course of business, sold the grain which the defendant had agreed to sell, and deliver to them, at a loss which they now seek to recover, and that this consequence of defendant's delay precluded him from afterwards exercising his right to rescind.

I would allow the appeal with costs here, and in the court appealed from, and restore the judgment of the trial judge.

IDINGTON J.—I think this appeal should be allowed with costs.

The condition of the respondent, when he signed the agreement of the 30th of September, to sell appellant his wheat, was such (to the knowledge of the latter's agent) as to entitle him upon the receipt of the appellant's confirmation thereof, to repudiate the contract.

The contract bound appellant from the moment respondent received that confirmation and he alone having the option, could not hold the other an unreasonable length of time in such suspensory condition.

There is ample authority that lapse of time with full knowledge of the facts such as the learned trial judge has found herein that the respondent had, may furnish such evidence of acquiescence on the part of him entitled to repudiate a voidable contract as an election not to exercise his option and deprive him thereof.

Each case must be determined upon a due consideration of what is reasonable in the circumstances.

The argument that there must be some affirmation or ratification communicated to the other party by him having such an option, seems to be quite untenable.

1917

BAWLF GRAIN CO. v. ROSS.

Idington J.

If the surrounding facts and circumstances are such as render prompt repudiation a duty resting upon him who desires to exercise his option in such a case then an unreasonable length of time taken to communicate his decision when there is nothing in the case excusing him from doing so, binds the court, I think, in law, to hold him to have determined to abide by his contract.

I think, in this case, no fair minded man could have refrained from responding to the confirmation received, and read when sober, unless upon the hypothesis that he had decided not to exercise his option.

A month's consideration was far more than necessary, and but for the rising market, I suspect the respondent never would have had any hesitation, and would not have needed the appellant's letter of the 20th October, reminding him of his duty.

Why did he not answer that communication? Was it because he felt he could sell for a higher price? Possibly in fact he did and realized a handsome profit exceeding appellant's loss.

Fair dealing between men is what I think the law aims at in such cases as this.

To infer acquiescence from respondent's failure early in October, upon reading the communication of appellant, to exercise his option, proceeds upon that view.

Unfortunately the development of the law upon the subject has been of that misleading character, that though great lawyers held that a contract by a man so drunk as to be incapable of understanding what he was about was void, as shewn (in 1845) by *Gore* v. *Gibson* (1), and earlier cases yet in *Molton* v. *Camroux*(2), the results of a contract with a lunatic were treated differ-

(1) 13 M. & W. 623. (2) 4 Ex. 17.

ently and then (1873) in *Matthews* v. *Baxter*(1), on a demurrer to a replication which affirmed that after the defendant became sober, and able to transact business, he ratified and confirmed the contract, the replication was held good and the learned judges tried to explain away the prior judicial expressions relative to the like contract, and held it was only voidable at the option of the drunken man.

I have assumed this latter decision to express the law as existing now, but that is very far from supporting the proposition, seemingly assumed below, that some overt act of ratification communicating to the other party to the contract the decision or election of the drunken man is necessary.

All that was decided in *Matthews* v. *Baxter*(1) was that actual ratification as pleaded was a good answer. It did not decide the converse that ratification was necessary.

It simply implies that as you cannot ratify a void contract, it must be now held as result of the decision that the contract of a drunken man is not void, but merely voidable. And to avoid it repudiation is necessary.

And hence it must be treated as other voidable contracts of a like nature in law. The cases of fraud which enable one party to a contract to repudiate it are analogous, and in such cases the necessity for exercising the right of repudiation within a reasonable time after discovery of the fraud has been many times affirmed.

There so frequently occur circumstances excusing delay that no other rule can be laid down than to insist upon a reasonable course of conduct and that implies regard for the rights of others.

(1) L.R. 8 Ex. 132.

1917

BAWLF GRAIN CO. v. ROSS.

Idington J.

To maintain the judgment appealed from herein, would enable the drunken man to practise in such like cases the grossest fraud with impunity.

To bind him, as I submit the law requires, to repudiate if he desire within a reasonable time on discovery protects both and promotes fair dealing.

A due observance of such principles requires the allowance of this appeal.

DUFF J. (dissenting)—After a good deal of doubt on the question whether the respondent is entitled to succeed for the reasons stated in the judgment of Mr. Justice McCarthy, with which Mr. Justice Stuart concurred, I have come to the conclusion that those reasons ought to be given effect to, and, although I think the appeal fails on other grounds which do not depend upon those reasons, I think it is right to state the fact of my concurrence in them. Voidable, as applied to contracts, is not unambiguous. Among common lawyers it is used indifferently to express the fact that a contract or transaction *ex facie* valid, which somebody, nevertheless, is entitled, at his option, to treat as not binding, is in truth valid until the person so entitled has done what amounts in law to an election to treat it as null; and to express the fact that a contract or transaction *ex facie* subsisting is, *vis à vis* one of the apparent parties to it, of no legal effect until he does something which amounts to an election on his part to adopt it as binding upon him or to enforce it against somebody else.

And, therefore, when it is said that a contract between a person of unsound mind or drunk and being in such a condition as not to appreciate what he is doing, and another who knows his condition, is voidable at the option of the former, the statement is

ambiguous. The rule of the Roman law appears to have been that where incapacity arising from infancy or unsoundness of mind existed, there was no contract of which the law could take notice because of the absence of *assensus*.

The course of development in the English law of the rule governing the rights of a person entering into a contract or going through the form of entering into a contract while insane is very clearly traced in the judgment of Fry L.J. in *The Imperial Loan Co.* v. *Stone*(1). Under the old rule the incapable person was by law precluded from setting up his incapacity in answer to an action on the so-called contract. Under the modern rule this disability is removed where it is shewn that the other party had at the time of the transaction knowledge of the incapacity of the other.

The rule thus stated is consistent with two diverse theories concerning the true juridical character of the act or acts upon which the action is based. The law may regard the seeming contract as having no legal effect as against the party having the right to deny its validity until such party ratifies it, but as becoming, on such ratification, a binding contract. On the other hand, what occurred may be treated as a contract capable of being invalidated at the option of the person entitled to dispute it, but valid unless and until rescinded by him.

There is no decision which authoritatively sanctions either of these two conflicting theories to the exclusion of the other. The more logical view would appear to be, however, that, there being an absence of capacity to assent and consequently no assent, there is no contract at all until assent is supplied by something

(1) [1892] 1 Q.B. 549.

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

amounting to ratification. This view is not inconsistent with that branch of the rule which enables the temporarily incapable person, once he has recovered his capacity, to hold the other party to the apparent bargain, because this may be regarded as a just consequence of the unconsciencious conduct of the latter in attempting to bring about a contract with a person knowing him to be incapable of understanding what he was doing, and indeed this is the plight in which, as a general rule, a person contracting with an infant finds himself or may find himself, though ignorant of the fact of non-age and having no reason to suspect it. The language of the judges who decided *Matthews* v. *Baxter*(1), as well as the language of text writers (see, *e.g.*, Anson on Contracts, p. 151), points to this as the more generally held theory.

The distinction is plain, of course, between cases where there is no consent because of no capacity to consent and cases in which there is true consent, but consent brought about by such means or arising under such circumstances as to entitle one of the parties to disaffirm the transaction; and in the case, it may be observed, of the temporary lunatic or the drunkard, the above-mentioned considerations have even greater force than in the case of the infant, for in the former cases absence of assent is a fact, the incapacity is an incapacity in fact, while in the case of the infant there may be and in most instances there is, no doubt, a real assent in fact. In *Oakes* v. *Turquand*(2), at p. 375, the judgment of Lord Colonsay points to the distinction existing between the force of the word voidable as applied to contracts entered into by a person

(1) L.R. 8 Ex. 132. (2) L.R. 2 H.L. 325.

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

sui juris but procured by fraud and as applied, on the other hand, to the contracts of incapable persons. I quote the passage:—

> A contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of a third party intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable. I hold that the appellant did agree to become a member of the company. He may not have been induced to agree by fraud, but, having regard to the language of the statute, what we have to look to is this, whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil.

It is no answer to this to say that the law regards as actual fraud the conduct of a person who procures a seeming contract from a drunken person or a person temporarily insane, to such a degree as not to know the nature or effect of the transaction he is purporting to take part in. It has been held, and, in my judgment, rightly held, that conduct such as that of the agent of the appellant company disclosed by the evidence before us is fraud in fact—and fraud indeed of a very odious kind—not in contemplation of law merely. The argument presented on behalf of the appellant company is that because the conduct of the other party in acting with knowledge of the incapacity of the person sought to be charged is an essential element in the latter's defence, therefore the transaction, which in fact never was a contract, because the hypothesis is that there never was any assent in fact, must be treated in law as belonging to the class of true contracts resting upon an actual *assensus ad idem*, but capable of disaffirmance by reason of fraud. But what justification can there be for erecting this fiction of assent? I can see no reason for it and there is certainly no authority for it. On the other hand, the

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

view which has found acceptance in the court below can be rested on grounds which are simplicity itself—the knowledge possessed by the capable person of the other's incapacity entitles the temporarily incapable person to set up the temporary incapacity and at the same time precludes the capable party from denying that there was a contract in fact if the other, after he has recovered his capacity, chooses to affirm it. That is a view which appears to be consonant not only with sound theory but with justice and convenience as well.

But I propose to consider the appellant company's rights upon the hypothesis also that the so-called contract of the drunkard or of the person temporarily insane falls within the other class of voidable contracts, namely, contracts which are capable of being disaffirmed by one of the parties, but until disaffirmed are valid. On behalf of the appellant company it is contended that the so-called contract of a drunkard, the other party having knowledge of his condition, are binding upon the drunkard unless disaffirmed by him, and that the rules governing this right of disaffirmance are the same as those which govern the right to rescind a contract on the ground that it was obtained by fraudulent misrepresentation, and I shall consider the grounds upon which the appeal is based on that hypothesis.

The respondent, it is said, first in fact elected to affirm the contract, and secondly, by his conduct, precluded himself from disaffirming the contract, because (*a*) he delayed his disaffirmance for an unreasonable time, (*b*) by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract, upon which belief they acted to their prejudice, (*c*) by reason of his delay the position of the

appellant company was prejudicially affected in a substantial degree.

These contentions raise questions of law and of fact. First, as to the law. The common law doctrine on the subject is explained and discussed in several cases. I shall refer in particular to the judgments of the Exchequer Chamber in *Clough* v. *London and North-Western Railway Co.*(1); *Morrison* v. *The Universal Marine Ins. Co.*(2), which must be read with the judgment of Lord Blackburn in *Scarf* v. *Jardine*(3), at page 361; the judgment of the Privy Council in *The United Shoe Machinery Co.* v. *Brunet*(4); and the judgments of the Law Lords in *Aaron's Reefs* v. *Twiss*(5). I shall deal first with the contention that the proper conclusion from the evidence is that the respondent, before the action was brought, elected to affirm the so-called contract.

Election is something more than the mere mental operation; choice in itself is not sufficient, as Lord Blackburn said in *Scarf* v. *Jardine*(3), at pp. 360 and 361,

> where a party in his own mind had thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him.

The choice must be expressed by words or by unequivocal act.

> The determination of a man's election shall be by express words or by act:

Clough v. *London and North-Western Railway Co.*(1), at p. 34; "act" is explained in the same judgment to mean unequivocal act, and in *Scarf* v. *Jardine*(3), at

(1) L.R. 7 Ex. 26.
(2) L.R. 8 Ex. 197.
(3) 7 App. Cas. 345.
(4) [1909] A.C. 330.
(5) [1896] A.C. 273.

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

p. 361, Lord Blackburn explains unequivocal act to mean

> An act which would be justifiable if he had elected one way and would not be justfiable if he had elected the other way.

Election, therefore, involves the determination to adopt a given course and the manifestation of that determination by words or by act "under circumstances which bind" the person alleged to have made his election (*Clough* v. *London and North-Western Railway Co.*(1), at p. 35). Lord Blackburn does indeed say, in his judgment in *Scarf* v. *Jardine*(2), at p. 361, that,

> whether he intended it or not if he has done an unequivocal act * * * the fact of his having done the unequivocal act to the knowledge of the persons concerned is an election.

On the other hand, the Court of Exchequer Chamber, in *Morrison* v. *Universal Marine Ins. Co.*(3), at page 207, held that

> if there really was no election, it is wholly immaterial whether the plaintiff understood or had a right to understand the conduct of the defendant as amounting to an election unless under that belief he altered his position.

It appears that this was not the view of Bramwell B., see *Croft* v. *Lumley*(4), at page 705, and *Morrison's Case*(3), at page 206, or, as already intimated, of Lord Blackburn. In the view I take of this appeal it will not be necessary to consider whether the opinion expressed by the Exchequer Chamber in *Morrison's Case*(3) on this point is part of the *ratio decidendi* and binding upon us because the appellant company has quite failed to shew either words or anything which in any view could be described as an unequivocal act evidencing the existence of a determination on part of the respondent to affirm the contract.

(1) L.R. 7 Ex. 26.
(2) 7 App. Cas. 345.
(3) L.R. 8 Ex. 197.
(4) 6 H.L. Cas. 672.

The conduct of the respondent relevant to the point now under discussion—was there in fact an election to affirm—may be briefly described: The so-called contract is found in a document signed by the respondent and witnessed by the appellant company's agent Simpson, on the 30th September, by which the respondent undertook to sell certain wheat to the appellant company. The document was signed in duplicate, one of the duplicates being handed to the respondent by the agent and afterwards discovered by himself or his wife in his pockets. The document does not in itself evidence a contract because it contains no evidence of assent on part of the appellant company; that, however, was supplied some days after the appellant had recovered from his spree by a letter from the appellant company, which in fact was the first communication to the respondent, so far as the evidence shews, of any declaration on behalf of the appellant company that they were contracting with him to purchase what he was promising to sell. The respondent took no steps to carry out the contract. On the 20th October (the wheat had been sold for October delivery) the appellant company wrote him saying that he was probably too late for October delivery, and was too late in fact unless the cars were already *en route*, and suggested that the sale should be transferred to November delivery. The respondent made no reply. In the meantime the respondent had learned of the fact that he had signed some paper while he was in a state of drunkenness, but there is no evidence to shew when he learned (and there was no cross-examination on the point) that his state of drunkenness was of such a character as to make it apparent to the appellant company's agent that he was unable to understand what he was about.

1917

BAWLF GRAIN CO. v. ROSS.

DUFF J.

I pause here to point out that the appellant company down to the conclusion of the trial insisted, in the first place, that the respondent was capable of understanding what he was about, and, in the second place, if he was not, that the agent Simpson believed and properly believed that he was not incapable of transacting business. In these circumstances it was strictly incumbent upon the appellant company to ascertain by cross-examination of the respondent when he became aware of the fact essential to his right of rescission that Simpson, the appellant's agent, knew he was unfit to transact business; for the appellant company's plea of election cannot succeed unless it is at least shewn and affirmatively shewn that the conduct relied upon as constituting election or evidencing election was pursued in light of precise cognizance by the respondent of the material facts entitling him to disaffirm. *Wilson* v. *Thornbury*(1); *Jarrett* v. *Kennedy*(2); *Lachlan* v. *Reynolds*(3). I am assuming that knowledge of facts being proved a knowledge of the right to rescind resting on the common law rule abovementioned may be presumed, but knowledge of all the essential facts is necessary, and, in view of the position taken by the appellant company, it was incumbent, as I have said, upon them to shew this essential fact by cross-examination if necessary: see Lord Davy's judgment in *Aaron's Reefs* v. *Twiss*(4), at page 295.

Is there, then, evidence of an actual determination by the respondent not to exercise his right of rescission? This is a question of fact. What must be proved is conduct which clearly establishes that the respondent did in fact determine to affirm the con-

(1) 10 Ch. App. 239.
(2) 6 C.B. 319, 326.
(3) Kay 52.
(4) [1896] A.C. 273.

tract after he had learned the material facts entitling him to disaffirm it. The evidence to the effect that he had casually remarked that he had sold his wheat may be rejected (if for no other reason) because it is altogether too vague to be of any value. I shall have something to say presently as to the legal effect of such a casual remark made to a stranger. Nothing remains but delay. Upon that a certain amount of precision is necessary in justice to the respondent. It is quite plain that some time before the 20th October, that is to say, within three weeks after the signing of the so-called contract and probably within two weeks after the receipt of the so-called confirmation, and one may reasonably surmise not more than a week or ten days after the respondent had obtained any kind of definite information as to the circumstances of the signing of the document relied upon by the appellant company (one must at least presume this against the appellant company, on whom the onus of proof lay, and whose counsel deliberately refrained from cross-examining on the point) the respondent had decided not to carry the so-called contract into execution. The appellant company has refrained from giving evidence on the point, although their agent Simpson was called, and it is impossible to suppose that he was not aware of the facts, but the company's own letter of the 20th October is sufficient evidence that, in order to fulfil the terms of the contract (time was, of course, of the essence of it), it was necessary that the respondent should begin his preparatory steps some days, at all events, anterior to that date. "Of course," they say, "you will not be able to make October delivery unless you have the cars on the road now." The tenor of the letter makes it quite plain that the appellant company had no doubt whatever that October delivery would not be made,

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

that is to say, delivery in execution of the contract, and, in the absence of evidence to the contrary, it must be assumed against them that they, through their agent, were perfectly aware that the cars were not *en route* and that the respondent had taken no steps to that end.

In these circumstances it seems to be idle to suggest that there is any proof of an actual determination by the respondent not to rescind. Such period as elapsed from the time when the respondent became aware, on the receipt of the so-called letter of confirmation, that the appellant company were treating this piece of trickery as a matter of serious business down to the time when he must have known that failure to make preparations would involve default on his part if he was under a binding contract to deliver in October is reasonably accounted for by assuming that his attention was engaged during that period, first, in discovering the facts or endeavouring to discover them and the evidence available to prove them; secondly, in ascertaining what his rights were; and, again, in deciding, once having arrived at the conclusion that he could treat the document signed by him as a nullity, whether it would be more favourable to his interests to treat the transaction as binding on him or not.

That he was in fact waiting, before committing himself to affirm or disaffirm, to ascertain the course of the market is one of the contentions put forward on behalf of the appellant company. If he did so, that is, of course, conclusive against anything like election in fact to affirm.

Indeed, where a contract has been procured by fraud and the wrongdoer seeks to fasten the liability upon the person wronged on the ground that he has

elected against rescission and where the contract has remained executory, that is to say, where nothing has passed to the person defrauded which it would be his duty to give up on the exercise of his right to rescind, where nothing has been done by the wrongdoer in the execution of the contract, that is to say, nothing which he was bound by the terms of the contract to do, where these conditions are present the instances must be rare in which lapse of time *per se*, however great, would constitute sufficient evidence of an election not to rescind. What is there, in such circumstances, in the conduct of the defrauded person inconsistent with the exercise of his right (when the defrauder seeks the aid of the court to profit by his wrong) to declare that the contract is not binding because it was procured by fraud? *Ex hypothesi*, the defrauder knows that he is not entitled to enforce the contract, and that repudiation is one of the risks he must face. The victim of the fraud is assumed to know that also. Why should the victim not sit down and await attack? Why should it be inferred, from the fact that he has done so, that he has given up his right to repudiate?

The statement in the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Rly. Co.*(1), that lapse of time without rescinding will furnish evidence that the victim has determined to affirm the contract was used with reference to the case of a contract in part executed by the delivery of the goods on the one hand and by the payment in part of the price on the other, and I have found no case where it was a question of rescission on the ground of fraud of a contract which has remained wholly executory in which lapse of time alone has actually been held to amount to such evidence of the determination to affirm.

(1) L.R. 7 Ex. 26.

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

I am inclined to think that the law is correctly stated in Mr. Spencer Bower's Actionable Misrepresentation, at p. 282, paragraph 321, in the following terms:—

> Delay, laches, and acquiescence are constantly referred to in connection with proceedings for rescission as if, of themselves, they constituted affirmative defences thereto. This is quite a mistake. And it is a still greater error to use these expressions (as the term "laches" in particular is frequently used) with an underlying suggestion that the representee owes a duty to the representor in the matter, the failure to discharge which renders him "guilty" of conduct which, of itself, raises a personal equity against him in favour of the representor. The only legal consequence of the representee's inaction is either to furnish some evidence, with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the *jus tertii*, or of the plea of inability to make specific restitution to the representor; but where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has in fact acquired rights or interests under the contracts sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "acquiescence" goes for nothing—which is tantamount to saying that, *per se*, these matters constitute no defence.

It is true that in the treatise on Misrepresentation and Fraud, in Lord Halsbury's collection, of which Mr. Spencer Bower is the author, published in 1911, paragraph 1771, vol. 20, p. 752, it is stated that, with other facts or "even without them, delay, if very great, may constitute evidence of affirmation," but the authorities cited for the proposition are *Clough's Case*(1), *Lindsay Petroleum Co.* v. *Hurd*(2), and *Aaron's Reefs Case*(3), in every one of which the contract had at least in part been executed; and the observations of the law Lords in the last-mentioned case, and especially the observations of Lord Macnaghten and Lord Davey, seem to indicate that in their opinion where the obligation sued upon had assumed the form of a debt *simpliciter*,

(1) L.R. 7 Ex. 26. (2) L.R. 5 P.C. 221.
(3) [1896] A.C. 273.

the supposed debtor intending to rescind on the ground of fraud was entitled, in the absence of special circumstances, to sit down and await attack, and that consequently no inference could arise against him from failure to take active steps towards repudiation.

It is argued, however, that there are special circumstances here which, added to the respondent's inaction, support the suggested inference. It is said, first, that the respondent must have been aware of the practice of the appellant company making sales against their purchases as soon as the purchases were made and relying upon the purchases to enable them to fulfil their contracts of sale; and, moreover, that the letter of confirmation received a few days after the date of the so-called contract must have apprised the respondent of the fact that the appellant company were in this particular case relying upon the transaction as a genuine purchase. There is no evidence as to the respondent's knowledge, since counsel for the appellant company did not venture to cross-examine him on the point, and it seems an extraordinary thing to ask this court to presume such knowledge in the absence of any suggestion in the evidence. As to the letter of confirmation, here again the cross-examiner was too timid. Counsel for the appellant company suggests in his factum that the respondent must have known, when he received that letter, that the Winnipeg officials of the company were unaware of the trick that had been played upon him. That is a contention which, if it was to be insisted upon, should have been raised at the trial and pressed in cross-examination.

But it is surely extravagant to suggest that any inference can be founded upon the silence of such a man as this respondent in these circumstances, even granting the assumptions upon which the appellant

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

company's counsel asks us to proceed. The respondent was at least aware of this, that the one person who was acquainted with the material facts was the appellant company's agent Simpson, the material facts, that is to say, not only of the impugned transaction itself, but touching the appellant company's business practice and the risks, if any, they were taking in treating this contract as an enforceable sale, and if we are to speculate as to what was passing in the respondent's mind, without the benefit of his own explanations, why should we suppose him to have assumed that their agent would not protect the appellant company by giving them full information?

The next subdivision of this topic concerns the question whether, assuming there is some evidence of a determination not to rescind, there is any evidence of expression by word or by act of that intention in such a way as to constitute an election within the meaning of the law. Expression by word there was none, since the casual conversation already referred to cannot be brought within that category. There was no communication to the other party concerned, and it is impossible to affirm that such a vague casual expression uttered in such circumstances was uttered, to use the language of Bramwell B. in *Croft* v. *Lumley*(1), "under circumstances which bind him." I have already said sufficient to shew that the respondent's inaction did not fall within Lord Blackburn's definition of unequivocal act in *Scarf* v. *Jardine*(2), at page 361, "An act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way," or within Baron Bramwell's language in the passage quoted in the judgment of the Exchequer

(1) 6 H.L. Cas. 672. (2) 7 App. Cas. 345.

Chamber in *Clough's Case*(1), with approval: "Act inconsistent with his avoiding."

This much the law makes clear, that the determination of the victim's choice alone does not in itself constitute election. The law does not, as I have already said, take note of subjective events in the stream of consciousness save in relation to or as manifested by some external word or deed. See *Clough's Case*(1), at pages 34 and 35; *Morrison's Case*(2), at pages 203, 204, 205 and 206. In what circumstances the expression of an actual intention to take one course or the other, adequate in itself, but not communicated to the other party concerned, is sufficient to constitute an election in such case as this does not concern us here. Nor are we concerned with the question suggested by a comparison of the judgment of Lord Blackburn in *Scarf* v. *Jardine*(3), with the judgment of the Court in the Exchequer Chamber in *Morrison's Case*(2), whether (there having been no intention in fact to elect) an election is constituted by an act unequivocal in the sense in which Lord Blackburn used the word in *Scarf* v. *Jardine*(3), at page 361, knowledge of which has been communicated to the wrongdoer; or whether, in addition to that, the wrongdoer must be shewn to have changed his position in consequence of the defrauded party's act, and to have done so reasonably on the faith of the victim having made an election in fact. (See *Morrison's Case*(2).)

I come now to consider whether, under the three alternatives above mentioned, the appellant company have shewn that the respondent has precluded himself from disaffirming.

(1) L.R. 7 Ex. 26. (2) L.R. 8 Ex. 197.
(3) 7 App. Cas. 345.

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

First, then, has he so precluded himself because he delayed his disaffirmance for an unreasonable time?

The conclusion I come to is that there is no absolute rule of law that a party to a voidable contract entitled to avoid it on the ground that it was procured by fraud will be held to have elected not to do so by reason solely of the lapse of time without disaffirmance so long as the contract remains wholly executory.

I emphasize the fact that I am discussing only those cases where no property has passed, where possession of nothing has been obtained, that is to say, where the party seeking to avoid the contract has acquired nothing which it would be his duty to give up and where the party guilty of the fraud has done nothing in performance of the contract which the contract required him to do. Such cases must, of course, be distinguished from cases where the party defrauded has received some benefit under the contract which it would be his duty to give up on disaffirmance, or where, as in the case of an allotment of shares in a joint stock company, the party defrauded has, by acquiring the shares, at the same time acquired a status involving obligations or potential obligations to third persons.

I ought perhaps to mention that in *Aaron's Reefs Case*(1), Lord Watson and Lord Herschell pointed out that the defrauded person was not seeking the aid of the court to rescind the contract; "he is merely resisting its enforcement by the party guilty of the fraud"; and even in cases in which the actual interference of a court of equity is sought, as was laid down in *Erlanger* v. *New Sombrero Phosphate Co.*(2) (I refer to the judgment of Lord Penzance at page 1231), delay is only material, first, as affording evidence of waiver of the

(1) [1896] A.C. 273. (2) 3 App. Cas. 1218.

right to rescind because in the circumstances it may imply acquiescence or seem as making it practically unjust to give a remedy.

In the elaborate discussion in *Clough's Case*(1), by Lord Blackburn, then Blackburn J., there is no suggestion of the existence of any such rule; and in *Morrison* v. *Universal Marine Ins. Co.*(2), in the Exchequer Chamber (Mr. Justice Blackburn, being one of the court), it is said, at page 205:—

> The learned judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned judge was too favourable to the plaintiff, and of course he cannot complain of it.
>
> If, indeed, it had appeared that, in consequence of the delay and of the absence of protest by the defendants, the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from effecting insurance elsewhere, we should probably have thought that, though there had been in fact no exercise by the defendants of their right of election, the case fell within the view taken in *Clough* v. *L. & N.W. Rly.Co.*(1), and that this question ought to have been submitted to the jury. But, in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendants' conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy.

One must not overlook the fact that in *Morrison's Case*(2), as well as in *Clough's Case*(1), the Exchequer Chamber was dealing with a contract which had been in part executed. In *Morrison's Case*(2), indeed, not only had the insurance company received the premium, but, after knowledge of the misrepresentation giving them

(1) L.R. 7 Ex. 26. (2) L.R. 8 Ex. 197,

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

the right to avoid the contract of insurance, they had actually delivered the policy to the plaintiff and in fact took no step to rescind the contract until after they learned of the loss of the risk.

In *Aaron's Reefs* v. *Twiss*(1), Lord Watson, at page 291, Lord Herschell, at page 291, Lord Macnaghten, at page 293, Lord Davey, at page 295, all expressed themselves in a manner which seems hardly consistent with the view that as applicable to executory contracts there is any such rule of law.

Although I think it very doubtful indeed whether cases of equitable election for or against an instrument under which a person is entitled to a benefit, but in circumstances in which the law requires him, if he accepts the benefit, to submit to some disadvantage in order that the instrument may take effect as a whole—although I think it very doubtful whether such cases and the principles governing them can usefully be applied except with a good deal of circumspection to cases involving the right to rescind a contract on the ground of fraud, still it may be worth while to point out that in such cases neither the right to elect nor the right to put another person to election is forfeited merely by delay in enforcing the right. (*Brice* v. *Brice*(2); *Butricke* v. *Broadhurst*(3); *Lord Beaulieu* v. *Lord Cardigan*(4); *Spread* v. *Morgan*(5); *Padbury* v. *Clark*(6).)

I have said sufficient to shew that, assuming there is such a general rule as that contended for, there was no delay which, according to any standard of reasonableness that could fairly be suggested, could be described as unreasonable.

(1) [1896] A.C. 273.
(2) 2 Molloy 21.
(3) 1 Ves. 171.
(4) Amb. 532; 3 Br. P.C. 277.
(5) 11 H.L. Cas. 588.
(6) 2 Macn. & G. 298.

The next ground upon which it is argued that the respondent is precluded from disaffirming the so-called contract is that by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract and that upon this belief they acted to their prejudice.

I am unable to find any reason for thinking that the appellant company were in any way influenced by what the respondent did. Knowledge of Simpson's fraud must be imputed to the appellant company, or, to put it in another way, the respondent cannot be put in a worse position in relation to the appellant company than he would have been in if the Winnipeg employees of the company had been instantly informed by Simpson of the trick he had played on the respondent. On this assumption the sale which the appellant made against the respondent's purchase in consequence of Simpson's telegram of the 30th must either be regarded as a speculation upon the respondent's probable attitude with reference to the contract or as evidencing a determination to take the risk of fastening the transaction upon the respondent notwithstanding what occurred; and indeed it is sufficiently evident that this latter is the explanation in fact of their conduct after they became aware that Simpson was not shipping his wheat for October delivery.

But a fatal objection to this contention is that in order to maintain that it was incumbent upon the appellant company to shew affirmatively that the respondent's conduct had led them to act in a manner prejudicial to their interests; but their representative who gave evidence was not asked by the counsel for the appellant a single question upon the subject. The passage quoted above from the judgment in the Ex-

1917

BAWLF GRAIN CO. v. ROSS.

Duff J.

chequer Chamber in *Morrison's Case*(1) plainly indicates the course the appellant's counsel should have taken.

But that is by no means all. It is abundantly evident that there was a considerable correspondence between Simpson and the Winnipeg office. This correspondence is not produced, and we may only guess of the light it would have thrown upon the motives and reasons which actuated the appellant company in not buying again to protect themselves at a time when prices may have been favourable to them; the onus being upon them, they cannot with any shew of plausibility, while withholding these communications, ask a court of justice to infer that what they did was the result of any belief upon the point whether the respondent was likely to affirm or disaffirm the sale which Simpson was trying to fasten upon him.

The next contention is that the respondent by his delay prejudiced the interests of the appellant company.

On the point of fact it seems reasonably clear that the appellant company, if prejudiced at all, was prejudiced by the failure on the part of Simpson to inform them of the real circumstances in which the alleged contract was procured.

The argument is, moreover, demurrable in point of law. It is quite true that in the judgment in *Clough's Case*(2), an expression is used which seems to indicate that prejudice owing to delay suffered by the wrongdoer may be a reason for disabling the defrauded person from setting up the fraud. But the expression is *obiter*, and when read in connection with the judgment in *Morrison's Case*(1) (the passage is quoted above) it is

(1) L.R. 8 Ex. 196. (2) L.R. 7 Ex. 26.

clear that the cases contemplated are those in which the conduct of the defrauded party constitutes an estoppel and those mentioned by Mr. Spencer Bower in the treatise on misrepresentation and fraud in Lord Halsbury's collection, namely, those cases in which some property has passed into the hands of the wronged person, some property, that is to say, which could have been restored in specie at the moment it was received, that had been lost, destroyed or affected in such a way as to make specific restitution on part of the victim impossible.

Sir Edward Fry (Specific Performance, page 369) points out that there is some ground for thinking that even in such cases the plea may be effective unless the destruction or deterioration of the property is caused by the conduct of the person wronged; and there is some support for this in the observations of the law Lords in *Adam* v. *Newbigging*(1).

There is, at all events, so far as I can see, neither authority nor principle in favour of the suggestion that in the case of such a contract as this the defrauded party may lose his right of rescission because the other wrongdoer chooses to make collateral arrangements on the chance that the former will uncomplainingly submit to be victimized.

ANGLIN J.—I doubt whether, upon the evidence in this case, I should have held that the defendant was so drunk when he signed the agreement in question that he was incapable of making a binding contract. But the learned trial judge has found that he was, and that his condition was known to the plaintiffs' representative who procured his signature and we must

(1) 13 App. Cas. 308.

1917

BAWLF GRAIN CO. v. ROSS.

Anglin J.

accept these findings. It follows that the contract so executed was, according to English law, not void, but voidable at the defendant's option. The question presented on this appeal is whether explicit affirmative ratification is necessary to render such a voidable contract unassailable or whether by standing by for an unreasonable length of time, with full knowledge of what he has done, and that the other party assumes the contract to be valid and binding, the erstwhile drunken man does not forego his right to elect to avoid it. The learned trial judge took the latter view; the Appellate Division of the Supreme Court of Alberta, the former.

Since the voidability of the contract depends not merely upon the intoxication of the party entitled to avoid it, but upon the knowledge of his condition by the other party, who is presumed to have taken advantage of it, the position and the respective rights of the parties are, in my opinion, the same as in the case of a contract procured by fraud. The duty of a person entitled to rescind for fraud is to exercise his option to do so promptly when he becomes aware of the circumstances which entitled him to repudiate liability. He cannot with knowledge stand by indefinitely until he has satisfied himself whether it will be to his advantage to repudiate rather than affirm the contract. Especially is this the case where the subject matter is of a highly speculative nature.

What is a reasonable time must always depend on the circumstances. Here the defendant on the following day acquired full knowledge of the contract which he had executed on the 30th of September. He knew on the third or fourth of October that the plaintiff regarded that contract as subsisting and binding. He knew that wheat was an extremely speculative

commodity, its market price varying from day to day. On the 20th of October, he was written to by the plaintiff as to the shipment of his grain, and thus again had express notice that they were relying upon his making delivery according to his contract. Yet it was not until the 6th of November, when the price of wheat had greatly advanced, that he took the first step towards repudiating liability. In my opinion this was entirely too late. By his conduct he had led the plaintiffs to believe that he did not intend to rescind and they had acted on that belief. I think he thus waived his original right to elect to avoid the contract and must be taken to have elected to affirm it, as he undoubtedly would have done had the market price declined instead of advancing. I find nothing in the decision in *Matthews* v. *Baxter* (1), at all inconsistent with the view that failure to repudiate within a reasonable time, where the circumstances are such that, in justice, the right of election should be exercised with promptness, should be deemed tantamount to an express ratification.

I am, with respect, of the opinion that this appeal must be allowed and the judgment of the learned trial judge restored. The plaintiffs are entitled to their costs in this court and in the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *H. W. Church.*

Solicitors for the respondent: *Charles F. Harris.*

(1) L.R. 8 Ex. 132.

1917

*June 5.
*June 22.

A. A. COCKBURN (PLAINTIFF).....APPELLANT;

AND

THE TRUSTS AND GUARANTEE COMPANY (DEFENDANTS).....RESPONDENTS.

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

Suretyship—Employee—Guarantee of payment of salary—Mitigation of damages.

C., by contract with a manufacturing company, was employed for five years and payment of his salary was guaranteed by a director. In three years thereafter the company went into liquidation and he was unemployed for the balance of the term. Shortly after the liquidation of the company he and an associate purchased most of its assets by the sale of which he made a profit of $11,000. In an action on the guarantee for $9,000, salary for the two years of his engagement with the company,

Held, affirming the judgment of the Appellate Division (38 Ont. L.R. 396, which reversed that at the trial (37 Ont. L.R. 488, that the action taken by C. which realized a profit exceeding the amount he is claiming arose out of his relations with his employers and the diminution of his loss thereby must be taken into account though he was under no obligation to take it. *British Westinghouse Electric and Mfg. Co.* v. *Underground Electric Railways Co.* ([1912] A.C. 673) applied.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the plaintiff.

The appellant (plaintiff) was employed by the Dominion Linen Mfg. Co., as sales manager, under a

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

(1) 38 Ont.L.R. 396. (2) 37 Ont.L.R. 488.

contract for five years at a salary of $5,000 a year; payment of which was guaranteed by one Kloepfer, a director of the company. The action in this case was brought against the administrator of Kloepfer's Estate (the respondent) to recover two years' salary the company having gone into liquidation after three years of the term had passed. The appellant purchased the assets of the insolvent company and made a profit of $11,000 by their sale. The only question on the appeal was whether or not he could recover from the guarantor the amount claimed without regard to this profit.

Hamilton Cassels K.C. for the appellant referred to Sedgwick on Damages (9 ed.) vol. 2, par. 667 et seq.

Sir George Gibbons K.C. and *Boland* for the respondents.

THE CHIEF JUSTICE.—It is claimed by the respondent that it was merely a surety. I have had some doubts whether this was really so, but the case has proceeded on this assumption and if it is so I suppose, according to the usual rule, the measure of the respondent's liability as a surety is the loss of the appellant under his contract of employment.

If the contract had been carried out and the appellant, continuing his employment, had been paid his salary of $5,000 a year for two years it is clear he could not have earned the $11,000 which he did from other sources. He has therefore not only sustained no loss, but is better off than if the contract had been fulfilled. I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract.

1917

COCKBURN v. TRUSTS AND GUARANTEE CO.

The Chief Justice.

The judgment of the Divisional Court gives as instances of what cannot be taken into account:—

> If, for instance, immediately after dismissal, the appellant had fallen heir to an estate producing $5,000 a year or had by a lucky chance speculated in stocks and made a large amount or if he spent the time which was not previously occupied in his employment so profitably as to bring him a good income.

In each of these three examples the gain to the appellant would have equally accrued if he had not lost his employment, it would therefore have nothing to do with his loss through the breach of the contract. In the actual case, however, the gain is directly dependent on the breach of the contract and would not have been made if it had not occurred. I do not suggest that this is an absolute test of what ought to be taken into account but I think it is sufficient to dispose of the claim in the present case.

The appeal should be dismissed with costs.

DAVIES J.—I concur with Anglin J.

IDINGTON J.—Without committing myself to the entire reasoning adopted in support of the judgment appealed from herein I think the conclusion reached is right and that the appeal should be dismissed with costs.

DUFF J.—The point presented for consideration in this appeal is by no means free from difficulty, but I am convinced that the actual decision of the First Appellate Division is right and that the appeal must be dismissed with costs.

The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co.* v. *Under-*

ground Electric Railways Co. (1), at pp. 689 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed—the damages being limited to those that are the natural and direct consequences of the breach—his Lordship proceeded as follows:—

> But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (2), at p. 25: "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

Illustrating this last observation, his Lordship refers to *Staniforth* v. *Lyall* (3), and commenting upon that decision, he proceeds:—

> I think that this decision illustrates a principle which has been recognized in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damages.

A little further on, he adds:—

> The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business.

(1) [1912] A.C. 673. (2) 9 Ch.D. 20.
(3) 7 Bing. 169.

1917

COCKBURN v. TRUSTS AND GUARANTEE CO.

Duff J.

I do not entertain the slightest doubt that the appellant's dealings were not dealings which he was under any obligation to engage in for the purpose of mitigating damages, but that, as Lord Haldane points out, is not necessarily decisive. Even though the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still, having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages provided that what he did was what a reasonable and prudent person might do properly "in the ordinary course of business."

Whether what the appellant did falls within this description is strictly a question of fact, and I have come to the conclusion that it does.

I have not felt it necessary to pass upon the question whether or not, consistently with this view, some allowance could properly be made to the appellant as compensation for the use of his capital and for the risk. I find it unnecessary to do so because the argument of Sir George Gibbons convinces me that any reasonable allowance on that footing would be overtopped by the allowance which *strictissimo jure* should be made to the respondents in respect of probable gains by way of salary, the opportunity for earning which the appellant deliberately decided to forego.

ANGLIN J.—The facts of this case are fully stated in the report of it in the provincial courts (1).

The fundamental basis of the assessment of damages for breach of contract—compensation for pecuniary loss naturally flowing from the breach—and its quali-

(1) 38 Ont.L.R. 396; 37 Ont. L.R. 448.

fication—that the plaintiff cannot recover any part of the damages due to his own failure to take all reasonable steps to mitigate his loss—are too well settled to admit of controversy. The application of this qualified rule, however, sometimes presents difficulty. The qualification does not impose on the plaintiff claiming damages for the breach

> an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business:

nevertheless,

> when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

The applicability of the principles expressed in these passages from the judgment of Lord Chancellor Haldane in *British Westinghouse Elec. & Manufacturing Co.* v. *Underground Elec. Rlys. Co. of London* (1), at p. 689, to breaches of contracts for personal services is shewn by the authorities cited by Mr. Justice Hodgins in delivering the judgment of the Appellate Division—notably in *Beckman* v. *Drake* (2).

The action of the appellant in acquiring and disposing at a profit of a considerable part of the manufactured stock of his former employers arose out of his relations with them. It involved the employment by him of time, labour and ability which he had engaged to give to them. For his loss of an opportunity to use these in earning a salary from those employers he is now asking that the respondent shall be compelled to pay by way of damages. It would seem to be manifestly unfair that, if the appellant is thus to be remunerated on a contractual basis by way of damages, he should not be held accountable in mitigation for money

(1) [1912] A.C. 673. (2) 2 H.L. Cas. 579. 608.

1917

COCKBURN v. TRUSTS AND GUARANTEE CO.

Anglin J.

made by using for his own purposes the time, labour and ability so to be paid for. The $11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane. The action which produced it arose out of his former employment in the sense in which the Lord Chancellor uses the phrase "arising out of the transaction," as is shewn by his illustration from *Staniforth* v. *Lyall* (1). Again to quote his Lordship (p. 691):

> The transaction was * * * one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach.

By devoting his time, energy and skill for two years to the service of his former employers the appellant would have earned $10,000. A breakdown in his health, or other unforseen contingencies might have prevented his doing so. Excused from that service, he was enabled by a happy combination of making use of the time, labour and ability thus set free and taking advantage of the opportunity afforded by his employers' misfortune within 66 days to make a clear profit of $11,000—and he still had at his disposal, in which to add to his earnings, if so inclined, or to amuse himself if he preferred doing so, the remaining year and 299 days. Were he to be now awarded not the $10,000 claimed in his action but the $4,000 allowed him by the learned trial judge, he would, as a result of his employers' disaster, be better off by at least $5,000 than

(1) 7 Bing. 169.

he would have been had he put in his two years of service—"a somewhat grotesque result," as Lord Atkinson put it in *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1). Making due allowance for extra time and trouble expended and all other elements proper to be considered involved in the efforts which resulted in the plaintiff's securing the profit of $11,000, and taking into account the year and 299 days left at his disposal after that was accomplished, it seems reasonably clear that he did not sustain any actual damage as a result of losing his position. He was probably, on the whole, better off.

Upon the facts, when "allowed to speak for themselves," not only is the conclusion reached by the Appellate Division in conformity with legal principles and the authorities but any other would shock the common sense of justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Cassels, Brock, Kelley & Falconbridge.*

Solicitors for the respondents: *Macdonell & Boland.*

(1) [1911] A.C. 105, 115.

1916
*Nov. 30.
1917
*Feb. 6.

KILDONAN INVESTMENTS LIMITED (PLAINTIFF)..... } APPELLANT;

AND

JNO. THOMPSON AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Jurisdiction—Company—Revocation of letters patent—Revival of charter—R.S.M. c. 35, ss. 77, 130.

At the time leave to appeal to the Supreme Court was granted, the letters patent of the company appellant had been cancelled under section 77 of the "Manitoba Companies Act;" but subsequently its charter was revived under section 130 of the same Act.

Per Fitzpatrick C.J. Davies, Anglin and Brodeur JJ. — The revocation of the charter operated as a mere suspension of the powers and functions of the company and the order-in-council reviving the letters patent of incorporation restored the company to its legal position at the time of the revocation as to the proceedings instituted between such revocation and the re-instatement of the company for an order allowing the present appeal to the Supreme Court of Canada.

Per Duff J.—Without deciding whether acts of the officers of the company during the interregnum are in all respects to be deemed acts of the company, it is clear that the company, by virtue of the statute, is to be deemed to have been in possession of its powers during that period, and the act of its officers in applying for the order allowing the appeal, done in the name of the company, could be and has been ratified.

So long as there is no Dominion legislation inconsistent therewith, the capacity of a provincial corporation, as a legal *persona* to initiate and carry on an appeal in this court, is determined by the provincial law.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of Mathers

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

(1) 25 Man.R. 446.

C.J. at the trial, by which the plaintiff's action was dismissed with costs.

The judgment of the Court of Appeal for Manitoba, dismissing the appeal of the present appellant, was rendered on the 17th of May, 1915. The appellant company, having failed to make the annual summary showing the lands it possessed as required by section 77 of the Manitoba "Companies Act," the letters patent evidencing its incorporation were duly cancelled by Order-in-Council on the 14th day of July, 1915. During the time the charter of the company appellant was so revoked, the solicitors for the appellant obtained from Mr. Justice Richards, on the 6th of August, 1915, an order allowing the present appeal to the Supreme Court. But, on the 18th of October, 1916, the disability of the appellant company was removed, under the provisions of section 130 of the Manitoba "Companies Act," which declares that the Lieutenant-Governor-in-Council may order that the charter of a company "be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender."

The respondents moved to quash on the ground that the company appellant had virtually ceased to exist when the appeal to the Supreme Court has been instituted.

The motion to quash the appeal and the merits of the case were argued at the same time.

Tilley K.C. for the appellant.
Fullerton K.C. for the respondents.

THE CHIEF JUSTICE.—As to the question of jurisdiction I agree with Mr. Justice Anglin. The order-

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

The Chief Justice.

in-council reviving the letters patent of incorporation restored the company to its legal position as at the time of the revocation in the same manner and to the same extent as if there had been no such revocation.

On the merits I agree, with some hesitation, that this appeal should be dismissed with costs.

The evidence does not support the defence originally set up, and, in my opinion, it is not very satisfactorily established that all the respondents were induced to enter into the agreement in question exclusively by the representations made by Batters and Baldwin. Some of them on their own evidence were certainly guilty of gross neglect and would appear to me to have been willing to take considerable risks. Little or no inquiry was made as to the site or possibilities of the property. The only consideration with the purchasers apparently was the possibility of a quick turnover in a rising real estate market. For instance, respondent Irwin says that had he known that Batters was getting a commission on the sale of the property that fact would not have affected his mind and there are others who testify to the same effect. Men who are so regardless of the ordinary rules of caution do not deserve much consideration, but the transaction was certainly not an honest one and the presumption is that the company must have known of the relations existing between the secretary-treasurer Hansen, and Baldwin and Batters.

I defer to the better opinion of my colleagues and of the judges in the courts below and am content to let the tree lie where it has fallen.

Davies J. concurred with Anglin J.

IDINGTON J. (dissenting).—This is an appeal by a company incorporated under "The Companies Act".

of Manitoba in an action in which the learned trial judge had maintained charges of fraud set up by way of defence and counterclaim against the company's action and therefore dismissed, on the 27th February, 1915, the action and gave effect to the prayer of those respondents who had counterclaimed. Thereupon the appellant appealed to the Court of Appeal for Manitoba and its appeal was unanimously dismissed on the 17th May, 1915.

On the fourteenth day of July, 1915, the letters patent evidencing the incorporation of the appellant were duly cancelled by order-in-council and such company had not been reinstated at least until after the 18th October, 1916.

Indeed we have no evidence before or beyond the oral admission of counsel that in fact there ever was a re-instatement and nobody seems to know the precise terms thereof.

The case has been hanging before us a long time and something desperate seems to have been done at the last moment.

An affidavit filed on this application to quash (which has been pending for a year or more) suggests, and it is not denied, that the proceedings to revoke the incorporating letters patent were taken under section 77 of the "Companies Act," which reads as follows:—

> 77. The Lieutenant-Governor-in-Council may, at any time, revoke any letters patent of incorporation granted under this part or under "The Manitoba Joint Stock Companies Act," or under any other Act or Acts for which the said Act was substituted, on account of the violation, by any such company, of any of the provisions hereinafter contained respecting the annual summary to be verified, deposited and posted up, in so far as it is required to show the number of acres of land held by the company, and when they were purchased. Any such letters patent of incorporation so revoked shall be null and void as to any matter occurring subsequent to such revocation. R.S.M. c. 30, s. 67.

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

Idington J.

The notice of said order of rescission was advertised in the Manitoba Gazette on the 31st July, 1915, as required by the Act.

The "Companies Act" was amended on the 20th February, 1914, by the following:—

1. "The Companies Act," being chapter 35 of the Revised Statutes of Manitoba, 1913, is hereby amended by adding thereto the following sections:

130. In any case where, by virtue of section 86 of this Act, any charter or letters patent of incorporation of any company has become revoked and cancelled, or where any such charter or letters patent of incorporation has been revoked by order-in-council under section 76 of "The Manitoba Joint Stock Companies Act," being chapter 30 of the Revised Statutes of Manitoba, 1902, as amended by section 3 of chapter 13 of 5 & 6 Edward VII., or where any charter or letters patent of incorporation have been surrendered under the provisions contained in sections 78 and 79 of this Act, if it is made to appear to the Lieutenant-Governor-in-Council, on the application of any person, that the acts or neglects of the company or corporation which led to such revocation or surrender were due to inadvertence, accident or neglect of the officers or servants of the company, and that such cancellation, revocation or surrender of the charter or letters patent of incorporation will result in loss or serious inconvenience to the company or the applicant, and that the required returns have been filed with the Provincial Secretary and fees paid and all other defaults of such company remedied, then the Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

During the time the company was dead and its incorporation absolutely null in the language first quoted, the solicitors for the appellant had the temerity, on the 6th of August, 1915, to approach Mr. Justice Richards and obtain from him an order allowing this appeal to be made.

Mr. Fullerton in his affidavit, upon which (amongst other things) this notice to quash is founded, denies any knowledge at that time on his part of the revocation of appellant's charter.

I have not the slightest doubt that Mr. Justice Richards was equally ignorant of the fact and was improperly imposed upon, and that if the facts had been disclosed he would have refused to make said order and we would never have heard of this appeal.

The sixty days for an applicant to move had long expired before the appellant could get into any such position as entitled it to make the application.

There is no material filed on behalf of the appellant explaining anything, or excusing anything, and possibly the solicitor in this case was imposed upon; yet even so one cannot help regretting his failure to have ventured upon some explanation for having made an application so unjustifiable under the circumstances. The matter touched his honour as a professional man in a way not to be so lightly passed by.

The proceeding was null and void and the learned judge was entitled to have been frankly treated instead of being imposed upon. The successful despatch of an immense volume of business daily depends upon the most rigid care on the part of the solicitor that he never misleads the judge as to the facts to be considered by him.

In any way I can look at the matter I can find nothing to give vitality to that order so improperly got, or anything pertaining to this appeal founded thereon. And without that where is this appeal landed? The motion to quash was without any question entitled, upon any facts existent for nearly a year after it was launched, to prevail.

The words at the end of the amended section 130, in section 1 of the Act of 1914, do not seem to me to help the appellant.

The company's legal position is not improved by the literal terms of that section restoring it

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

Idington J.

as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

These words do not touch or help an order absolutely void.

And the section 122 evidently refers to steps taken in the course of proceedings in Manitoba by virtue of its legislation and not by virtue of the "Supreme Court Act."

The legislature had no power over the subject matter of the appeal to this court and could not, even if it intended so by anything it could enact, affect our right to hear an appeal so launched. I do not think any such thing was ever intended or the words bear any such meaning.

Moreover section 122 of the Manitoba Act may not be applicable to this which is a case of revocation of a charter and not the mere revocation of the licence which it must obtain and lose by revocation of its charter.

The motion to quash should prevail with costs.

Notwithstanding this being my decided opinion at the hearing I listened attentively to the argument and am yet unable to dissent from the holdings below and hence on the ground of any such merits as the case may have, I think it should be dismissed with costs.

DUFF J.—First, as to jurisdiction. The judgment appealed from was pronounced on the 17th day of May, 1915. On July 14th, 1915, the letters patent of incorporation of the appellant company were cancelled by order-in-council under the authority of section 77 of the "Manitoba Companies Act." On the 6th August, 1915, an order was made on the application of persons professing to act on behalf of

the appellant company whose letters patent had been cancelled in the previous month and Mr. Justice Richards made an order allowing the appeal under the provisions of the "Supreme Court Act." In October, 1916, an order was made by the Lieutenant-Governor-in-Council reviving and restoring the letters patent. The objection to be considered is whether or not the order made by Mr. Justice Richards was a valid order.

The decision depends on the effect of the statutory provisions under which, first, the order was cancelled, and secondly, the order of revivor was made, section 77 of the "Companies Act" (1), and section 130 introduced into the Act by an amendment passed in 1914. The effect of the order for revivor is declared by the last mentioned enactment in these words:—

> The Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender, in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

When, therefore, an order for revivor has been made under the authority of this enactment the company is deemed in point of law to have retained its corporate character and its corporate capacities and powers without interruption notwithstanding the order of cancellation. The enactment does not explicitly declare that acts done by officers of the corporation are to take effect as if no cancellation had taken place; and whether that is or is not involved in the provision that the company is to be

> restored to its legal position as at the time of cancellation

is a point upon which it is unnecessary to pass and upon which I desire to say nothing.

(1) Ch. 35 R.S.M. 1913.

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

Duff J.

It is now in point of law deemed to have been in possession of its corporate powers at the time the order of Mr. Justice Richards was made and the act of its agents in applying for the order in the name and on behalf of the corporation is an act which could be and which has been ratified.

I am not losing sight of the fact that an appeal to this court is an independent proceeding which can only be instituted by a competent legal *persona* and that the right to institute it is a right enjoyed in virtue of a Dominion statute. In the absence of some federal enactment relating to the subject, the capacity of a provincial company in this respect is determined by provincial law and we must consequently give effect to the order of revivor in conformity with section 130.

As to the merits, the Chief Justice, who tried the action, in effect found as a fact that Batters was the agent of the company, and that finding was concurred in unanimously by the Court of Appeal. This finding, it is true, rested to a considerable degree upon inference, but this does not detract from the weight of the consideration that two courts have concurred in it. *Johnston* v. *O'Neil*(1). Batters' agency established, there is nothing more to be said.

The appeal should be dismissed with costs.

ANGLIN J.—The effect of section 130 of ch. 35 of the R.S.M. 1913, as enacted by the Manitoba Legislature in the session of 1913-14 (ch. 22, s. 1), is, in my opinion, that, in cases where revivor under its provisions subsequently takes place, any revocation, cancellation or surrender of a charter therein dealt with operates as a mere suspension of the powers and functions of the company

(1) [1911] A.C. 552 at p. 578.

so that upon such revivor the status and rights of the company are in all respects

as if there had been no such revocation, cancellation or surrender.

Thus, for instance, no reconveyance to it or revesting in it of its real or personal property is required. After revivor it is seized and possessed of such property as it was before the revocation, cancellation or surrender and as if the latter had never taken place. All acts done in its name, which would have been lawful and effective had there been no revocation, cancellation or surrender, are after revivor to be deemed acts of the company and of the same efficacy and force and entailing the same consequences

as if there had been no such revocation, cancellation or surrender.

That, I take it, was the purpose of the legislature in enacting section 130, and that purpose would be defeated in this case were we to quash the present appeal because it was instituted and perfected during the period of suspension, *i.e.*, in the interval between the revocation or cancellation of the appellant company's charter under section 86 of the "Companies' Act" (1), and its revivor under section 130.

On the merits, however, the appeal, in my opinion, fails. The facts found and the inferences of fact drawn by the learned Chief Justice who presided at the trial established the agency of Batters for the appellant company. Its responsibility for his misrepresentations follows. That such misrepresentations were made and were material is sufficiently proved by the evidence. I have not been convinced that the findings made and the inferences drawn by the Chief Justice are so clearly wrong that we should reverse

(1) R.S.M. 1913, ch. 35.

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

Anglin J.

them, after they have been unanimously affirmed by the provincial Court of Appeal, the judgment of the trial court having been in its opinion apparently so clearly right that it was unnecessary to state any reasons for dismissing the appeal from it.

BRODEUR J.—The first question on this appeal is whether we have jurisdiction.

The appellant company having failed to make the annual summary shewing the lands it possessed as required by law (Manitoba Company Law, ch. 35, R.S.M. 1913, s. 77), the charter was revoked, and when the security on this appeal was received the letters patent as a result of that revocation were null as to any matter occurring afterwards. But the parties admit that the disability has since been removed under the provisions of ch. 22 of 1914, sec. 1, which declares that the Lieutenant-Governor-in-Council may order that the charter

> be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender.

The respondents contend that the company having virtually ceased to exist when the appeal had been instituted the appeal should be quashed and they move accordingly.

The provisions of the Act just quoted are wide enough to lead me to the conclusion that the company has always subsisted and if at one time the company was under some disabilities they have been removed by the action of the Lieutenant-Governor-in-Council with a retroactive effect.

In general principle a statute is not to be construed so as to have retrospective operation unless there is

something in its language and contents indicating a contrary intention, but in looking to the general scope and purview of the statute and at the remedy sought to be applied, it seems to me that the provisions of the statute of 1914 must be considered as having a retrospective effect since the company is not only restored to its legal position and has the right to exercise the same corporate powers, but the cancellation is declared as never having existed.

The motion to quash should be dismissed.

On the merits of the case I find that the consent of the plaintiffs on the counterclaim to the sale of the lots of land in question was obtained by fraud and misrepresentation.

The selling agent of the appellant company retained the services of one Batters to carry out negotiations with the plaintiffs in order to induce the latter to purchase those lots. Batters had lived in their locality for a great number of years and was carrying on an agricultural implement business which put him in the best of relations with those people who were farmers. Though he was to have a commission from the selling agent of the company, appellant, he represented to the defendants, respondents, that he was taking some shares in the purchase.

False representations were made to the farmers by Batters and the other agent, Baldwin, as to the vicinity of the lots to the street car lines and as to the erection of valuable houses across the street from those lots and as to their value.

The courts below found against the appellant company on these representations. Their findings should not be disturbed.

1917

KILDONAN INVESTMENTS LIMITED v. THOMPSON.

Brodeur J.

But the appellant contends that Batters was not its agent.

The general selling agent of the company, Skuli Hannson, was at the same time the secretary of the company.

A real estate agent named Baldwin had for some years occupied desk room in Hannson's office and he had undertaken to sell the lots in question. He put himself in relation with Batters to the knowledge of Hannson. Remittances were made direct to Hannson by Batters and as the latter was indebted to Hannson his commission was to be credited on his indebtedness with Hannson.

He did not pay anything on his share of the purchase price but that share was to be paid by way of commission, as he says himself.

I concur in the view expressed by the trial judge that it was intended and agreed between the company and their selling agent, Hannson, that the latter should appoint sub-agents for the purpose of disposing of those lots.

Batters and Baldwin were both sub-agents of the company. The latter recognized Batters as its agent since he was not required to pay any part of the cash payment provided in the contract, but was given credit thereon for his share of the commission he was entitled to.

I may add that it was the duty of the Company on becoming aware that Batters was a co-purchaser with the plaintiffs respondents to satisfy itself that they were aware of the agency of Batters. *Hitchcock* v. *Sykes* (1).

(1) 49 Can. S.C.R. 403.

For these reasons the appeal should be dismissed with costs.

Motion dismissed without costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Graham, Hannesson & McTavish.*

Solicitors for the respondents: *Aikins, Fullerton, Foley & Newcombe.*

1916

*Oct. 17.
*Oct. 30.

DAVID A. McKEE (PLAINTIFF).....APPELLANT;

AND

WILLIAM PHILIP (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale—Recovery of moneys paid—Evidence—Onus probandi—Estoppel by receipt.

The appellant, having sold a property to one Arnold, purporting to act as agent for the respondent, received in part payment a cheque for $1,300 of the Dominion Trust Company of which Arnold was manager. The respondent, on the ground that the purchase was beyond the powers vested in Arnold, resisted an action of the appellant for the enforcement of the agreement and sued the appellant, by counterclaim, for the reimbursement of the $1,300 so paid, alleging that this sum, which was borrowed by Arnold from the Trust Company, was repaid by Arnold out of his moneys in the hands of Arnold for investments. The trial judge and the Court of Appeal held, and it was not disputed, that Arnold, in entering into the purchase in the name of the respondent, exceeded his authority.

Held, Duff J. (dissenting), that the *onus probandi* as to the ownership of the moneys, was not on the respondent, and that, even if it was so, the receipt in the agreement of sale and the facts leading up thereto were sufficient proof that the money paid to the appellant was that of the respondent.

Per Duff J. (dissenting).—Respondent can not repudiate Arnold as his agent for the purchase and at the same time treat him as such in connection with the advances. The receipt in the agreement for sale could only constitute an *estoppel* in an action based upon the agreement and between the parties to it. On respondent lies the *onus* of showing that the moneys in question are his moneys; and the admission derived from the receipt in the agreement did not constitute a *primâ facie* case sufficient to shift the burden of proof.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Mac-

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

donald J. at the trial, by which the respondent's counterclaim was dismissed.

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

E. L. Newcombe K.C. for the appellant.
S. S. Taylor K.C. for the respondent.

THE CHIEF JUSTICE.—The late W. R. Arnold who held a power of attorney from the respondent purchased for him and in his name certain lands in British Columbia. The consideration was $11,700 of which $1,700 was paid in cash, the receipt being acknowledged in the agreement for sale, and the balance was to be paid in future instalments. The $1,700 was paid by a cheque of the Dominion Trust Co. of which Arnold was manager and on which he could draw for any money he wanted.

It was held and it is not now disputed that the purchase was beyond the powers vested in Arnold and is void. The trial judge, however, refused to order the return to the respondent of the $1,700 paid to the appellant because he was not satisfied that the moneys were the moneys of the respondent; he held that the onus was on the respondent to shew that they were his moneys. I can see no grounds for this decision. The respondent, as he admits, is a man of small education and trusted his affairs entirely to his friend Arnold. He states over and over again that he knew nothing whatever about the transaction; it was useless therefore for the judge to give him, as he says he did, an opportunity of proving that the money was his.

But even if the onus was on the respondent, I think that it has been sufficiently discharged. The respondent has proved that some years previously he had

1916
McKEE
v.
PHILIP.
The Chief Justice.

placed in Arnold's hands a sum of $1,700 and even if this had been invested there is nothing to shew that Arnold, a man of endless speculations, had not realized the money again. Further there is no doubt that very shortly after making this agreement for purchase Arnold collected and had in his hands many thousand dollars belonging to the respondent.

I do not know how you can identify any particular moneys of the respondent in the hands of Arnold; men of his type are not very particular about money coming into their hands from whatever sources and I think it is likely that he used either the respondent's, his own or his company's cash very indifferently.

I cannot see that there is anything in the fact that the appellant was paid by a cheque of the Dominion Trust Co. which will enable him to dispute that the money was received from the respondent, the purchaser named in the deed, as by this writing under seal he admitted was the case.

The respondent has lost all his money which he confided to Arnold and the appellant has certainly no claim to the $1,700 beyond the fact that it is in his possession. Under these circumstances one might have supposed that he would have been content to pay it over under the judgment by which, of course, he was fully protected, without bringing the respondent before this court.

The judgment should be affirmed and this appeal dismissed with costs.

DAVIES J.—A majority of the learned judges of the Court of Appeal drew the inference that the money which is in dispute in this case belonged to Phillip. Though at the close of the argument I entertained some doubts upon the point, subsequent consideration,

after reading the evidence, has convinced me that the inference is a reasonable and proper one.

I have nothing to add to the reasons of Chief Justice Macdonald and would dismiss the appeal with costs.

IDINGTON J.—I think there was evidence furnished by the receipt in the agreement in question and the facts leading up thereto and surrounding all the transactions in relation thereto from which it should be inferred that the money paid to appellant was that of the respondent which he is entitled to recover when repudiating the onerous contract which he never had authorized. It certainly was not the money of Arnold and could not be claimed honestly by appellant unless it was so which he has failed to establish.

The appeal should, therefore, be dismissed with costs.

DUFF J. (dissenting)—The appellant's action was based upon a purported agreement, dated the 1st Nov., 1909, for the sale of land near Vancouver. The instrument was executed by the appellant as vendor and by one W. R. Arnold, who has since died, but was then the manager of the Dominion Trust Co. in the name of the respondent and professedly as the respondent's agent. The appellant claimed judgment against the respondent for the unpaid instalments of the purchase money and, in the event of nonpayment, for foreclosure of the interests of the respondent and certain persons claiming by transfer from him. The respondent denied the authority of Arnold to enter into the agreement on his behalf or in his name and counterclaimed for the restitution to him by the appellant of certain sums amounting in all to $1,300 which he alleged had

1916

McKEE v. PHILIP.

Duff J.

been paid to the appellant as part of the purchase money, but without authority, out of the moneys in Arnold's possession for him. The trial judge held, and this is a point upon which all parties are agreed, that Arnold had in fact no authority to execute the so called agreement in the name of the respondent and dismissed the action against the respondent. He held also that the respondent had failed to shew any title to the moneys received by the appellant from Arnold and dismissed the counterclaim. In the Court of Appeal Mr. Justice McPhillips concurred with the trial judge in his view that the counterclaim should be dismissed; but the majority of the court, the Chief Justice and Mr. Justice Martin, held that the respondent had sufficiently established his title to the moneys claimed and judgment was given accordingly.

I think the opinion of the learned trial judge and that of Mr. Justice McPhillips is the opinion which ought to prevail; and I think it right to state my reasons in full because the points in controversy are not exclusively points of fact, the decision in favour of the respondent having no unimportant relation to the proper application of one of the leading principles governing the incidence of the burden of proof. The agreement between Arnold and the appellant which the document above mentioned professes to embody was made on the 1st of Nov. when $200 was paid to the appellant on account of purchase money by means of the cheque of the Dominion Trust Co. At that time the respondent's name was not mentioned and nothing appears to have been said to indicate that Arnold himself was not the purchaser. On the 12th Nov., when the residue of the cash payment was due (nominally $1,500, but in reality $1,100, $400 being allowed, as it was said, for a commission to the purchaser) Arnold

informed the appellant that he wished the agreement to be taken in the respondent's name and the document on which the appellant's action was brought was produced and executed. The residue ($1,100) was also paid by means of the cheque of the Dominion Trust Co. These sums of $200 and $1,100 paid in the manner mentioned were treated by the Dominion Trust Co., as in fact they were, as advances for the purpose of the purchase. The respondent had a personal account with the Trust Co. but the moneys advanced were not charged to him in this account; nor was he there charged with the Trust Co's share (½) of the sum allowed the purchaser as commission (so called) which would have been $200. The only entries in the Trust Co.'s books relating to the transaction are to be found in a book known as the "real estate ledger" in which there is a description of the transaction, the appellant being entered as vendor and the respondent as purchaser and in which the sums advanced on Nov. 1st and Nov. 12th are entered as debits against the transaction as well as the repayment of these advances on July 12th, 1910, which is entered as a credit. This latter payment was made by Arnold, a receipt being given to him as for money paid by him personally and not in the character of agent. In the meantime, in April, 1910, Arnold, professing to act under his power of attorney from Phillip, had transferred the agreement to himself. Subsequently Arnold sold certain undivided interests receiving therefor shares in the capital stock of a certain company. These shares were taken in his name and treated as his own property.

Arnold was an old friend of the respondent's and in 1904 and 1905 had received some money from him for investment which had then been invested. He seems to have acted as the respondent's agent in vari-

1916

McKEE v. PHILIP.

Duff J.

ous ways and the respondent seems to have trusted him implicitly, not asking for accounts, and in fact the only account he received appears to have been one rendered in 1912. This account did not treat the property in question as a property held for Phillip. His power of attorney admittedly did not confer authority to pledge the respondent's credit in purchasing land or in borrowing money. There is no direct evidence and there is no fact pointing to the conclusion that Arnold had any funds of the respondent's in his possession either at the time the purchase was made or at the time the advances were repaid in July, 1910. The respondent, it may be added, did not become aware of this purchase or of the advances until after Arnold's death and some little time before the appellant's action was brought.

The respondent's counsel rightly assumed that he could make no progress towards establishing his claim without first satisfying the tribunal of the fact that there were sufficient grounds for judicially inferring either (1) that in taking over the agreement in April, 1910, and in repaying in July, 1910, the advances of Nov., 1909, as well as in procuring these advances to be made Arnold was acting as the agent of the respondent or (2) that in point of fact the advances were repaid out of moneys belonging to the respondent in his possession. There is no evidence to support either of these propositions, and it will be clear enough I think, from the considerations I shall briefly mention, that the preponderance of probability to be derived from the facts in evidence is against both of them. It will be sufficiently clear also that even assuming the first proposition to be established in fact that proposition can lead us nowhere in view of the circumstance that the respondent's case made upon his counterclaim and in his defence is wholly based upon the repudiation of

Arnold's authority to act as his agent; and, as to the second proposition, assuming it established, it is hardly doubtful that it would afford no ground for relief to the respondent as against the appellant.

Before proceeding to discuss these propositions in detail it is well to emphasize the fact already mentioned that the moneys in question were paid by the Dominion Trust Co. and that the payment was treated by the Trust Co. and by Arnold as an advance for the purpose of the purchase and that, eight months afterwards, this advance was repaid by Arnold. The fact that these moneys were advanced and the advance was running for a period of eight months is conclusive against any suggestion that the sums in question were paid out of moneys in the Trust Co.'s possession for the respondent or out of moneys at the time in Arnold's possession for him, the advance having been made, as already mentioned, in the form of a payment direct from the Trust Co. to the appellant. The respondent can therefore successfully contend that these moneys were his moneys only on one of two assumptions; first, that the advance was an advance to Arnold as the respondent's agent; or, secondly, that the payment was a payment by the Dominion Trust Co. acting as the respondent's agent, which latter assumption could only be supported upon the theory that the Trust Co. had been employed to act as the agent of the respondent in making the advance by Arnold acting as his agent. Admittedly there was no communication between the respondent and the Trust Co. with regard to this particular transaction and the Trust Co. had not been empowered by the respondent himself directly to act for him in such transactions generally.

This brings us to the first of the above mentioned propositions put forward on behalf of the respondent.

1916

McKEE v. PHILIP.

Duff J.

There is one circumstance which can be urged in support of the theory that Arnold in procuring the advance to be made by the Trust Co. professed to act for the respondent, that is the fact that the purchase was made in the respondent's name and that in the real estate ledger of the Trust Company the transaction was entered as being, that which it appeared to be on its face, a purchase by the respondent. As against this theory, on the other hand, there are all the circumstances which seem to indicate that Arnold was merely using Phillip's name as a convenience in a transaction which in reality was, and was intended to be, his own.

These circumstances include the fact, according to the appellant's testimony which the learned trial judge seems to have accepted, that Arnold approached the appellant in the guise of being himself the purchaser but taking the purchase in Phillip's name for his own convenience; they include also the facts that no notice was given to Phillip that Arnold was pledging his credit for large deferred payments; that the agreement was afterwards taken over by Arnold without notice to Phillip; that the advances were repaid in a manner which indicated that he treated them as advances to himself personally; that he treated the property as his own making no reference to it or to the proceeds of the sale of an interest in it in the subsequent account rendered to the respondent. These circumstances all point to an intention on the part of Arnold not to throw the burden of the purchase on Phillip, but rather to use Phillip's name in a transaction which was his own and the burden of which he intended to carry. There is the additional circumstance already mentioned that the respondent had a personal account with the Trust Company and that in this account no mention is made either of the advances or of the sum of $200.00

(commission) which the Trust Company was entitled to charge against the real purchaser. Add to these the circumstances that Arnold in fact had no authority to borrow money from the Trust Company on behalf of Phillip and that as between the Trust Company and himself he treated the loan as his own (see receipt of July 21st, 1910) and it seems sufficiently clear that the weight of evidence is distinctly in favour of the view that the advance was not procured by Arnold intending to act as the respondent's agent and was not made by the Trust Company intending to act as the respondent's agent at Arnold's request.

If indeed it could have been shewn, either by direct evidence or through a well founded inference, that the advance was in fact repaid out of the moneys in Arnold's possession on behalf of the respondent, then a different colour would be given to the whole business and it would not then, I think, have been open to Arnold to say as against the respondent that he had not acted for the respondent in all these dealings with the Trust Company as well as with the appellant and it would have been open to the respondent to adopt these dealings as his own. But in truth, as I have already said, there is no direct evidence and there is no fact which indicates that Arnold at any time in the course of these transactions had funds of the respondent's in his possession, still less that the advances were repaid out of any such moneys. The suggestion that this was so cannot be put in any higher category than mere guesswork; as against it there are all the circumstances above mentioned indicating that Arnold was merely using the respondent's name as a convenience, in which case the use of the respondent's money for the repayment of the advances could only be classed as intentional misappropriation.

1916

McKEE v. PHILIP.

Duff J.

But with respect to all these theories as grounds for supporting the respondent's claim, the respondent is in hopeless difficulties by reason of the position he is obliged to take up as the very foundation of his claim. The respondent now repudiates the authority of Arnold to enter into the purchase on his behalf or in his name. Arnold, as already mentioned, was equally without authority either to enter into the purchase or to procure advances on behalf of the respondent; and it is impossible to draw a line between the purchase and the arrangement resulting in the advances in such a way as to enable the respondent at one and the same time to repudiate the purchase and to adopt as his own act the act of Arnold in procuring the Trust Company to make the payments. As against Arnold it could not be done and therefore as against the appellant, with whom Arnold was professing to deal in the respondent's name with the respondent's authority, it cannot be done. The respondent, by repudiating Arnold's authority to pledge his credit in respect of the purchase (thereby escaping all responsibility to the appellant under the professed agreement), has incapacitated himself from alleging as a ground of his claim against the appellant that the moneys in question were borrowed by Arnold for him and that they became in consequence his moneys in the appellant's hands.

The respondent cannot insist upon adopting any one of Arnold's acts from that by which he procured the advances to that of repaying the advances without treating Arnold as his agent for making the purchase.

From all this it is quite evident that even if the respondent had been able to shew that Arnold had used his funds in July, 1910, in repaying the Trust Company the respondent would still have one or more difficult bridges to cross before making good his claim

against the appellant. The root of the difficulty is that the respondent's position in repudiating Arnold's authority and the Trust Co.'s authority to make payments for him, that is to say, in his behalf, necessarily separates any misappropriation by Arnold of his funds for the purposes of the transaction from the transaction itself and he could only make good his claim to moneys of his misappropriated by Arnold as far as he could trace these moneys (if in fact such moneys had passed into the hands of the Trust Company). He might have remedy against the Trust Company but he cannot trace his moneys further. It was not his funds, but the Trust Company's funds which went to pay the appellant. He cannot allege that the Trust Company paid out his moneys eight months before it received them because he has repudiated any authority on the part of the Trust Company to act for him in making payments. Whether or not the Trust Company in such circumstances might have had a claim against the appellant would be a profitless inquiry for many reasons, the most conclusive for the present being that the whole discussion is hypothetical, there being as already said nothing to indicate that the Trust Company was repaid out of the respondent's moneys, and much to indicate the contrary.

On behalf of the respondent the judgment below is supported on two other grounds. The first is the ground upon which the Chief Justice in the court below proceeded, namely, that the agreement of the first of November, 1909, contains a statement in the following words:—

> The sum of $1,700 (Seventeen Hundred Dollars) on the execution of this agreement, the receipt whereof the vendor doth hereby admit and acknowledge,—

1916

McKEE v. PHILIP.

Duff J.

and that this constitutes an admission by the appellant who executed the agreement of the receipt of the sum in question for the respondent. This admission is said to constitute a *primâ facie* case in favour of the respondent and as the learned Chief Justice puts it in his judgment, it is said that there are no other facts in evidence which "displace" this *primâ facie* case. There are two reasons which force me to reject this line of reasoning:—First, the statement of fact upon which it is based could only constitute an estoppel in an action between the parties to the agreement and based upon it. The respondent's counterclaim is not an action based upon the agreement, it is an action in repudiation of the agreement. Then if this so called admission is to be treated as a piece of evidence simply it must be construed and weighed for the purpose of appraising its value with reference to the circumstances in which it is said to have been made. It is not at all a point in controversy that the appellant, in executing the agreement, acted on the representation made to him by Arnold that Arnold had the respondent's authority for using his name. What then does this statement, which, be it observed, is not a statement that the appellant has received the sum mentioned from the respondent, amount to? Neither expressly nor by implication can it be read as a declaration of anything more than this—that in a transaction in which Arnold professes with the respondent's authority to be using the respondent's name as purchaser, the appellant as vendor has received a certain sum as part of the purchase money. The so called admission in other words does not carry us a step beyond the fact that Arnold did profess to have authority to enter into the transaction and to make these payments, in the name of the respondent. The so called admission

then being an admission only of certain undisputed facts is not of the least assistance to us. The second reason is this:—The so called admission being nothing but a piece of evidence, it does not shift the burden of proof as determined by the pleadings, which cast on the respondent (plaintiff by counterclaim) the onus of shewing that the moneys in question are his moneys. An admission may, of course, without shifting the burden of proof in that sense, constitute a *primâ facie* case and thereby shift the burden of proof in the other sense, namely, the burden of going on with the evidence, with the consequence that if the defendant fails to give further evidence judgment may be given to the plaintiff. In the case before us the so called admission in itself could not constitute a *primâ facie* case for the respondent (plaintiff by counterclaim) and shift the onus in this last mentioned sense. That is so for the simple reason that the very document containing the admission taken by itself alone, instead of establishing the respondent's right to recover the money back from the appellant, would have established the appellant's right not only to retain the money paid but to hold the respondent for the still unpaid purchase money. But, assuming a *primâ facie* case to be established, it is quite a misconception to suppose that (except in special cases where, for example, the facts proved give rise to a presumption of law in the plaintiff's favour) the effect of a *primâ facie* case is to cast upon the defendant the burden of disproving the plaintiff's allegation of fact in the sense of negativing that allegation by a preponderance of evidence in favour of the defendant. The real effect, as I have indicated above, is that if further evidence is not given the plaintiff is entitled to judgment; if further evidence is given, whether by the plaintiff or the defendant, then

1916

McKEE v. PHILIP.

Duff J.

the evidence being complete, the plaintiff must fail unless the evidence as a whole is sufficient to establish the allegation of fact upon which his case depends. The burden of establishing remains on him to the end and if at the end the scales are even, he must fail. The matter is stated very succinctly by Lord Esher in the following passage from his judgment in *Abrath* v. *The North Eastern Railway Co.* (1).

> It is contended (I think fallaciously) that if the plaintiff has given *primâ facie* evidence, which unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the *decision of the question itself*. . . It seems to me that the proposition ought to be stated thus:—the plaintiff may give *primâ facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. . . Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Taking all the facts before us as a whole, the preponderance appears to be rather in favour of the appellant (defendant by counterclaim).

The second ground upon which the respondent relies is the fact that the Dominion Trust Company, the executor of Arnold, both as executor and personally, disclaims in its pleading any interest in the moneys in question. The respondent founds upon this fact the argument that the moneys were not provided by Arnold himself and it follows, he contends, that they must have been taken from the funds in Arnold's hands for him.

(1) 11 Q.B.D., 440 at p. 452.

This argument is not wanting in audacity although as a ground supporting the judgment below it seems to be lacking in everything else. It is an extraordinary proposition that the disclaimer by Arnold's executor of any interest in these moneys should in itself be considered to establish as against the appellant, who, of course, is no way responsible for the pleading of any fact of any description whatever. If there was any fact within the knowledge of those responsible for the pleading which would have added to the weight of the respondent's case there is not the slightest reason for supposing that evidence of that fact would not have been forthcoming. But quite apart from that it would be a most unlawyerly proceeding to treat this pleading as of any judicial relevancy in the dispute between McKee and Phillip.

This is a conclusive answer to the suggestion, but it is only just, I think, to add that the course taken by the Trust Company as executor in making no claim to these moneys is not in the least difficult to understand; and indeed it would be difficult to suppose the experienced professional gentlemen who were advising the Trust Company taking any other course. The moneys in question had been paid by Arnold under an agreement executed by the appellant in consequence of Arnold's representation that he had authority to enter into it in the name of the supposed purchaser. Arnold's executor advancing a claim now to recover these moneys would be exposed to a conclusive defence in the estoppel created by Arnold's representation or, if the appellant chose to rely upon the true facts, to a counter-attack upon the ground that Arnold was responsible in damages under his warranty of authority, a field of litigation obviously not presenting an inviting prospect to a judicious representative of Arnold's

1916

McKEE v. PHILIP.

Anglin J.

estate. Personally the Trust Company having been repaid has no interest.

ANGLIN J.—This case is, no doubt, very close to the line and there is not a little to be said in support of the position taken by Mr. Newcombe that the respondent (plaintiff by counterclaim) can only succeed upon the strength of his own title and that he has failed affirmatively to establish that it was his money that Arnold paid to McKee. On the other hand, it is certain that the money in question does not belong to McKee and that his only right to retain it is that of possession. It is also clear that the money belonged either to the respondent Phillip or to Arnold or to the Dominion Trust Company. The Dominion Trust Company in its own right and as executor of Arnold is a party to this litigation and in both capacities disclaims all right or title to the money. Under these circumstances, I am not convinced that the inference drawn by the majority of the judges in the Court of Appeal that the money belonged to Phillip is so clearly erroneous that we should reverse the judgment rendered in his favour. I would, therefore, dismiss this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wallbridge.*
Solicitor for the respondent: *C. S. Arnold.*

DOMINION CREOSOTING COMPANY (DEFENDANT)..... APPELLANT;

AND

T. R. NICKSON COMPANY (PLAINTIFF)..... RESPONDENT.

1916
*Oct. 23.
1917
*Feb. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Company law—Assignment of debt—Security—"Mortgage or charge"—Registration—"Companies Act," R.S.B.C. 1911, c. 39, s. 102.

A contract was entered into between the respondent company and the City of Vancouver for paving some of its streets; and it was provided that the city should retain ten per cent. of the contract price for twelve months after the completion of the work to insure the carrying out of the contract. The respondent, being indebted to the appellant for the purchase of the materials required for the work, assigned to the appellant, before the expiration of the twelve months, the monies so conditionally retained by the city. The respondent went afterwards into liquidation.

Held, Fitzpatrick C.J. and Anglin J. (dissenting), that such assignment, while in form absolute, constituted a "mortgage or charge," within the meaning of section 102, chapter 39, R.S.B.C. 1911, requiring registration as against the liquidator of the insolvent company.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs.

The material facts of the case are stated in the above head-note.

Armour K.C. for the appellant.

Stuart Livingston for the respondent.

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

(1) 23 B.C. Rep. 72.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

The Chief Justice.

THE CHIEF JUSTICE.—I am disposed to think that the judgment on the trial was right and that this appeal should be allowed. The assignments are absolute in form and must be held to be so in effect unless we can find some ground for supposing that they were only made as security to the appellant for payment on the goods sold by it to the respondent.

Counsel for the appellant endeavoured to show at the trial that the retention moneys under the respondent's contracts with the City of Vancouver which were assigned were payments in discharge of the balance due to the appellant on their accounts with the respondent. If the decision of the case depended on this question I should have no hesitation in finding for the respondent. Until the expiration of the period of retention it was impossible to say that monies would be payable to the respondent by the City of Vancouver. In the first case, the contract having been completed when the assignment was made and the amount of the retention money being known, this exact amount was assigned; the City, however, incurred expenses for maintenance in accordance with the terms of the contract and accordingly deducted the amount of these from the retention monies, paying only the balance into court. The amount of these deductions the appellant admits it cannot recover. I cannot think that the amounts of the retention monies which would eventually be payable by the City of Vancouver being thus uncertain, the appellant could have ever intended to accept the assignments of them in full discharge of the respondent's indebtedness to it. Again, the retention monies under the first contract were payable by the City after twelve months which expired on the 17th September, 1913. There is no explanation why the appellant after having stipulated

for a bonus equivalent to 10% interest should have allowed payment to stand over until the respondent went into liquidation more than a year after unless they were looking to a future general settlement of accounts with the respondent.

However, the amount of the retention monies eventually to become payable could not have exceeded the appellant's claim though it might have been less and I cannot under these circumstances see any reason why the appellant should not have accepted absolute assignments of the retention monies as payments *pro tanto* of the debts due to it.

The amount assigned was calculated to cover interest at 10% and the agreement was therefore equivalent to an undertaking not to pay off the debt until the expiration of the retention period. The appellant was entitled to this interest and it is not to be supposed that the respondent even if the assignment had been only a security would have paid it before it was due. It is absurd to suppose that the respondent would have had any object in paying a charge off at the expiration of the retention period for it would have been paying a sum in cash to obtain an exactly equal amount of cash.

The record is a very embarrassed one but so far as I can ascertain the facts, I think there is no reason why the assignments should be held to be other than absolute as they purport to be. I have, of course, less hesitation in so holding as the trial judge gave no reasons for judgment and the Chief Justice delivering the judgment of the Court of Appeal only says that he thinks there is sufficient evidence to shew that the assignments were given as security falling within section 102 of the statute.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Davies J.

DAVIES J.—After much consideration and not without some doubts, I have reached the same conclusion as that reached by the Court of Appeal for British Columbia.

The question to be determined is whether the assignments to the appellant company by the respondent company now in liquidation of certain moneys to become due under certain contingencies to them under contracts the latter company had with the City of Vancouver, for the paving of its streets, were absolute assignments of such moneys or were mortgages or charges on such moneys within the meaning of section 102, chapter 39, R.S.B.C. 1911, requiring registration as against the liquidator of the assignor company and others.

I have reached the conclusion that they were such mortgages or charges within the meaning of that section and therefore void as against the liquidator by reason of want of registration.

The assignments though in form absolute shew on their face that they were intended *as a security* to the assignee for the payment of its debt.

In determining whether they were absolute assignments or mortgages or charges merely regard must be had to the nature of the transaction and the real facts and intentions of the parties.

The broad facts were that the Nickson Company, respondent, having obtained from the Creosoting Company, the appellant, supplies to enable them to carry out their contracts with the City of Vancouver, for the laying of creosoted block pavement in the city "for the purpose of securing the payment" of the cost of such supplies gave the assignments in question.

The moneys proposed to be assigned were 10% of the contract price retained in its hands by the City

for twelve months after the contracts were severally completed in accordance with the specifications. If during that period the work was found to be defective the contract with the City provided that its officers might remedy and repair the defects and that the cost of doing so should be paid out of the moneys so retained.

The moneys so assigned were not payable till the period of 12 months from the completion of the contract had expired; they might never become payable at all as they might be used for the purposes for which they were retained or they might only be payable in part.

The stipulations of the appellants' several contracts with the city provided that the moneys so retained by the City might be used if necessary not only in making good defects in the work done under the particular contract under which it was retained but also defects or faults in the work of any other similar contract the party had at the time with the City.

At the time the assignments were lodged with the City by way of notice there was no fund in the hands of the City to which they or any of them attached but merely the retention moneys under the contracts which might be exhausted in whole or in part in maintenance and repairs on any or all of the respondents' contracts with the City.

Looking at the nature of these transactions as detailed in the evidence, the fact that the assignments though absolute in form profess to be taken as security for the moneys due the assignee, the further fact that no moneys were really payable under them until the period of maintenance had expired and then only such of these moneys as were not used in remedying defects

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Davies J.

or faults, which during that period had been found in the work done, I have reached the conclusion that the assignments while in form absolute were in reality and in substance equitable assignments only and constituted mortgages or charges within the meaning of the Act upon the disputed moneys which to be effective against the liquidator required registration.

In *Gorringe* v. *Irwell India Rubber Co.* (1), at p. 134, Cotton L.J. uses the following words which I think applicable to this case:

> When there is a contract for value between the owner of *a chose in action* and another person which shews that such person is to have the benefit of the *chose in action* that constitutes a good charge on the *chose in action*. The form of words is immaterial so long as they shew an intention that he is to have such benefit.

And Chitty L.J. in the case of *Durham Brothers* v. *Robertson* (2), at p. 772, says:

> "Where there is an absolute assignment of the debt but *by way of security* equity would *imply* a right to a reassignment on redemption.

Looking therefore at the purpose and object of the Act requiring registration and at all the facts and circumstances of the case, I have reached the conclusion that the appeal must be dismissed with costs.

Once this conclusion is reached, it becomes unnecessary to discuss whether any part of the 10% deposit had become exigible before the insolvency of the company now in liquidation.

The point was not referred to in the factums of either party on this appeal or in the argument at bar, nor does it appear to have been raised in the Court of Appeal.

The single question argued and determined was whether the assignments were or were not mortgages or charges requiring registration within the meaning of the statute.

(1) 34 Ch. D. 128. (2) [1898] 1 Q.B. 765.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Idington J.

I mention it because of the reference made to it by my brother Anglin in his reasons for the conclusion he has reached, which opinion I have had an opportunity of reading.

IDINGTON J.—The legislature of British Columbia enacted by the Revised Statutes of that province of 1911, ch. 39, sec. 102, as follows:—

102 (1) Every mortgage or charge created by a company after the first day of July, 1910, and being either—

(a) A mortgage or charge for the purpose of securing any issue of debentures: or

(b) A mortgage or charge on uncalled share capital by the company; or

(c) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(d) A mortgage or charge on any land, wherever situate, or any interest therein; or

(e) A mortgage or charge on any book debts of the company; or

(f) A floating charge on the undertaking or property of the company,—

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against *bonâ fide* purchasers and mortgagees for valuable consideration, and the liquidator and any creditor of the company, unless the instrument, or a true copy thereof, by which the mortgage or charge is created or evidenced, is delivered to and filed with the Registrar for registration within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.

The question to be determined in this appeal is whether or not three several assignments made by the respondent to appellant, the Dominion Creosoting Company, fall within the provisions of the said enactment.

The respondent company, which admittedly was a company within the meaning of the section, was engaged under a contract it had with the City of Vancouver to pave parts of streets in said city with

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Idington J.

creosoted blocks manufactured by the appellant, and sold by it to the respondent company for the execution of that work.

The work of paving was supposed to be completed in the end of August, 1912, and the respondent company then owed the appellant on account of creosoted blocks purchased by it from appellant and used in connection with said contract.

One of the assignments now in question was made on the 3rd of September, 1912. It recited the foregoing facts and then as follows:—

> And whereas for the purpose of securing to the said Assignee payment for the cost of the said creosoted blocks, the Assignor has agreed with the Assignee in manner hereinafter appearing.

Then follows the operative part of it assigning to appellant in consideration of the premises and the sum of one dollar, the final payment of $2,084.75 to become payable by the City to the assignor on the 3rd of Sept., 1913. That also provides a power of attorney as follows:—

> To settle and adjust any or all accounts in connection with the said contract or work which may be necessary to enable the moneys hereby assigned to be paid to the said Assignee and to give perpetual receipts for the moneys hereby assigned which said receipts shall discharge the person paying the same from all liability in respect thereto and the person paying the same shall not be concerned to see to the application thereof, and also, if necessary, to sue for or take such other steps as the Assignee may think advisable for enforcing payment of the moneys hereby assigned or any part thereof and to compromise and settle any such proceedings on such terms as the Assignee may see fit, it being clearly understood that all costs and expenses of recovering the moneys hereby assigned are to be paid by the said Assignor and the said Assignor doth hereby covenant that it will at the request of the said Assignee and at the cost and expense of the said Assignee execute and do all such further acts, deeds, matters and things as the Assignee may reasonably require for giving full effect to the assignment of the said moneys, and it is hereby expressly understood and agreed that the said Assignor shall only receive credit on account of the moneys owing by the Assignor to the Assignee as aforesaid for the sum of one thousand eight hundred and seventy-six dollars and twenty-eight cents ($1,876.28) part of the said sum of

two thousand and eighty-four dollars and seventy-five cents ($2,084.75) hereby assigned, the difference of two hundred and eight dollars and forty-seven cents ($208.47) being a bonus or discount charged by the aid Assignee for the deferred payment of the said sum of two thousand and eighty-four dollars and seventy-five cents ($2,084.75).

It is to be observed that the assignment clearly professes on its face to be a security, and that all costs of recovering the moneys are to be paid by the assignor.

At the trial it appeared in evidence that the respondent company continued to give notes for the amount to the appellant company.

Clearly the respondent never was discharged.

A leading question by its counsel suggests these notes were accommodation notes and an assenting reply is apparently got.

The evidence of the secretary-treasurer of the appellant clearly shews that he had the impression that the respondent was not discharged. And again when asked if the City by reason of the contract with it had made and been found entitled to claim further deduction from the amount he thought then that the respondent would be liable.

It is absolutely clear I think from the terms of the instrument itself and this evidence and the absence of any release or receipt and the continuation of the notes that neither party considered the transaction closed and this assignment accepted as full satisfaction for the balance of the amount due or any definite sum.

It is said the respondent's books shew a credit taken therefor, but Mr. Nickson evidently thought this was conditional as it were, and that another account was kept of the transaction.

The character of the instrument itself is against the appellant's contention.

Much stress is laid upon the absolute form of its operative part.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Idington J.

Any one conversant with the mode of thought and manner of transacting such like dealings amongst business men, I imagine, would attach little importance to such an argument.

And if we would do justice we must try and apprehend and correctly appreciate what men are about.

If the assignment had been intended finally to close up between those parties to it all it related to, there would have been no doubt left existent in the minds of any one. There would not have been used either the word "security" instead of "payment" or the provision for the assignor bearing the expenses of recovery of the money.

I conclude it was exactly what the statute describes as a mortgage or charge on the book debt due by the City to the company.

This assignment I have taken up first for consideration because if any of the ingenious suggestions of counsel as to the test to be applied could be given any weight there are some features of that transaction and its surrounding circumstances which might lend a slight colour of reason to the argument.

The other two assignments were each made before the delivery of any goods for which they were to secure the price before anything was done to entitle the appellant to look to the City for payment of a dollar. Yet they are given expressly for securing the goods and the moneys are collectable at the expense of the assignor as in the first assignment.

If an assignment (framed in that way) of a claim over the future liability of any third party to a contractor when the goods to be delivered pursuant to it and work done therewith under the contractor's agreement with the third party only relates to a part of the total sum to accrue due to the contractor, is

not a mortgage or charge, I do not know what could be so.

That mortgage or charge, it might have been argued, and I am surprised it was not, was not of the book debts but what led up to same.

The result has been the creation of a book debt and it is that which was intended to stand charged.

In my opinion any such assignment falls within the mischief which the Act is intended to render harmless.

I think, therefore, the appeal should be dismissed with costs.

DUFF J.—I proceed upon the assumption that the instruments all came into operation effectively under the statute relating to assignments of choses in action as regards all the debts and sums they profess to transfer to the appellant subject only to the consequences of the imperfection, if it be an imperfection, due to non-registration. I reject Mr. Armour's argument that the statute requiring registration is limited in its application to mortgages and charges for securing the repayment of loans for the reason that such is not the necessary or the more natural construction and that the intention to exclude from the operation of an enactment such as this securities given for debts incurred otherwise than by way of loan, for example, in the purchase of goods or other property, ought not to be attributed to the legislature in the absence of something in the statute pointing to such an intention.

The real question is: Are the instruments before us within the words "mortgage or charge?" The decisive point is, were the assignments given as security or were they absolute assignments in the sense that the

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Duff J.

respondent would not be entitled as of right by paying the debt and costs to require a retransfer ?

I think the point must be decided against the appellant. It is evident that the purpose of the arrangements as practical business was to buy and sell blocks and pay and get paid for them. The appellant had no possible interest in the contracts with the municipality except as a cause or occasion for the sale of its blocks and as a source of supply for the respondent of means of paying for them. Whether they were paid by the means made available by the assignments or by any other means was a point which could possess no interest for the appellant. The phrase "for securing * * * payment" must be read, I think, when all the circumstances are considered just as if the words were "as security for the payment;" and it is almost a universal rule that a transfer of property as security implies a right of redemption.

It would not be profitable to consider whether the assignments fall within the category of "mortgage" or within that of "charge;" or partly in one category and partly in the other; it is enough that they are embraced within the scope of the expression "mortgage or charge."

Some energy was devoted at the trial to the endeavour to establish by the evidence of Nickson and Company's bookkeeper that the assignment of the deferred residue of 10% under the instrument of the 3rd September, 1912, was actually treated by Nickson and Company as payment. Now it is very difficult when the facts are considered to entertain the suggestion that this assignment was regarded by anybody as in itself, regardless of its fruits, amounting to payment. The respondent company were under an

obligation to maintain the street for a year and deliver it up in a condition satisfactory to the municipal engineer. At the expiration of the year the provisional progress certificates were subject to readjustment and the whole of the deferred payments of 10% might conceivably be eaten up by deductions required on various grounds by that official. This, the appellants, of course, knew, and the suggestion lacks plausibility that, with their eyes open to these possibilities, they would release the respondent company before the year of probation had expired.

The appeal should be dismissed with costs.

ANGLIN J.—By three instruments in the form of absolute assignments the T.R. Nickson Company for valuable consideration purported to transfer to the Dominion Creosoting Company moneys due and to become due from the corporation of the City of Vancouver to the assignors under certain paving contracts between them, existing and prospective.

The purpose of the parties was as clear as it was honest. In order to obtain from the Dominion Creosoting Company materials necessary for the performance of these contracts, the Nickson Company agreed to vest in the Creosoting Company its entire right to defined portions of the moneys earned and to be earned under them. The matter for our consideration is whether any legal obstacles exist which prevent that purpose being carried out.

The T. R. Nickson Company went into liquidation on the 26th October, 1914. The Court of Appeal for British Columbia has held the instruments in question to be mortgages or charges within sec. 102 of ch. 39 of the R.S.B.C., 1911, and therefore void as against the liquidator because not registered. The respondent

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Anglin J.

supports this view, and also contends that, as against the liquidator, the assignments, although they should be deemed absolute, passed nothing to the assignees, because the debts which they purported to assign did not exist when they were executed and, becoming exigible only after the liquidation began, they were then payable to the liquidator.

The utmost amount that could become payable to the assignees under the transfers in question would not exceed the indebtedness to them, present and contemplated, of the assignors in respect of which the assignments were made. Of course the absolute form of the assignments is not conclusive as to their true nature and effect. Upon proof that the real purpose was merely to create a security, equity would imply a right to a re-assignment on redemption, and the instruments would in that case operate only as mortgages or charges. *Durham Bros.* v. *Robertson* (1); *Saunderson & Co.* v. *Clark* (2). Evidence given on discovery, however, by the secretary of the T. R. Nickson Company and by witnesses called by the respondent with a view of shewing that these instruments, notwithstanding their absolute form, were meant to operate only as mortgages or charges makes it abundantly clear that after the execution of them the assignors regarded themselves as having no further interest in, or claim to, or upon the moneys dealt with, and that it was intended that on payment to the assignees (whose right to receive them was meant to be absolute and unqualified) of whatever sums should eventually be payable in respect of the interests assigned, the indebtedness of the assignors to them would be *pro tanto* discharged. In the moneys so dealt with

(1) [1898] 1 Q.B. 765, 772. (2) 29 Times L.R. 579.

the assignors intended to retain no right, interest or claim of any nature or kind whatsoever. That they should ever thereafter under any circumstances again have any such right, claim or interest was quite contrary to the purpose of the parties. They meant to transfer the title to the moneys dealt with, and not merely to undertake that their debt to the assignees would be partly discharged out of a particular designated fund. They did not mean to confer on the appellants merely a right to have their claim in respect to the moneys enforced by assignment. They meant to give to the assignees a direct right of action against the debtor municipality, not merely a right to institute proceedings against the assignors. *Burlinson* v. *Hall* (1). The purpose was to confer on the appellants complete control of the part of the debt transferred to them and to put them for all purposes in the position of the T. R. Nickson Company with regard to it. These are the essential features of absolute assignments. *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2); *Comfort* v. *Betts* (3); *Hughes* v. *Pumphouse Hotel Co.* (4). That these cases deal with the construction of s.s. 6 of s. 25 of the "Judicature Act," under which the form and terms of the instrument are of greater moment than under the provision invoked by the respondent, has not been overlooked.

Although such a dealing with part of a larger indebtedness has sometimes in a different sense been spoken of as charging, or giving a charge upon, that indebtedness, and there may be serious difficulties even since the "Judicature Act," in the way of vesting in the assignee of part of a debt a right to sue the debtor without joining the owner of the other part of

(1) 12 Q.B.D. 347, 350.
(2) [1905] A.C. 454.
(3) [1891] 1 Q.B. 737.
(4) [1902] 2 K.B. 190.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Anglin J.

the debt, *Forster* v. *Baker* (1), I confess my inability to understand how instruments such as those here in question designed to effect a complete divestment of property and of every interest therein, legal or equitable, can be regarded as "mortgages or charges" within the purview of the statute invoked by the respondents either because they do not deal with the whole amounts to be earned under the several contracts, or because some of the moneys covered by them would only accrue due at a future date and their amount was subject to future ascertainment owing to the fact that certain deductions, contingent, but for defined purposes, might be made therefrom after they had become debts due to the contractors, though not presently exigible. Moreover, we are now dealing with the entire unpaid balance of the debt, *Yates* v. *Terry* (2), and all the persons interested in the debt are before the Court. *Conlan* v. *Carlow County Council* (3).

That the instruments in question were mortgages was scarcely argued. Indeed they lack the essential feature of a mortgage—the right of redemption. The respondent relied rather on the word "charge" in the statute. The use of the terms "mortgage or charge" in collocation, however, indicates that the word "charge" is used in a sense somewhat akin or analogous to that of mortgage, (see authorities collected in Maxwell on Statutes (5 ed.), pp. 529 et seq.,) and was not meant to include anything so utterly foreign to the nature of a mortgage as an out and out transfer. *In re Old Bushmills Distillery Co.* (4), at pages 504-5, 508. The net amounts earned by the T. R. Nickson Company

(1) [1910] 2 K.B. 636.
(2) [1902] 1 K.B. 527.
(3) [1912] 2 Ir. R. 535.
(4) [1897] 1 Ir. R. 488.

and ultimately to become due from the municipal corporation, whatever they might be, were intended to be assigned absolutely and irrevocably to the appellant. I am, therefore, with respect, of the opinion that the assignments in question were not mortgages or charges within the statutory provision invoked on behalf of the liquidator.

But it is also urged that the appellants cannot recover, not because there cannot be a valid equitable assignment of a defined portion of a future debt, the amount of which has not been precisely ascertained, to arise out of a contemplated contract which is a mere expectancy (see *Skipper* v. *Holloway* (1); *Forster* v. *Baker* (2), and cases there referred to), but on the ground that at the date when the T. R. Nickson Company went into liquidation the fund claimed was not in existence as a debt which had accrued due; and the principle underlying such cases as *Wilmot* v. *Alton* (3), *Ex parte Hall* (4), and *Ex parte Nicholls* (5), is invoked. In support of the applicability of that principle to a company in liquidation counsel for the respondent cited *Bank of Scotland* v. *MacLeod* (6), at page 317. Without assenting thereto I shall for the purposes of this case assume that a company in liquidation is governed by these authorities. Attention should, however, be directed to the facts that the bankruptcy rules as to reputed ownership do not apply to the winding-up of companies, *Gorringe* v. *Irwell India Rubber & Gutta Percha Works* (7), and that in liquidation the company's property remains vested in it and does not pass to the liquidator (who is a mere

(1) [1910] 2 K.B. 630.
(2) [1910] 2 K.B. 636.
(3) [1896] 2 Q.B. 254; [1897] 1 Q.B. 17.
(4) 10 Ch. D. 615.
(5) 22 Ch. D. 782.
(6) [1914] A.C. 311.
(7) 34 Ch. D. 128.

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Anglin J.

administrator) as the property of the bankrupt passes to his trustee in bankruptcy.

Under the terms of each of the contracts in question the municipal corporation retained 10% of the total amount earned by the contracting company for twelve months after its completion as a guarantee that the company would during that period, known as "the term of maintenance," keep the pavements in good repair at its own expense, replacing any defective materials and remedying all ruts, hollows, depressions, cracks, settlements, unevenness or other defects. Should the contractor make default in fulfilling this obligation the engineer of the municipal corporation had the right, on giving forty-eight hours' notice, to execute all repairs which he should deem necessary and the corporation was entitled to charge the costs of repairs so executed against the moneys retained or any other moneys of the contractor in its hands.

By the first assignment—that of the Pender Street contract—nothing but the 10% "retention money" was assigned. The two other assignments deal with other moneys to be earned under the contracts as well as the 10% retention moneys. But payment of all except the 10% had been made in respect of them to the assignees before the Nickson Company went into liquidation and the only sums now in question in respect of these contracts are likewise the 10% retention moneys held under them.

In the case of the Pender Street contract the construction work had been finished and the retention moneys, ascertained to amount to $2,084.75, were held by the municipal corporation under the guarantee clause before the assignment of them was executed. Before the Nickson Company went into liquidation the "term of maintenance" had expired, $1,500 on

account of the retention moneys had been paid to the assignees on the 3rd December, 1913, by the municipal corporation (which had full notice of all the assignments), the final certificate had issued on the 15th September, 1914, and after deducting $131.37 expended by it for repairs, the corporation had in hand $458.38 which had become actually payable under the contract. On the 23rd September, 1914, more than a month before the liquidation began, the Nickson Company wrote to the municipal corporation approving of the deduction of the $131.37 and requesting that payment of the balance of the retention moneys held on the Pender Street contract should be made to the appellants. There can therefore be no difficulty either as to the assignability or the absolute assignment of this money. The appeal as to it should be allowed.

On the other hand, in the cases of the contract for Hastings Street and that for Fourth Avenue, the "terms of maintenance" did not expire until August or September, 1915—nearly a year after the liquidation began. All the moneys to become payable under these two contracts had been earned, however, in August or September, 1914, when the works were completed. The contracts expressly recognize this fact in providing that

> a certificate, marked "completion certificate for payment," at the rate of 90% on the whole amount *due* under the contract

should be issued payable to the contractors on completion of the works. These certificates had been duly issued in respect of both contracts before the liquidation. The construction of the pavement was the whole consideration for all the moneys to be paid under each contract. The consideration for the supplementary obligation to repair was the giving of the paving contract. No doubt the right to payment

1917

DOMINION CREOSOTING CO. v. NICKSON CO.

Anglin J.

of the 10% retention moneys only arose twelve months afterwards, *i.e.*, on the expiry of the "term of maintenance." These moneys in the interval, however, were (subject to the assignments) the property of the T. R. Nickson Company. They were held for that company by the municipality as *debita in presenti, solvenda in futuro*, subject only to the fulfilment of the guarantee of maintenance, and to the right on the part of the corporation to deduct therefrom any expense to which it should be put for such maintenance or for maintenance under similar provisions of other contracts of that company. They were precisely in the same position as moneys of the T. R. Nickson Company deposited by it with the municipal corporation as a guarantee for the fulfilment of any contractual obligation would have been. Moneys so deposited remain the property of the depositor subject to the lien or charge in favour of the depositee defined by the terms of the guarantee. There was at that time nothing to prevent the assignment of these moneys by the T. R. Nickson Company to the appellants becoming effective. The assignments as to them had, no doubt, operated at the time they were made only as contracts to give them to the assignees when they should be earned, *Thompson* v. *Cohen* (1); *Cole* v. *Kernot* (2), because

> a man cannot in equity any more than at law assign what has no existence. But a man can contract to assign property which is to come into existence in the future and when it has come into existence equity, treating that as done which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment. *Collyer* v. *Isaacs*, (3); *Holroyd* v. *Marshall* (4).

On the completion of the works the right to the "retention moneys," which were part of "the whole

(1) L.R. 7 Q.B. 527, 533.
(2) L.R. 7 Q.B. 534.
(3) 19 Ch. D. 342, 351, 353.
(4) 10 H.L Cas. 191.

amount due under the contract," passed to the assignees, subject to the lien or charge thereon of the municipal corporation. The case in respect of these moneys, I think, falls within the principle on which *In re Davis* (1), *Ex parte Moss* (2), and *Pipe's Case* (3), were decided. The moneys assigned had not, it is true, been earned when the assignments were made and could not, therefore, be the subject of common law assignments. But although the contracts themselves should be regarded as having been then mere expectancies and the moneys to arise under them as mere possibilities—future book debts, *Tailby* v. *Official Receiver* (4)—in equity, when they had been earned and were "due," the assignment of them for valuable consideration became operative and could no longer be defeated even in bankruptcy. This was the situation when the T. R. Nickson Company went into liquidation. Had the liquidation occurred before the completion of the works, *i.e.*, before the moneys had been earned, the position might have been different, and the principle of the decisions in *Wilmot* v. *Alton* (5), and *Ex parte Nicholls* (6), might have governed, if these bankruptcy decisions are applicable in the liquidation of a company.

I am for these reasons of the opinion that the appeal as to the retention moneys held in respect of the Hastings Street and Fourth Avenue contracts should also be allowed.

The appellant is entitled to its costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Senkler & Van Horne.*
Solicitors for the respondent: *Livingston & O'Dell.*

(1) 22 Q.B.D. 193.
(2) 14 Q.B.D. 310.
(3) W.N. 1888, 225.
(4) 13 App. Cas. 523, 542-8.
(5) [1896] 2 Q.B. 254.
(6) 22 Ch. D. 782.

1917

*June 11.
*June 22.

ERNEST BOUCHARD (PLAINTIFF)....APPELLANT;

AND

HENRY SORGIUS (DEFENDANT).....RESPONDENT.

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

Appeal—Jurisdiction—"Supreme Court Act," sections 39 and 46—Prohibition—Future rights.

The words "where rights in future might be bound," contained in sub-section (*b*) of section 46 of the "Supreme Court Act," apply to the whole sub-section: *Olivier* v. *Jolin* (55 Can. S.C.R. 41), followed.

Per Davies, Idington, Duff and Anglin JJ.—Section 39 of the "Supreme Court Act," giving an appeal to the Supreme Court in cases of prohibition, is limited and controlled by section 46 of the same Act: *Desormeaux* v. *The Village of Ste Thérèse* (43 Can. S.C.R. 82), followed.

Per Fitzpatrick C.J.—No appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec rendered upon an application for a writ of prohibition against proceeding with the hearing of a criminal charge: *Gaynor and Green* v. *The United States of America* (36 Can. S.C.R. 247), followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Roberval, maintaining the plaintiff's petition for a writ of prohibition.

The appellant was charged before a magistrate with having set fire to the forest in the lower part of the County of St. John, which action was declared a criminal offence by section 515 of the Criminal Code. A writ of prohibition, issued in connection with these

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

proceedings, was maintained by the trial judge, but was discharged by the Court of Appeal.

Belcourt K.C. for the motion, based largely his argument upon the claim that the action sought to be prohibited was exclusively a criminal matter or in the nature of a criminal proceeding.

Auguste Lemieux K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash.

Personally I am disposed to hold that we are without jurisdiction on the ground that the judgment appealed from was rendered upon a writ of prohibition against proceeding with the hearing of a criminal charge; and, under the jurisprudence of this court and of the Court of Appeal in England, there is no appeal in such cases. *Gaynor and Green* v. *United States of America*, (1); *Rex* v. *Garrett* (2). The appellant was charged before a magistrate with having set fire to the forest in the lower part of the River Brulé in the County of St. John without justification or excuse and against the statutes in such case made and provided. The statutes relied upon by the complainant are R.S.Q. (1909) sections 1636-37-39-40-41-55 and article 515 of the Criminal Code which latter makes it an offence to recklessly set fire to any forest in violation of a provincial or municipal law.

The writ of prohibition now in question was issued in connection with these proceedings and discharged by the Court of Appeal and this appeal is taken from that judgment.

In *Rex* v. *Garrett* (2), their Lordships say:—

> The judgment of the Divisional Court in this case, discharging the rule for a prohibition, was a judgment in a criminal cause or matter

(1) 36 Can. S.C.R. 247. (2) 33 Times L.R. 305.

1917

BOUCHARD v. SORGIUS.

The Chief Justice.

—namely, the criminal proceedings pending in the Police Court, and this Court was unable to entertain any appeal from that judgment.

The majority of the court, however, prefer to grant the motion on the principle laid down in *Desormeaux* v. *Village of Ste. Thérèse* (1), where it was held that no appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec in case of proceedings for or upon a writ of prohibition unless the matter in controversy falls within some of the classes of cases provided for by section 46 of the "Supreme Court Act."

DAVIES J.—The motion to quash this appeal was based by Mr. Belcourt largely upon the claim that the action sought to be prohibited was exclusively a criminal matter or in the nature of a criminal proceeding.

It is not necessary for me to deal with this contention because I am of opinion that apart from the question of the proceedings being of a criminal nature no appeal lies.

The judgments of this court in *Desormeaux* v. *Ste. Thérèse* (1), and *Olivier* v. *Jolin* (2), decided during this present year, determine respectively, 1st, that the section giving an appeal to this court in cases of prohibition is limited and controlled by the 46th section of the "Supreme Court Act" and, secondly, that in sub-section (*b*) of that section the words "where future rights may be bound" control the whole sub-section.

These two authorities are conclusive against the right to appeal in this case and the motion to quash should be allowed with costs. It may not and could not be argued successfully that any future rights were bound by the judgment appealed from.

(1) 43 Can. S.C.R. 82. (2) 55 Can. S.C.R. 41.

IDINGTON J.—The motion to quash should be allowed with costs.

DUFF J.—The appeal is incompetent on Mr. Belcourt's second ground; it is excluded by section 46.

ANGLIN J.—I am of opinion that this appeal is not within any of the clauses (*a*), (*b*) and (*c*) of section 46 of the "Supreme Court Act" and therefore does not lie. *Desormeaux* v. *St. Thérèse* (1), is directly in point. While inclined to think that this is a case of prohibition arising out of a criminal charge and as such likewise not within section 39 (*c*), I find it unnecessary to rest my judgment on that ground.

Appeal quashed with costs.

Solicitor for the appellant: *Armand Boily.*
Solicitor for the respondent: *Ths. Ls. Bergeron.*

(1) 43 Can. S.C.R. 82.

1916

*Oct. 16, 17.
*Dec. 11.

GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANT;

AND

BRITISH COLUMBIA EXPRESS COMPANY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Damages—Navigation—Obstruction—Causation—Public nuisance.

The appellant was authorized to build a bridge on the Upper Fraser River, where the respondent was operating a steamboat service. The plans for the bridge were approved of by competent authority, "subject to and upon the condition that if at any time it is found that a passageway for steamboats is required, the applicant company should provide the same upon being directed to do so either by the Department of Public Works or by the Board" of Railway Commissioners. After the foundations of the bridge had been built, but before the superstructure had been erected, a letter was sent by the secretary of the Department of Public Works to the appellant, to say that he is directed to require the company to kindly submit plans for the swing spans necessary to provide passageways for boats. No attention was paid to the request and the bridge was completed without providing a passageway.

Per Fitzpatrick C.J., Davies, Duff and Anglin JJ.—Upon the evidence, the construction of the bridge was not the cause of the non-user of the river by the respondent's steamboat, Duff J. dissenting however on the ground that respondent was entitled to damages, because the steamer was prevented from making a trip by the presence of a cable which the appellant had placed athwart the river.

Per Idington J. (dissenting).—The order of the Board of Railway Commissioners must be held to have been conditional; and as, on the facts in evidence, leave to cross the river had been withheld by the Department of Public Works, there was an infringement of the respondent's rights.

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

Note.—Leave to appeal to Privy Council granted, 30th July, 1917.

Per Duff and Anglin JJ.—The condition contained in the order of the Board of Railway Commissioners did not contemplate a judicial "finding" by the Board itself before becoming operative.

Per Anglin J.—The placing of the bridge across the river without a passageway was unlawful and rendered the appellant liable for any actual damages sustained by the respondent such as would support a private action in respect of a public nuisance.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs. The material facts of the present case and the questions of law are fully stated in the above head-note and in the judgments now reported.

Before the institution of the present action in damages, an application was made, on behalf of the plaintiff company, for a mandatory injunction to compel the defendant company to cease obstructing the Fraser River, to remove the temporary bridge built across it and to make openings in two permanent steel bridges. This application for injunction was practically based on the same grounds as in the present action and was refused by Morrison J. (2).

D. L. McCarthy K.C. and *F. W. Tiffin* for the appellant.

S. S. Taylor K.C. for the respondent.

THE CHIEF JUSTICE.—The claim for damages put forward by the plaintiff respondent here involves the consideration of two questions: (1) the right of the defendant appellant to obstruct, in the year 1913 and 1914, by the erection of a fixed low level steel bridge, the navigation of the Upper Fraser River at the place

(1) 27 D.L.R. 497; 10 West W.R. 477, 583. (2) 20 B.C.Rep. 215.

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

The Chief Justice.

referred to in the factums as the Second Crossing Bridge; (2) whether in fact the construction of the bridge at the Second Crossing in August, 1913, was the real cause of the non-user by the plaintiff respondent of the Upper Fraser.

At the trial the action was dismissed by Mr. Justice Clement.

On appeal the plaintiff's claim was allowed except for the damages in respect of the year 1914; so that, we are concerned only with the claim for loss of the profits which might have been earned had the plaintiff's steamer "B. C. Express" continued to operate on the Upper Fraser beyond the second crossing bridge during the autumn of 1913.

The plans for the bridge in question were approved of by competent authority in May, 1912, subject to and upon the condition that

> if at any time it is found that a passageway for steamboats is required the company (defendant) shall provide the same upon being directed so to do either by the Department of Public Works for the Dominion of Canada or by the Board of Railway Commissioners.

The foundations for the bridge were built and the steel for the superstructure manufactured and ready for erection, when, on the 4th July, 1913, a letter was written by R. C. Desrochers, Secretary of the Department of Public Works, to say

> that he is directed to require the company *to kindly submit plans* for the swing spans necessary to provide passageways for boats in the bridge.

Apparently no attention was paid to this request, the bridge was completed on the original plans approved by the Governor-in-Council, and trains were operated over the bridge, presumably with the consent of the Department and the Railway Board, in August, 1913, and the bridge has ever since been used by the railway company for the passage of its trains.

In these circumstances, it is difficult to say that the letter of the 4th July, 1913, was intended as a direction that the work on the bridge should not be proceeded with until new plans for a swing span bridge had been submitted and approved of. The Department could have prevented the operation of trains over the bridge at any time after construction and it no doubt would have exercised its power had the railway company built the bridge in defiance of a departmental order to the contrary. In any event the view I take of the second question makes it unnecessary for me to say more on this point.

Whether the plaintiff respondent's steamer "B. C. Express" was prevented from navigating the waters of the Upper Fraser in the autumn of 1913, by reason of the construction of the second crossing bridge, is, in my opinion, a question of fact, the determination of which depends largely upon the weight to be given the evidence of the witnesses West and McCall, the representatives of the two companies, who chiefly directed their business operations at the time. The trial judge, who had both witnesses before him, tells us, that the impression left on his mind by the oral testimony, which was confirmed by a careful reading of the extended notes of the evidence, was that the construction of the bridge was not the cause of the non-user of the Upper Fraser by the "B. C. Express." He also refers to the correspondence exchanged between the representatives of the two companies at the time of the occurrences now in question and holds that those letters point to the conclusion "that the lowness of the water was explicitly given at the time as the reason for withdrawing the boat to the lower run," that is to the reaches of the Fraser River below Fort George. And to that extent McCall is corrobo-

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

The Chief Justice.

rated. It is not even suggested anywhere in that correspondence that the company respondent suffered any loss by reason of the construction of the bridge or that the appellant company was in any way to blame.

It also appears from the oral evidence that the Upper River was blocked by the bridge at the second crossing about the 31st August, 1913, and that between that date and the 20th September following the depth of water was too low for the purpose of navigating a steamboat of the size and draught of the "B. C. Express." Anticipating this change in the level of the water the boat was withdrawn from the Upper River and there is certainly nothing in the evidence, as I understand it, to justify the reversal of the trial judge's finding that the respondent company

did not then intend to resume operations even if water conditions improved.

In a letter written by Mr. West, 18th July, 1913, he says that

the upper part of the river between Tête Jaune Cache and Fort George is only navigable for about two and a half to three months in the year and when I was at the Cache the other day we had a large quantity of freight stored there for delivery to Fort George and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Tête Jaune Cache was apparently the head of navigation at that time. In a letter written by Mr. Lesueur, accountant of the respondent company, of date 11th September, 1913, he says:

Owing to the Upper River having such a low stage of water we were compelled to take our steamer off and she is now operating between Soda Creek and Fort George so that navigation on the Upper River is over for the remainder of the present season.

Moreover, prior to the blocking of the river by the bridge the defendant's railway line had been completed to mile 145 B.C., a point below the bridge where temporary accommodation was provided to handle all

freight from Tête Jaune Cache. It was more convenient for the respondent company to operate in conjunction with the railway at that point than to run the risks attendant on the navigation of the river above at that season of the year.

Mr. West admits that this company had in contemplation that year the carriage of freight by water "from the end of steel," *i.e.*, from the point at which the railway could deliver the freight. His complaint made at the trial was that the company refused to carry his freight below the second crossing bridge and this complaint is certainly not borne out by the evidence, and he is contradicted by McCall who is apparently believed by the trial judge who says "that there is not a hint that the defendant company was to blame."

But the most striking commentary on Mr. West's evidence is his own letter to Mr. Hinton, General Passenger Agent of the railway, written on the 27th September, 1913, when to Mr. West's own knowledge the water in the Upper Fraser had risen again. In this letter he says that the steamboat service "from Fort George to the 'end of steel' has practically closed," the "end of steel" then being below the bridge, and he asks if arrangements can be made for the interchange of traffic for the next season. This is a curious letter to write if the railway was at this time causing the company so much damage by blocking the river or refusing to deliver freight at mile 145 B.C.

It is significant that in all the correspondence exchanged, no complaint is made of improper interference by the railway with the right of navigation, and, in my opinion, this omission strongly supports the evidence of the witnesses that there was practically

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

The Chief Justice.

no business to be done on the Upper Fraser after the removal of the boat to the run from Soda Creek to Fort George in August. The constant effort of the respondent company even during the autumn and winter of 1912 was to keep down the amount of freight consigned to it at Tête Jaune Cache and they were in this so successful that after the steamer "B. C. Express" left Tête Jaune Cache on its last return trip to Fort George there remained at the Cache only three carloads of freight and this was taken by rail to the end of steel below the bridge whence it was taken in August by boat. And thereafter there was no freight lying at Tête Jaune Cache consigned to consignees in care of the plaintiff respondent. There was practically no other through freight offering and the local freight was a negligible quantity; it was a mere incident not a factor in the operations of the company respondent. The freight coming in and consigned to the Fort George District would naturally go the end of steel where it could be more advantageously handled by respondent company as is not denied, but no attempt was made to that end.

The contemporaneous record of events to be found in the correspondence together with the oral evidence taken at the trial convince me that the findings of the trial judge are right and should not have been interfered with by the Court of Appeal.

This appeal should be allowed with costs.

DAVIES J.—This action was one brought to recover damages for loss of business and profits, etc., by the plaintiffs in the latter part of the year 1913 and the year 1914, owing to the construction by the railway company of a bridge known as the second crossing bridge across the Fraser River, without providing a

passageway for steamboats and which bridge prevented the plaintiffs from carrying on their business as steamboat carriers on that river above and beyond the place where it was constructed.

The trial judge's finding dismissing the action for damages claimed during the navigating season of 1914 was sustained by the Court of Appeal and no question arises here as to these alleged damages there having been no cross-appeal on that point.

The learned trial judge found that he was

> unable to find as a fact that the construction of the bridge at mile 142 was the cause of the non-user of the Fraser above that point by the plaintiff company after such constructing and that the essential element of causation had not been made out to his satisfaction or indeed at all.

He therefore dismissed the action.

The Court of Appeal, except with respect to that part of the judgment dismissing plaintiff's claim for 1914, set aside this judgment and directed a reference to ascertain the plaintiff's damages for the season of 1913, caused by the construction of the bridge.

On the appeal to this court, Mr. McCarthy contended that the order of the Board of Railway Commissioners had duly authorized the construction of the bridge complained of and that the condition in that order making it

> subject to and upon the condition that if at any time it is found that a passageway for steamboats is required, the applicant company should provide the same upon being directed to do so either by the Department of Public Works or by the Board,

implied as a condition precedent to requiring the company to provide a passageway for steamboats there should be some finding either judicial or quasi judicial by some competent authority such as the Board itself before the company could be legally directed to provide such passageway, and that no such

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

Davies J.

finding had been had or made. That the direction or order of the Department of Public Works requiring such passageway for boats was not given to the company until more than a year after they had built their foundation work in accordance with the plans approved of and did not profess to be the result of any such finding as the order of the Board of Railway Commissioners authorizing the construction of the bridge contemplated but on the contrary was a letter from the Secretary of the Department of Public Works expressed in these words:

> In view of the protests which have been received against the construction by the company of fixed bridges at mile 274 and mile 316 west of Wolf Creek, B.C., I am directed to state that it will be necessary for the company to provide passageways for boats in these bridges.

In the view, however, that I take of this case and the proper conclusion to be drawn from the evidence given at the trial, including the correspondence which passed between the officials of the litigants, I do not find it necessary to express any opinion upon the contention of the appellant above outlined and I mention it to shew that it has not been overlooked. I do not think there is any difference of opinion with respect to the legal right of the plaintiff company to recover damages if they had proved any to have been suffered by them and caused by the construction of the bridge complained of in the latter part of the season of 1913.

The question before us is purely one of fact to be determined on the reading and consideration of the evidence and the correspondence.

After such reading and consideration, I have come to the same conclusion as that reached by the trial judge, Clement J., and which I have above shortly epitomized. As that learned judge says:—

In the correspondence the lowness of the water was explicitly given at the time as the reason for withdrawing the (steamer) "B.C. Express" to the lower run, not a hint that the defendant company was in any way to blame, and the oral testimony has convinced me that the plaintiff company never intended to resume operations that season above the bridge at mile 142 and I cannot bring myself to find that they could have done so, even in the actual water conditions which afterwards developed.

In deference to the opinion of the learned judges of the Court of Appeal who reached a different conclusion, I have felt myself obliged to give the oral evidence and the correspondence the closest attention and study with the result I have stated.

I cannot see however that any good would result from a stated analysis of this evidence and correspondence which in the nature of the case would be very lengthy. Suffice it to say that I entertain no reasonable doubt as to the correctness of my conclusions.

I would therefore allow the appeal with costs in this court and in the Court of Appeal and would restore the judgment of the trial judge.

IDINGTON J.—I have considered the ingenious construction sought by counsel for appellant to be put upon the order of the Board of Railway Commissioners for Canada, but am unable to adopt the same.

I think the words in question therein must mean if it is in fact "found that a passageway for steamboats is required" then the conditions of the order must be complied with and that the order as a whole must be held to have been conditional.

Apart from the ambiguous language used in the order it must be borne in mind that the Board had no jurisdiction to impose upon any navigable stream a barrier to the navigation thereof without the authority of the Government.

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

Idington J.

Such is my interpretation and construction of the "Railway Act" and that the several provisions giving powers to the Board designed to aid in the details to be adopted for the facilitating of crossing such streams by railways are all subservient to that paramount power entrusted to the Governor-in-Council relative to the ultimate decision of granting or refusing permission and the terms and compliance with the terms upon which such leave to cross may be granted.

That never was given, but on the contrary, through the Department of Public Works, seems to have been withheld.

As in that view there was on the facts in evidence an infringement of the respondent's rights and a clear deprivation in one instance at least by reason of the conduct of the appellant's servants, of the respondent's rights, I fail to see why the action cannot be maintained.

It is not open to us on this appeal to determine the matters in dispute further.

Much of the argument in the appellant's factum designed to uphold the position that there was no infringement is much more applicable to the question of the measure of the damages, than to what is involved in the appeal.

If there were any damages in fact suffered no matter how small, by reason of a legal wrong done, the appeal fails.

It would, therefore, serve no good purpose for us to enter upon the many apparently cogent reasons put forward bearing upon the measure of damages.

These reasons, of course, are properly put forward in order if possible to demonstrate that there was no damage suffered.

In my opinion they fall short of complete demonstration that there was no damage in fact of any sort.

I agree in the reasoning of Mr. Justice Galliher, relative to the main issue presented and need not repeat the same here.

The appeal should be dismissed with costs.

DUFF J.—I concur in the view of the learned trial judge that the claim for damages in respect of the interruption of navigation at mile 142 during the later season of high water in 1913, that is to say, from the 20th Sept. onward, must fail. The presence of the bridge, although it made navigation in fact impossible, had nothing to do with the discontinuance by the respondents of their operations above mile 142. Before the recurrence in September of conditions making navigation possible above the site of the bridge the "B. C. Express" had been withdrawn for service elsewhere and I agree with the trial judge that she had been withdrawn with the settled intention on the part of the respondent company not "to resume operations that season above mile 142." That interruption, therefore, however illegal, was not in the juridical sense the cause of any actual loss to the respondents.

Mr. Justice Galliher appears to suggest that the doctrine of *Lyon* v. *Fishmongers Co.* (1), applies since he appears to assume there was an invasion of the rights of the respondents as riparian owners in virtue of their wharf and warehouse at Tête Jaune Cache. Such riparian rights are rights incidental to proprietorship or rather perhaps rights of proprietorship, *Kensit* v. *Great Eastern Railway Company*(2), at p. 133, *Esquimalt Water Works* v. *Victoria* (3), at pp. 320 and 322, and

(1) 1 App. Cas. 662. (2) 27 Ch.D. 122.
(3) 12 B.C. Rep. 302.

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO

DUFF J.

invasion of them without legal justification or excuse gives rise to a right of action even in the absence of actual pecuniary loss. Such an invasion is in the fullest sense *injuria*. It appears to be suggested as mentioned above, that the respondents have been wronged in respect of their riparian rights. With respect, that could not, I think, be sustained. There was an obstruction of the navigation of the river at "mile 142" and in that respect an interference with the public right; but there was not infringement of the private rights of the respondents incidental to the ownership or occupation of a property nearly 100 miles away; and the respondents could therefore only succeed by shewing that in consequence of the violation of the public right, they had suffered some loss peculiar to themselves. In this I agree with Clement J. in holding that they have failed as I have said.

There is evidence, however, that during the continuance of the earlier season of navigation, that is, during the second half of August, the passage of the "B. C. Express" up the river was actually stopped—a trip to Tête Jaune Cache on which she was bound being actually prevented by the presence of a cable athwart the river at mile 142 which the appellants had placed there. My conclusion from the evidence is that the presence of this obstruction is proved and that there is sufficient evidence of actual loss in consequence of it to establish a right of action. If the appeal were to be disposed of in accordance with my notions I should direct a reference to ascertain the amount of damages properly awardable in reparation for this interference with respondents in their use of the river.

The view just expressed involves, of course, a decision against the appellants of the point raised by Mr. McCarthy's contention that the appellants are

not chargeable with illegality but that their act in constructing the bridge as and where they did, was done strictly under the sanction of law, and that point must be briefly noticed.

The relevant statutory provision is sec. 233 of the "Railway Act," ch. 37, R.S.C., which is in these words:—

Section 233:—When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work, in, upon, over, under, through, or across any navigable water or canal or upon the beach, bed or lands covered with the waters thereof, the Company shall, before the commencement of any such work,—

(a) in the case of navigable water, not a canal, submit to the Minister of Public Works, and in the case of a canal to the Minister, for approval by the Governor-in-Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister; and

(b) upon approval by the Governor-in-Council of such site and plans, apply to the Board for an order authorizing the construction of the work, and, with such application, transmit to the Board a certified copy of the Order-in-Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require.

2. No deviation from the site or plans approved by the Governor-in-Council, shall be made without the consent of the Governor-in-Council.

3. Upon any such application, the Board may:

(a) make such order in regard to the *construction of such work upon such terms and conditions as it may deem expedient*;

(b) make alterations in the detail plans, profiles, drawings and specifications so submitted;

(c) give directions respecting the supervision of any such work; and;

(d) require that such other works, structures, equipment, appliances and materials be provided, constructed, maintained, used and operated, and measures taken, as under the circumstances of each case may appear to the Board best adapted for securing the protection, safety and convenience of the public.

4. Upon such order being granted, the company shall be authorized to construct such work in accordance therewith.

5. Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the pro-

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

Duff J.

visions of this section have been complied with, the Board may grant such order. 3 Ed. VII., c. 58, s. 182.

The approval of the Governor-in-Council is expressed in an Order-in-Council dated 8th May, 1912, by which the appellant's plans for the construction of their bridge are

approved subject to the condition that should it be found at any time that passageways are required in these bridges for steamboats the Company shall provide the said passageways upon being requested to do so by the Department of Public Works.

The order of the Board of Railway Commissioners authorizing the construction of the bridge is dated 4th April, 1912, and the grant of authority is declared to be "subject to and upon the condition that if at any time it is found that a passageway for steamboats is required the applicant Company shall provide the same, being directed to do so either by the Department of Public Works for the Dominion of Canada or the Board." On July 4th, 1913, the Department of Public Works directed that a swing span should be provided to meet the requirements of navigation but the company proceeded with the construction of a low level bridge in accordance with the plans previously approved (by the order of 8th May, 1912) making no such provision, and the river seems to have been closed as a consequence of this about the 24th August, 1913.

At the time the notice of the Department's demand was received nothing had been done to obstruct navigation of the river, although much had of course been done in making and assembling parts. I think the direction of the Department does come within the four corners of the power reserved by the condition.

Mr. McCarthy argued that the condition required a "finding" by the Board of Railway Commissioners before becoming operative.

The argument is worthy of serious examination because the power reserved did not cease to be exercise-able upon the erection of the bridge; and indeed it must have been evident, if the matter was considered, that the exercise of it even before the erection of the bridge might prove costly and burthensome for the Railway Company, and we should naturally expect to find the decision of such a question hedged about by those guarantees which are usually afforded by a judicial inquiry.

Unfortunately the condition contemplates action by either the Department of Public Works or the Board; and in the case of the Department it is too clear that it is to act as an administrative department and it seems impossible to escape the conclusion that the question is left to the Department as a question of policy. If the Department had refused a hearing to the Railway Company a different question might have arisen.

Such a condition seems to be within the authority of the Board under sec. 233 (3-a); and at all events there can be no doubt of the power of the Governor-in-Council to exact such a condition in approving plans under sec. 233 (a). The stipulation once entered into gives rise to an obligation on the part of the Railway Company enforceable by the Crown on behalf of the public and when not performed and private loss is suffered in consequence of non-performance, to a right of action for reparation. *Rex* v. *Inhabitants of Kent* (1); *Rex* v. *Inhabitants of Parts of Lindsey* (2); *Rex* v. *Kerrison* (3); *Reg* v. *Ely* (4); *Hertfordshire County Council* v. *Great Eastern Railway Co.* (5); *Rex* v. *West-*

(1) 13 East 220.
(2) 14 East 317.
(3) 3 M. & S. 526.
(4) 15 Q.B. 827.
(5) (1909) 2 K.B. 403.

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

Duff J.

wood (1) at page 92; *Mayor of Lyme Regis* v. *Henley* (2), at p. 355.

The judgment under appeal ought, therefore, in my opinion, to be varied by directing a reference as to damages in respect of the actual obstruction caused by the cable placed across the river in August, but subject to that, dismissed.

ANGLIN J.—Mr. McCarthy, appearing for the appellants, presented to us a view of the order of the Board of Railway Commissioners, under which the bridge in question was constructed, which was not submitted to the provincial courts. Apart from the objection to its being entertained based upon that fact, I cannot agree with Mr. McCarthy's contention that, on the proper construction of the order of the Board, it was necessary, before a request binding on the company to provide a passageway in its bridge could be validly made by the Department of Public Works, that there should be a finding by the Board of Railway Commissioners that such a passage was necessary. As I read the order the request might be validly made at any time either by the Board itself or by the Department of Public Works upon its appearing to either of them that a passageway was required.

Moreover, the approval of the plans for the bridge by the Governor-in-Council, prescribed by sec. 233 of the "Railway Act," was expressly made subject to the condition that the company should furnish passageways for boats upon being requested to do so by the Department of Public Works if it should be found at any time that such passageways were required. The Department having notified the company before the

(1) 7 Bing. 1. (2) 2 Cl. & F. 331.

bridge in question was constructed that it would be necessary for it to provide a passageway for boats, the placing of a bridge across the river without such a passageway and so constructed that it caused an obstruction to navigation in contravention of sec. 230 of the "Railway Act" was, in my opinion, unlawful and rendered the company liable for any actual damages sustained by the plaintiffs such as would support a private action in respect of a public nuisance.

On the other hand, however, after carefully considering all the evidence, particularly the correspondence read in the light of the oral testimony, I think the conclusions reached by the learned trial judge

> that the plaintiff company never intended to resume operations that season (*i.e.*, in 1913) above the bridge at mile 142,

and would not

> have done so even in the actual water conditions which afterwards developed

were correct and should not have been disturbed. It is very significant that, although the alleged interruption to navigation took place in August, 1913, there appears to have been no complaint about it on the part of the plaintiffs until the following year. On the contrary, correspondence between representatives of the parties in September, 1913, appears to be inconsistent with an intention on the part of the plaintiffs to prefer a claim for damages in respect of interruption of their business in that year.

On the 18th of July, 1913, in answer to a request by the defendant company for information as to the plaintiff's intentions with regard to the route in question in order to inform their representatives in the east as to the routing of freight, Mr. West, Superintendent of the plaintiff company, wrote

1916

GRAND TRUNK PACIFIC RWAY. CO. v. BRITISH COLUMBIA EXPRESS CO.

Anglin J.

Under the difficult conditions which we have had to operate this summer we think it advisable not to advertise the route or encourage shippers to send their goods by the Cache unless they are prepared to handle the same in scows from that point to Fort George.

Earlier in the same letter he said:

The upper part of the river between Tête Jaune Cache and Fort George is only navigable for about 2½ to 3 months in the year * * * and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Acting upon this information the defendant company notified its agents on the 30th of July that:

Until further notice we will decline to accept freight consigned to the British Columbia Express Company at Tête Jaune Cache for Fort George.

Though aware of this notice having been sent out the plaintiffs took no exception to it. On the evidence of Mr. Boucher, the plaintiffs' agent at Tête Jaune Cache, I incline to think that, as a result, immediately before traffic was interrupted by the construction of the bridge they had only two loads of freight left above the bridge, one at Tête Jaune Cache, the other at mile 129. The latter they took away themselves on the day when traffic closed; the former was brought for them to a point below the bridge by the defendant company and was taken away by them. Any other freight which came to Tête Jaune that season was consigned, I should infer from Mr. Boucher's evidence, for shipment to Fort George by scows. This evidence further strengthens the view taken by the learned trial judge that the plaintiffs had no intention of resuming navigation of the route in question after the water conditions in August interrupted it.

On the whole case, while the plaintiffs may have sustained some *injuria* at the hands of the defendants, it appears to have been *injuria sine damno*. The making of a claim in respect of loss of business in 1913

would seem to have been an afterthought and action in respect of it would in all probability never have been taken had proceedings not been instituted in connection with the business of 1914, for which it has been held by the British Columbia courts that the plaintiffs have not an actionable claim.

I would, for these reasons, allow this appeal with costs in this court and the Court of Appeal of British Columbia and would restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Tiffin & Alexander.*

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

1917

*May 22.
*June 22.

THE SCHOONER "JOHN J. FALLON": HER TACKLE, APPAREL AND CARGO (DEFENDANT)..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DIVISION.

Constitutional law—Illegal fishing—Three mile limit—Island—Coast—Treaty of 1818.

A foreign vessel is liable to seizure for fishing or preparing to fish within three marine miles from the shores of an island part of the Dominion of Canada and situate fifteen miles from the mainland of Nova Scotia.

The term "Coast" in the treaty of 1818 by which the United States renounced the right to fish within three marine miles of the coast of any British territory is not confined to the coast of the mainland.

APPEAL from the judgment of the local judge for the Nova Scotia Admiralty District, of the Exchequer Court of Canada, condemning the appellant schooner to seizure for illegal fishing in Canadian waters.

Two questions were raised by the appeal. First, was the evidence sufficient to establish that the schooner was fishing within the three mile limit; and, secondly, is the limit to be measured from the mainland or is fishing within three miles from the shore of St. Paul's Island, situate fifteen miles from the mainland of Nova Scotia, illegal under the treaty of 1818?

R. G. Code K.C. for the appellant. The evidence that the "Fallon" was fishing or preparing to fish within

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

the three mile limit was far from convincing. As precise measurements cannot be ascertained distances should be calculated liberally. *The "Twee Gebroeders"* (1); *The "Kitty D."* v. *The King* (2).

The marine league must be measured from the coast of the mainland. At all events, if the treaty contemplates the three miles from the coast of an island it must be an island of considerable size and capable of use and cultivation. Ferguson, Manual of International Law, page 399; Twiss, Law of Nations (280), page 292; Pigott's Nationality, Pt. 1, page 40.

Newcombe K.C. for the respondent dealt with the evidence as sufficiently establishing the position of The Fallon within the three mile limit.

The term "coast" in the treaty means the coast of the mainland and its dependencies, even though the latter are incapable of being inhabited or fortified. Wheaton, International Law (4 ed.), page 277; Halleck, International Law, page 174. *Mowat* v. *North Vancouver* (3).

THE CHIEF JUSTICE.—This is an appeal from a judgment of the local Judge in Admiralty decreeing the condemnation and forfeiture of the schooner "John J. Fallon," her tackle, rigging, etc., on the ground that she was fishing or preparing to fish within three marine miles of the "coasts, bays, creeks, or harbours of Canada," namely, St. Paul's Island, N.S.

There are two questions presented by the evidence. First, whether the schooner when arrested was within the three mile limit of the coasts of Canada, and,

(1) 3 C. Rob. 163. (2) 22 Times L.R. 191.
(3) 9 B.C. Rep. 205.

1917

THE SCHOONER "JOHN J. FALLON" v. THE KING.

The Chief Justice.

secondly, whether she was fishing at the time. Mr. Justice Drysdale found that the vessel was, at the time of the seizure, within the three mile limit and no other conclusion is reasonably open upon the evidence. The observations taken by Lieutenant McGuirk, checked and found correct by Captain Webb of the "Hochelaga," shew the "Fallon" and its dories to have been within the three mile belt off of the shore of St. Paul's Island. Captain Stewart of the Government patrol vessel "Canada" also took bearings with an instrument called a pelorus, which measures exact distances, and found that the trawls which had been left in position by the schooner "Fallon" were within the three mile limit. But the most conclusive evidence is to be found in the cross-examination of Capt. Oliver, from which I make the following extract:—

Q. Did you take any bearings? A. No, sir.

Q. Did the officer? A. He said they took bearings aboard his boat.

Q. Did he take bearings aboard your ship? A. He looked at the compass.

Q. Did he take the bearings on board your ship? A. Yes, sir.

Q. Did he shew you you were one and a quarter miles from the shore? A. Two and a quarter, I think he told me. I think he told me we were three-quarters of a mile inside the limits; two and a quarter from shore.

Q. If that was correct that you were two and a quarter miles from shore, could you not by the use of your own compass and instruments have found out you were within the three mile limit? A. I can see how near we are only by the compass; the only instrument we have.

Q. If from what the officer said you were only two and a quarter miles from the shore, could you by using your compass or bearings have known you were within the three mile limit? A. Yes, sir.

Q. The whole trouble arose by not using your compass, if you did, you could have found out? A. Yes, but I thought we were outside the limit. I had no intention of violating the law.

It is denied, however, that St. Paul's Island is part of the coast of Nova Scotia, notwithstanding that by the statutes of that Province it is made part

of the County of Victoria. But whatever may be the effect of that legislation, it can scarcely be contended that the territorial waters of Canada do not extend three miles seaward from St. Paul's Island. Such a contention would, as pointed out by Mr. Newcombe in his argument, be at variance with the position taken by the State Department at Washington so far as concerns the eastern coast of North America, and with the accepted authorities on international law.

Wharton's International Law Digest, pp. 107-109, quotes from letters from Mr. Bayard to Mr. Manning:

> The position of the State Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from high water mark and that the seaward boundary of this line of territorial waters follows the coast of the mainland, *extending where there are islands, so as to place around such islands the same belt.*

The same view of the extent of territorial jurisdiction is held by the British Government and has been supported on various occasions by the decisions of the British courts. *Reg.* v. *Keyn* (1); *The Queen* v. *Dudley* (2), at p. 281; *The "Anna"* (3); see also *The "Frederick Gerring, Jr."* v. *The Queen* (4), per Sedgewick J. at pp. 287 and 288.

The title of Great Britain to St. Paul's Island under the treaty of 1763 and by occupation is made abundantly clear in Mr. Newcombe's admirably prepared factum.

I would dismiss the appeal with costs.

DAVIES J.—This is an appeal from the Nova Scotia Judge in Admiralty, Mr. Justice Drysdale, condemning the defendant schooner, a United States fishing vessel, as forfeited to the King on the ground that

(1) 2 Ex. D. 63.
(2) 14 Q.B.D. 273.
(3) 5 C. Rob. 373.
(4) 27 Can. S.C.R. 271.

1917

THE SCHOONER "JOHN J. FALLON" v. THE KING.

Davies J.

when captured she was fishing within three marine miles of St. Paul's Island, N.S., such island being a part of "the coast" of Canada, in contravention of "The Customs and Fisheries Protection Act," R.S.C. ch. 47, and amending Acts.

Two questions were raised and argued on this appeal. First, that the proof was insufficient to establish the fact of the vessel having been, when captured, "fishing or preparing to fish" within three marine miles of the Island of St. Paul; and, secondly, that even if that fact was proved, the Island of St. Paul, situate some fifteen miles from the mainland, could not be held to be part of the "coasts" of Canada within the meaning of that term as used in the renunciatory clause of the Treaty of 1818 between Great Britain and the United States.

On the question of fact as to the vessel when captured being actually engaged in fishing within three marine miles of the coast of St. Paul's Island, I cannot think under the evidence there can be any doubt and the learned local Judge in Admiralty so found.

The only answer made by the officers of the condemned ship was that they thought they were not within the three mile limit and that they had no intention to break the law. In most of these cases of alleged violation of the treaty of 1818 by fishing vessels, this excuse is generally set up. But even supposing that the excuse of non-intention to fish within the limits was advanced in good faith, the evidence in my judgment places the fact of the vessel being engaged in fishing very much within the limit of three miles beyond any question. The question is one of fact not of intention and dealing with the facts as we find them proved it would require much charity to reach the conclusion that the officers were

not aware that they were violating the law, even if such a conclusion was necessary to reach.

As to the legal question whether St. Paul's Island is to be held as part of the "coast" of Canada within the meaning of that term as used in the renunciation clause of the treaty of 1818, I do not entertain any reasonable doubt.

The admissions of facts in the case state

(a). That St. Paul's Island is an isolated island, covered to some extent by dwarfed spruce and very little of it is fit for cultivation. The island is situate in Cabot Strait 15 miles from Cape North, Nova Scotia, which is the nearest main land. The island is three miles in length and two miles in the widest portion of it. The island consists of gray colored granite.

(b). That St. Paul's Island has no settlers excepting an occasional fisherman in the summer time. The persons located there are the Dominion Government employees, that is to say:—The Superintendent, the keeper of the lights and a government life-saving crew. And when the ice is packed around the Island and navigation is closed about it the lights are not lit.

(c). That there are no bays, harbours or creeks in St. Paul's Island and supplies are landed by boats from vessels standing off at sea in fine weather. For Municipal and other purposes St. Paul's Island is deemed part of Victoria County.

Article 1 of the treaty of 1818, after providing that the inhabitants of the United States should have "forever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind" within certain specified limits, went on to provide as follows:

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, harbours of His Britannic Majesty's Dominions in America not included or within the above mentioned limits.

The question therefore resolves itself into one whether St. Paul's Island was a part of His Majesty's Dominions in America not included within the limits provided for common rights of fishing and if so whether its shores were embraced within the words "any of

1917

THE SCHOONER "JOHN J. FALLON" v. THE KING.

Davies J.

the coasts, bays, creeks, harbours" thereof in the renunciation.

The island is clearly not within the limits provided for a common right of fishing and in my judgment is embraced within the words of the renunciatory clause "any of the coasts, etc." of His Majesty's Dominions in America not included within the limits providing for a common right of fishing.

The argument for the appellant at bar, as I understand it, was an elaboration of that stated in the factum as follows:—

> It is submitted that the very fact that the treaty of 1818 uses the words *"coasts, bays, harbours and creeks"* together indicates by all the rules of construction, that the land contemplated as that from which the three mile limit extends is such land as has coasts, bays, harbours and creeks, that is, the mainland and such islands as have these characteristics.

I am not able to accept such an argument. It practically amounts to this, that because in the treaty the word "coast" was followed by the words "bays, harbours and creeks" the renunciation only extended to such islands off the main coasts as have these latter characteristics.

Why such a limitation should be read into the words "any of the coasts, bays, creeks, harbours, etc." I cannot understand.

In my judgment, "any of the coasts" is large enough and definite enough to embrace such an island lying off the mainland as St. Paul's is admitted to be.

It has always been claimed, treated and utilized as part of the King's Dominions in America and so far as I have been able to find no trace exists of any claim to the contrary having been set up since the treaty by any foreign nation.

Long before the Confederation of the Dominion of Canada, the island was by express legislation of

the Province of Nova Scotia made part of the County of Victoria in that Province and has for a great many years been used as a lighthouse and a station for a government life-saving crew.

If the argument advanced by the appellant was tenable it would apply to other islands, such as Prince Edward Island, Anticosti, Sable Island, etc., and would practically nullify the renunciatory clauses of the treaty.

The terms of the cession of territory made by France to Great Britain by the Treaty of Paris, 1763, clearly embrace St. Paul's Island, the islands of St. Pierre and Miquelon in the Gulf of St. Lawrence being alone retained by France. The occupation of St. Paul's Island by Great Britain since that treaty has never at any time, so far as I know, been questioned by any foreign power and it must be taken to be part of the Dominion of Canada, and its shores part of the coasts of the Dominion.

IDINGTON J.—I find no reason in fact or the relevant law for disturbing the judgment appealed from and hence am of the opinion that this appeal should be dismissed with costs.

DUFF J.—First, as to the sufficiency of the evidence to support the finding of Drysdale J. that the appellant ship was found fishing within three marine miles of the Island of St. Paul's. I see no reason to disturb the finding. I accept the contention of the appellant ship that something more than a mere preponderance of probability is necessary to establish this. (See *Carlson* v. *The King* (1).) It cannot be said that the evidence in this "case is in an uncertain and unsatisfactory state." (*The Kitty D.* v. *The King* (2).)

(1) 49 Can. S.C.R. 180.

(2) 22 Times L.R. 191.

1917

THE SCHOONER "JOHN J. FALLON" v. THE KING.

Duff J.

I proceed to consider the questions of law raised by the appeal. The factum of the Attorney-General contains an argument conclusively shewing that St. Paul's Island is British territory, and that it is *de facto* and *de jure* part of Canada, and that being so, the only remaining subjects for consideration are, first: Is St. Paul's Island included within the phrase "coasts, bays, creeks and harbours of Canada?" And secondly, whether any treaty or convention is in force permitting the inhabitants of the United States to fish in the locality where the appellant ship was found. To sustain the judgment of the court below it is necessary, by reason of the provisions of the first section of ch. 14 of the Statutes of Canada, 1913, amending ch. 47 R.S.C. 1906, that the first of these questions should be answered in the affirmative and the second in the negative.

As to the first question, the argument on behalf of the appellant is expressed thus in his factum: That "coast" means the general coast line of the mainland at low water and that by the operation of the rule *noscitur a sociis* the word "coast" should be held in this context to have no application to a shore of such limited magnitude as to have no bays, harbours or creeks. I have no hesitation in rejecting this contention. I have no doubt the word "coasts" in this statute embraces the coast of any part of the territory of Canada.

As to the second question. The principal contention was that by the treaty of 1783, the right was granted to the inhabitants of the United States to fish on the "coasts, bays and creeks" of all British Dominions in America, and that the renunciation by the United States expressed in article 1 of the treaty of 1818, by which the United States renounced forever

any right enjoyed or claimed by its inhabitants to fish within three marine miles of British coasts in America, with certain exceptions, not at present material, must be restricted in its application to those localities over which, by the accepted doctrines of international law, the British sovereignty prevailed; and it is argued that the extension of territorial sovereignty over the marginal seas (the three mile distance from the shore) is not recognized in the case of small unoccupied and unproductive islands such as St. Paul's Island.

This contention is quite without foundation. The international recognition of sovereignty in respect of marginal seas rests upon very easily intelligible and well settled principles. The grounds of the doctrine are very lucidly explained by Mr. Hall (6th ed., pp. 150, 151). *Imperium* over these waters is necessary for the safety of the state and over them control can be effectively exercised.

In the judgments in *Reg.* v. *Keyn* (1), a vast number of authorities is collected in which this is accepted with unanimity. The passage in Grotius, which is the beginning of them, is cited by Cockburn C.J. at page 176, and is in the following words:—

> Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia; id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat; ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam so in ipsa terra reperirentur.

A power possessing a barren island is entitled to protect its property; and control over the marginal seas is just as essential for this purpose in the case of a barren island as in the case of a small highly productive

(1) 2 Ex. Div. 63.

1917

THE SCHOONER "JOHN J. FALLON" v. THE KING.

Duff J.

one. With regard to the possibility of control, Mr. Westlake, at page 190 of the first part of his book on International Law, discusses the subject in this way:—

> The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighboring water, carries the sovereignty over the same width of the latter all around it as a piece of mainland belonging to the same state would carry. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring Sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes so far as that lighthouse is concerned part of the territory of the nation which has erected it, and as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less." It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might, however, be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.

Further discussion seems superfluous. I may add, however, that I prefer to rest my judgment upon grounds of principle independently of Lord Stowell's decision in "*The Anna*" (1), the exact application of which may, I think, be open to argument.

The appeal should be dismissed with costs.

ANGLIN J.—Upon the evidence before him Mr. Justice Drysdale could not, in my opinion, have come to any other conclusion than that the schooner "Fallon" was fishing within three miles of the shore of St. Paul's Island when arrested.

I have heard no good reason advanced in support of the other ground of appeal, that the renunciation

(1) 5 C. Rob. 373.

by the Government of the United States in the Treaty of 1818 of the liberty of American citizens to fish within three miles of the coasts of British Dominions in America does not apply to a three mile belt around St. Paul's Island because it is comparatively small and lies more than three miles from the mainland. That the island is a British possession and forms part of the Dominion of Canada does not admit of question. Two lighthouses are erected on it which are under the control of the Government of Canada. I can conceive of no reasonable ground on which it could be held that the territorial rights of the Dominion do not extend over the waters lying within three miles of the island. In *The King* v. *Chlopeck Fish Co.* (1), cited by counsel for the Attorney-General, it was assumed, I think rightly, that the waters within the three marine miles of the shores of Cox Island, which lies about seven miles off the coast of the mainland, were subject to the prohibition against fishing by Americans within territorial waters of Canada. Authority on such a point seems to be superfluous. Some however may be found in the cases of *The "Anna"* (2), and of *The "Vrow Anna Catharina"* (3), cited in the factum filed on behalf of the Attorney-General.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. R. Rowlings.*
Solicitor for the respondent: *John A. McDonald.*

(1) 17 B.C.Rep. 50.
(2) 5 C. Rob. 373.
(3) 5 C. Rob. 15.

1917

*May 21.
*June 22.

ROBERT S. ROSBOROUGH AND KATHERINE AMELIA WALKER, COMMITTEE OF THE ESTATE OF JOHN DOUGLAS WALKER (PLAINTIFFS)..... APPELLANTS;

AND

THE TRUSTEES OF ST. ANDREW'S CHURCH IN THE CITY OF SAINT JOHN AND ANOTHER (DEFENDANTS)..... RESPONDENTS.

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

Will—Devise of Mortgage—Election—Maintenance.

W. by his will bequeathed real estate to a trustee the revenue therefrom, so far as necessary, to be applied to the support and maintenance of his son who was in poor health and afterwards became lunatic. He also devised the sum of $12,000 directly to the son and to St. Andrew's Church a mortgage he held on the church property which he had previously assigned to the said son. In an action by the Committee of the latter for a declaration of rights under the will:—

Held, affirming the judgment of the Appeal Division (44 N.B. Rep. 153) Fitzpatrick C.J. dissenting, that the Committee must elect between taking the benefits under the will, the provision for maintenance as well as the money devised, and retaining the rights of the son under the mortgage.

Per Fitzpatrick C.J. the case was not one for the application of the equitable doctrine of election. The devise of the mortgage must be treated as a legacy to the church of the amount due thereon.

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

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

(1) 44 N.B. Rep. 153.

The facts are not in dispute and are stated in the above head-note.

Powell K.C. and *F. R. Taylor K.C.* for the appellants. The devisee can only be compelled to elect if the property devised is free disposable property and the testator plainly intended the contrary. See 13 Halsbury Laws of England, page 123; *In re Wintle* (1); *In re Sanderson's Trust* (2) at page 503; *In re Bryant* (3).

The testator could not dispose of property that did not belong to him and must be considered as having had something in his mind besides the mortgage held by his son when he made the devise to the church. See *Dummer* v. *Pitcher* (4); *In re Harris* (5).

Pugsley K.C. and *Baxter K.C.* for the respondents. As to election see *Cope* v. *Wilmot* (6), referred to in *In re Sanderson's Trust* (2); *Pitman* v. *Crum Ewing* (7); *In re Sefton* (8).

THE CHIEF JUSTICE.—The will of the testator contained the following:—

> I give, devise and bequeath to the Trustees of St. Andrew's Presbyterian Church, in the City of St. John, the mortgage which I now hold on their property and all principal and interest due or owing thereon at the time of my death.

Prior to the date of his will the testator had assigned this mortgage, which was for $30,000, to his son absolutely.

Under the will the son is entitled to benefits which, I will assume, are of value exceeding $30,000. It is

(1) [1896] 2 Ch. 711.
(2) 3 K. & J. 497.
(3) [1894] 1 Ch. 324.
(4) 2 Mylne & K. 262 at p. 274.
(5) [1909] 2 Ch. 206.
(6) 1 Coll. 396n. (a)
(7) [1911] A.C. 217.
(8) [1898] 2 Ch. 378.

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

The Chief Justice.

claimed by the respondents that he must elect between taking the benefits under the will and discharging the mortgage, or retaining the mortgage and compensating the respondents for their disappointment. If he is put to his election at all it is perhaps not very material which he does; the amount for which he would be liable to the respondents is really the same in either case. The court below seems to have fallen into the error of supposing that if he elects against the will he must renounce all benefits under the will and that therefore it is more advantageous to him to take under the will. He is, however, only bound if he elects against the will to compensate the respondents to the extent of their disappointment under the will, and that, of course, is the sum of $30,000, which he would have to forego if he elected to take entirely under the will.

In my opinion, however, no question of election arises at all. The doctrine of election is purely an equitable one and in equity a mortgage is only a security for the debt. Now the testator mistakenly alleged that the respondents were indebted to him and he forgave the debt. There is no question here of a bequest of the son's property; it is a legacy to the respondents and it makes no difference that the mortgage is vested in the son for the respondents can redeem the mortgage and so the intention of the testator will not be disappointed.

In *Findlater* v. *Lowe* (1), it was held that:

> If a testator has had at a time antecedent to the will a certain kind of stock or property, and he has parted with it before the date of the will, and by his will purports to dispose of it in a way which if he had retained it would have been a specific legacy, it will be treated by the court as a general legacy of equivalent amount payable out of the general personal estate.

(1) [1904] 1 Ir. 519.

Mrs. Baker, the residuary legatee, is not a party to these proceedings but I observe that at the trial Mr. Teed K.C. who with Mr. Ewing K.C. appeared for the executor, stated that he was instructed more particularly on her behalf.

The residuary legatee has, however, no equity to oblige the plaintiff to make an election. I refer to the case of *Lady Cavan* v. *Pulteney* (1), at page 561, (2), at page 385, and also to the elaborate judgment in *McGinnis* v. *McGinnis* (3).

There should be a declaration that the plaintiff is not put to his election in respect of any of the benefits left to him by the will, to the whole of which he is entitled according to their nature and the tenor of the will, and that the respondents, the Trustees of St. Andrew's Church, are entitled to a general legacy of the amount equivalent to the mortgage debt formerly held by the testator and interest due at the time of his death, payable out of the estate of the testator.

The executor has pleaded that the estate is not liable to the respondents, the Trustees of St. Andrew's Church, but as they have not advanced any claim against the estate I think they are not entitled to any costs although the result is to give them a right to be paid out of the estate. All parties bear their own costs.

DAVIES J.—This appeal is from the judgment of the appeal division of the Supreme Court of New Brunswick confirming a judgment of the trial judge in equity declaring that the plaintiffs, the Committee of the Estate of John D. Walker, a person of unsound

(1) 2 Ves. 544. (2) 3 Ves. 384.
(3) 1 Ga. 496.

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Davies J.

mind and so found, who applied for a declaration as to their rights under the will of the late James Walker, were bound to elect in favour or against the will bequeathing a certain interest in property of his for the maintenance and support of said John D. Walker, and certain other property which did not belong to the testator but did belong to said John D. Walker, to the Trustees of St. Andrew's Church and directing that the committee should elect under and not against the will and making the necessary provisions to have their decree of election carried out.

The facts to enable the controversy as to John D. Walker's being compelled to elect under or against the will to be understood are not in dispute.

Shortly they are that some years before his death, James Walker became the assignee and owner of a mortgage on certain real property given by the Trustees of St. Andrew's Church to secure the payment of $30,000 and interest and had assigned the same to his son, John D. Walker.

Subsequently, and after the latter had become *non compos mentis*, James Walker made a will by which he bequeathed that mortgage and the moneys secured by it (although they were not then his) to the Trustees of St. Andrew's Church, the mortgagors. In and by the same will he bequeathed certain property to trustees for the support and maintenance in comfort of his insane son, John D. Walker, and by a codicil to the will bequeathed his son $12,600 additional.

On his death, the question at once arose whether John D. Walker was entitled to claim his support and maintenance under the will and the $12,600 specifically bequeathed to him and at the same time claim as his own property the mortgage and moneys secured thereby. In other words, could he approbate the will to

the full extent of all the benefits it conferred upon him and at the same time reprobate it by refusing to recognize and complete the bequest of the mortgage to the trustees of the church, or was he bound to elect either for or against the will and so in the former case accept all the benefits it conferred upon him adopting the bequest of the mortgage to the trustees, or, in the latter case, of electing against the will, retain his own property, the $30,000 mortgage, and renounce the maintenance and support provided for him in the will as well as the $12,600 specifically bequeathed to him, or could John D. Walker hold that the doctrine of election did not apply at all and that he could claim the mortgage as its *owner*, and his maintenance and support and the $12,600 under the will?

The latter claim was the one advanced on the part of the Committee of John D. Walker, which the courts below had decreed against, and which claim on this appeal it was desired this court should affirm.

As to the further bequest by codicil of $12,600 to John D. Walker, the argument was advanced by the appellants, though very weakly, that even with respect to this sum, reading will and codicil together, the doctrine of election was not applicable.

The courts below were unanimous, however, in holding that so far as the $12,600 bequest was concerned the Committee of John D. Walker's estate would be obliged to elect and I, concurring with them, do not think the question arguable.

Chief Justice Sir E. Macleod, however, differed from his colleagues in the Appeal Division as to the application of the doctrine of election to the maintenance and support provisions of the will, holding that it was not applicable because, as I understand his argument, these provisions did not vest in John

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Davies J.

D. Walker any estate or interest which was capable of being disposed of by him or could be used for any other purpose than his maintenance and support; in other words, it was not "free disposable property" vested in or given to the legatee which he held was essential in order to put him to his election, and that the terms of these maintenance and support provisions clearly indicated an intention on the part of the testator not to put him to such an election.

The learned Chief Justice accepted what he considered to be the law with respect to this subject as laid down in 13 Halsbury, page 123, but I am not able to agree with him in his conclusion that the provisions of the will for the maintenance and support of his son John D. indicated a particular intention inconsistent with the general and presumed intention of the will, or that these provisions did not vest in the son such an interest in and benefit out of the properties devised for him as would entitle the court to lay hold on such interest and benefit and sequestrate them for the purpose of obtaining compensation to the Trustees of St. Andrew's Church in case of an election against the will.

The paragraph reads as follows:—

> 139. From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property which the testator can actually dispose of. It is only such benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied, except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election.

It is not doubted or questioned, in fact it is conceded, that the testator had a free disposable interest

in the property he devised to the Committee of his son John D. Walker and I am quite unable to draw or conclude from the provisions of the will for the maintenance and support of the son and procuring for him "the necessaries and comforts of life so long as he shall live" any indication of an intention not to put him to an election under the will as between these provisions and the bequest or gift of the mortgage to the trustees of the church. I cannot doubt that if the son John D. Walker was of sound mind he would be compelled to make such an election. His interest would be disposable by him and available towards making compensation to the disappointed beneficiary in the event of his electing against the will. Its value in such case would be ascertainable, though perhaps with some difficulty, but the mere fact of its being difficult would not alter the duty of the court to have its value ascertained. Of course, if he elected under the will, no compensation would have to be provided because in that case as in the one now before us where the court elected for him he would be directed to cancel and discharge the mortgage.

The fact that the son had become and was at the date of the will a lunatic or person of unsound mind does not change the conclusion which I think should be drawn from these maintenance and support provisions.

The only difference between the conditions is that in the one case suggested the beneficiary being *compos mentis* would make his own election, while in the other, the present case, the court makes it for him.

If it became necessary in case of an election against the will to put a value upon the interest of the son under these maintenance and support provisions, I would hold that the beneficiary was entitled to the whole

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Davies J.

of the net proceeds of the properties devised for his benefit. No words of limitation are used to indicate that he was only to get a part of these net proceeds. No person is given the power to determine or to exercise any discretion with respect to the amount he was entitled to. If he was *compos mentis*, I think he could insist upon all the net "rents and income" being paid to him and I cannot see that the fact of his not being of sound mind could prejudice his rights in that regard.

This is not like the case of *In re Sanderson's Trusts* (1), where the gift was to trustees to pay and apply the *whole or any part* of the rents, issues and property for and towards the maintenance, attendance and comfort of J. Sanderson who was an "imbecile and not competent to manage his own affairs." In that case there was drawn a

> distinction between a gift, like the above, of "*the whole or any part*" and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned; in the latter, although the purpose fails, the court holds the donee entitled to the entire fund or interest (as the case may be), treating the purpose merely as the motive of the gift.

This doctrine of election is an equitable one and its foundation and characteristic effect is stated in different language in the text books but there is really no difference between the statements. In Snell's Principles of Equity they are stated thus at page 179:

> Election in equity arises, where there is a duality of gifts or of purported gifts in the same instrument,—one of the gifts being to C. of the donor's own property, and the other being to B. of the property of C.; in the case of such a duality of gifts, there is an intention implied, that the gift to C. shall take effect, only if C. elects to permit the gift to B. also to take effect. This presumed intention is the foundation or principle of the doctrine of election; and the characteristic of that doctrine is, that, by an equitable arrangement, effect is given to the purported gift to B. "The principle is that there is an implied condi-

(1) 3 K. & J. 497.

tion that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it."

See also Smith's Equity Jurisprudence in the chapter on Election at page 137 and following pages, and Williams on Executors, 10th ed., page 1030.

In the late case of *In re Vardon's Trusts* (1), relied on at bar, Fry L.J. in delivering the judgment of the Appellate Court consisting of Lord Esher M.R., Bowen L.J. and himself, says at page 279:—

That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord Hatherley (*Cooper* v. *Cooper* (2)), "implied in every man who effects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by shewing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper* (2)), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.

For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, adopted by the instrument different from the general intention the presumption of which is the foundation of the doctrine of election."

The court in that case held that the restraint upon alienation in the settlement there in question contained

a declaration of a particular intention inconsistent with the doctrine of election

and therefore excluded it. But I find nothing of the kind here, nothing equivalent to a restraint upon alienation, nothing inconsistent with the doctrine of elec-

(1) 31 Ch. D. 275. (2) L.R. 7 H.L. 53 at p. 71.

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Davies J.

tion and no express declaration which the testator might, if he desired, have put in his will that in no case should the doctrine of election be applied to its provisions.

In Lord Chesham's case, *Cavendish* v. *Dacre* (1), Chitty J. in reviewing the authorities and the law on this doctrine of election, and the principle on which the doctrine is based, says at page 474:—

> In *Wollaston* v. *King* (2), at page 174, Lord Justice James, then Vice-Chancellor, after stating that he had endeavoured to extract from the cases a principle, adopted the rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (3), in the following general terms, viz.: "That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."
>
> In *Cooper* v. *Cooper* (4), Lord Hatherley says (page 69): "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."
>
> In *Codrington* v. *Codrington* (5), Lord Cairns states the law thus (page 861): "By the well settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."

I would dismiss the appeal; but under the circumstances think that costs of both parties to the appeal should be paid out of the testator James Walker's estate.

(1) 31 Ch. D. 466.
(2) L. R. 8 Eq. 165.
(3) 2 Ves. 367.
(4) L. R. 7 H.L. 53.
(5) L.R. 7 H.L. 854.

IDINGTON J.—I am of the opinion that the judgment appealed from should stand. But on the question of costs of appeal here I am in doubt. I imagine there can be no doubt that a case of some difficulty was presented requiring the construction of the will and hence the appellant trustees entitled to their costs out of the estate, yet Mr. Rosborough seems distinguished against by the formal judgment of the court below.

The respondents are entitled to their costs and I presume costs of all parties should come out of the estate. But for the not unreasonable division of opinion of the Court of Appeal I think litigation should have ended there.

The substantial division of opinion seems to me to entitle all parties to their costs out of the estate.

DUFF J.—I concur in the result.

ANGLIN J.—In the report of this case in the Appeal Division of the Supreme Court of New Brunswick (1) the facts are fully presented and the leading cases bearing upon them are discussed. But for the circumstances that the testamentary beneficiary, a portion of whose property the testator has devised to another, is a lunatic and that part of the benefit to which he is entitled under the will in question consists of a provision for his maintenance, there would seem to be no room to question the applicability of the doctrine of election. That the beneficiary is bound to elect between taking a pecuniary legacy of $12,600 given to him by a codicil, and retaining his $30,000 mortgage which his father bequeathed to the respondents, was the unanimous opinion of the learned

(1) 44 N.B.R. 153.

1917

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Anglin J.

trial judge and of the three learned judges who composed the appellate court. The contrary view was very faintly urged in this court, and is scarcely arguable.

But there was a difference of opinion in the provincial appellate court upon the question whether the provision for payment, out of the revenues of certain properties, of so much thereof as should be required to provide the lunatic with all necessaries and comforts and to give him a decent Christian burial, clearly denotes a particular intention that the right to this benefit should be inalienable, so that it would not be available for application in compensation should election be made against the will.

If the beneficiary were *compos mentis* his interest in this provision for maintenance would undoubtedly be alienable and therefore available towards making compensation in the event of an election against the will. Its value is ascertainable. The fact that the beneficiary is a lunatic does not exempt him from the operation of the doctrine of election in a case which is otherwise a subject for its enforcement. The court protects him by supervising the election.

With Mr. Justice White and Mr. Justice McKeown I am of the opinion that in making provision for the maintenance of his lunatic son, the testator has not evinced a particular intention either that that provision should be inalienable or that his son should be entitled to the full benefit of it even though he should refuse to relinquish his own property devised by his father to the church. It would be quite within the power of the court in the interest of the lunatic so to deal with the $30,000 mortgage, should he retain it, that whatever purpose the testator may have had in making the provision for payment of income to his custodians of insuring the permanence and continuance

of his maintenance would not be frustrated. With Mr. Justice McKeown I am satisfied that the testator had no actual intention on the subject of election. On the other hand, it is clear that he intended that St. Andrew's Church should be relieved from the $30,000 mortgage which he formerly held and had assigned to his son. He probably forgot that he had parted with this mortgage. The authorities, however, establish that it is immaterial whether the testator knew the property so dealt with not to be his own, or mistakenly conceived it to be his own. *Welby* v. *Welby* (1), at page 199.

For these reasons, more fully stated by Mr. Justice White and Mr. Justice McKeown, I would affirm the judgment in appeal. On the ground assigned in *Singer* v. *Singer* (2), at page 464, I think the appellants should pay the respondents their costs in this court.

Appeal dismissed. Costs payable out of estate.

Solicitor for the appellants: *Fred. R. Taylor.*
Solicitor for the respondents: *C. H. Ferguson.*

(1) 2 V. & B. 187.

(2) 52 Can. S.C.R. 447.

1916
*Nov. 6, 7, 8.
1917
*Feb. 6.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).. } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Principal and Agent—Power of attorney—Construction—Excess of authority—Fraud—Evidence—Onus probandi—"Customs Act," R. S.C. 1886, *c.* 32, *ss.* 157, 158 *and* 167, *now R.S.C.* 1906, *c.* 48, *ss.* 132, 133 *and* 264.

The appellant company, pursuant to the requirements of section 157 of the "Customs Act," R.S.C. 1886, c. 32 (now R.S.C. 1906, c. 48, s. 132), gave to one Hobbs, customs broker, a power of attorney "to transact all business which" the appellant "may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port * * * , ratifying and confirming all that * * * said attorney and agent shall do * * *." Cheques to the order of the Collector of Customs were given to Hobbs on his requisition for the payment of duties on goods imported by the appellant, these cheques being made by the latter for fixed amounts corresponding to the invoices. Afterwards, through fraudulent devices, Hobbs, having succeeded in passing entries for much smaller sums than the quantity of goods required, induced the Customs House cashier to take the cheques thus issued by the appellant for a higher amount than the one apparently due and either to apply the surplus in payment of duties owing by third parties or to reimburse him in cash. The frauds having been discovered, the respondent sued the appellant for the amount of duties unpaid through the criminal method of Hobbs.

Held, affirming the judgment of the Exchequer Court of Canada (14 Ex. C.R. 150), the court being equally divided, that, upon the facts in evidence, the appellant company had failed to prove that the customs duties claimed from it had been paid to or received by the Crown, *per* Anglin J., the appellant having failed to discharge the burden placed upon it by the "Customs Act," R.S.C. 1906, c. 48, s. 264.

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

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Per Fitzpatrick C.J., Duff, Anglin and Brodeur JJ.—It was within the scope of the power of attorney given to Hobbs by the appellant company that he should receive for it, in cash. from the Customs officials, balances of cheques delivered by him to them, after deducting the duties payable in respect of entries made by Hobbs on behalf of the company appellant.

Per Fitzpatrick C.J. and Duff J.—It was not within the scope of the power of attorney that he should direct the application of balances of the company's cheques in payment of duties owing by Hobbs' other customers; and such unreturned balances remained in the hands of the Crown the property of the company notwithstanding such direction by Hobbs and the pretended application of the moneys accordingly.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining plaintiff's action with costs.

The circumstances of the case and the questions of law are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *W. N. Tilley K.C.* for the the appellant.

E. L. Newcombe K.C. and *A. Wainwright K.C.* for the respondent.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

DAVIES J.—I think this appeal must fail.

The conclusions of fact I have drawn from reading the evidence after the argument at bar are that the customs duties sought to be recovered by the Crown in this action never were paid to or received by the Crown. The monies to pay them were no doubt paid over by the Railway Company to its agent in good faith for the purpose of paying these duties; but

(1) 14 Ex. C.R. 150.

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Davies J.

the latter misappropriated the monies and applied them to his own use or to purposes other than those they were entrusted to him for. It may well be that this fraudulent agent was enabled to carry out his fraud alike in obtaining possession of the goods and in misappropriating the monies entrusted to him to pay these duties by some remissness or negligence on the part of some of the Customs officers. It seemed to me not that these officers were partners in the frauds perpetrated by the company's agent but that they too were deceived by him. Be that as it may, I cannot see how the Crown can be held liable for the remissness or neglect of its officers, if any such there was.

The controlling fact is that the duties on these goods now sued for have not been paid to the Crown; but were misappropriated and embezzled by the Company's agent, who received them to pay the duties.

Under these circumstances, I hold that as between two innocent parties, the Company and the Crown, the former must suffer because the wrongful misappropriation was made by its agent.

The appeal should be dismissed with costs.

IDINGTON J.—The respondent sued in the Exchequer Court and recovered judgment against appellant for alleged unpaid duties on goods imported into Canada between January, 1904, and November, 1905.

The parties in the course of the trial by their respective counsel signed the following admission:—

> The parties admit for the purposes of this case only under reserve of all objections as to the relevancy of the facts submitted, that the defendant issued to its agent Hobbs, cheques payable to the order of the Collector of Customs sufficient to cover all the duties payable by the defendant during the period covered by this action, except as to the amounts which have been paid to plaintiff or into court by the

defendant herein. These cheques were deposited to the credit of the Receiver-General and used in the Bank of Montreal with monies received for customs duties to buy drafts for the Receiver-General representing the amounts of customs duties actually received from day to day from all sources according to the entries made at the Montreal Customs House, but certain of the entries made by, or on behalf of defendant at Customs during said period, as a result of manipulation and alteration of documents such as disclosed by the evidence of record, represented the amounts payable for customs duties by defendant during said period to be less in the aggregate than the total amount of said cheques or of said duties actually payable.

The further testimony which might be adduced before the referee, if proceeded with, would be similar in character to that which has already been given as to the way in which the entries, cheques and funds and the clearance of the goods were dealt with, prepared, appropriated or affected.

Ottawa, 19th December, 1912.

The man Hobbs therein referred to was a customs broker at Montreal to whom the appellant, pursuant to the requirements of section 157 of the Revised Statutes of Canada, ch. 32, had given the necessary written authority in the following terms:—

DOMINION OF CANADA.

Appointment of an Attorney or Agent.

Know All Men By These Presents That

We have appointed and do hereby appoint David Hobbs, of Montreal, to be our true and lawful attorney and agent for us and in our name, to transact all business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port, and to execute, sign, seal and deliver for us and in our name, all bonds, entries and other instruments in writing relating to any such business as aforesaid, hereby ratifying and confirming all that our said attorney and agent shall do in the behalf aforesaid.

In witness whereof we have signed these presents and sealed and delivered the same Act and Deed at Montreal in the said Dominion, this eighth day of April, one thousand nine hundred and three.

Signed and sealed in the presence of
J. W. NICOLL.
B. BARBER.

JOHN CORBETT (Seal).
Foreign Freight Agent for
Canadian Pacific Railway.

The course of business adopted by the appellant for the purpose of passing its importation of goods

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Idington J.

through the Montreal Customs was of that methodical and rigourous business character which left no loose ends or possible opening for perpetration of the frauds now in question by Hobbs by the means he adopted unless by the connivance of someone in respondent's employment at the Customs House, or such employee being so ignorant and incompetent that he applied appellant's cheques clearly intended to pay the duties claimed in ways quite unjustifiable.

Each cheque issued by the appellant to the respondent's Collector of Customs to pay duties had thereon when given Hobbs not only the usual numbering of cheques, but a special number thereon by which it was possible to trace the parcel or shipment and invoice referred to in the way that has been done compelling the admission above quoted that in fact the duties thereon had been paid—not to Hobbs, but to the respondent's collector.

This is an action to enforce the payment of same duties a second time.

The method adopted by Hobbs was to induce the Customs House clerk to take the cheques issued by appellant to the order of the Customs Collector and safeguarded from any such misapplication in every way that long experience had dictated as possible, and to apply them in payment of duties owing by third parties and thereby enable Hobbs to use the moneys or proceeds of cheques given to him by such third parties; or applying part of a cheque to pay appellant's customs duties and handing over balance of the amount of the cheque to Hobbs under the pretence that he was only making change. These third parties probably had not taken the same care as appellant to guard against possible fraud on his part.

The observance of common honesty or the slightest

business intelligence, or both, on the part of him receiving on respondent's behalf the appellant's cheques, would have frustrated any such practices as these adopted. Indeed the collector had laid down a rule for this man's guidance forbidding the making of change beyond a few cents in any case, yet he repeatedly violated it, and thereby helped the man Hobbs to misappropriate in part as well as misapply entirely such cheques. How could any one imagine that the appellant who had taken such care to reduce Hobbs, so far as his cheques were concerned, to nothing but an errand boy, had become seized with such repeated and unprecedented fits of generosity?

How could any one for months and months handle such cheques and having thus an opportunity of comparing appellant's rigorous and guarded business methods with possibly loose methods of others, fail to inquire why it had thus strangely departed from its usual businesslike methods?

Since when had it dawned upon any one that appellant had suddenly become a distributor of promiscuous charity or bounties for no consideration, and no apparent cause?

Whether the man employed by respondent, and who overlooked all such curious features presented to him from day to day, was an accomplice of Hobbs, or was merely a misplaced incompetent when trusted by respondent with the duty to avert such possible thefts, does not seem to me to matter.

The argument that would relieve the respondent from all responsibility for the consequences of mere stupidity of such a servant in a position of trust needing intelligence to discharge it, would equally relieve respondent in case that servant appointed to receive,

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Idington J.

and receiving, the cheques was a criminal accomplice of Hobbs.

I fail to see how any legal distinction can be drawn between these two possible ways of viewing this claim so far as dependent upon palpable misappropriation of appellant's cheques in the way I have referred to. And I submit that the proposition that a debtor of the Crown can, after handing the servant thereof, duly appointed to receive it, a cheque to discharge the debt, be sued for such debt because that servant and someone else stole the cheque, or misappropriated the proceeds, after it was handed in, is untenable.

Yet that seems less flagrant in substance than what is claimed by respondent. For what it claims from appellant was in truth paid by appellant, and all it had to do with the theft was that its cheques, which could not be readily converted, were misplaced in the accounts of an untrustworthy servant of respondent, and put to the credit of someone else.

It is said that misplacing was on the suggestion of Hobbs who had acted as I suggest as errand boy to deliver them. It is said that making entries was part of his duties and that in some cases he made false entries. But how did that justify the respondent's servant in misappropriating the appellant's cheques? As appellant well knew, and he was entitled to have the rule observed, if its cheque did not fit the entry it should be returned and no risk was run. The cheques were made to the order of the collector, and appellant left no excuse for any one doing anything with them except to apply them in payment for duties payable by appellant not by someone else, or if in any case an error to return the cheque evidently issued in error.

I fail to understand how that sort of wrongdoing on the part of the customs clerk can fall within the

ambit of the ostensible authority given the customs broker as such, or as presented in the power of attorney above quoted.

The section 157 requiring that power of attorney is followed by section 158 which defined in more specific language than section 157, what things the agent so appointed is expected to be able to do in relation to business with respondent, and is as follows:—

158. Any attorney and agent duly thereunto authorized by a written instrument, which he shall deliver to and leave with the Collector, may, in his said quality, validly make an entry, or execute any bond or other instrument required by this Act, and shall thereby bind his principal as effectually as if such principal had himself made such entry or executed such bond or other instrument, and may take the oath hereby required of a consignee or agent if he is cognizant of the facts therein averred; and any instrument appointing such attorney and agent shall be valid if it is in the form prescribed by the Minister of Customs.

How can these things which a broker is expected to be able to do extend to the misapplication of a cheque given for some such purpose limited on its face, to him who chooses to read it inquiringly and understand its contents, to one thing which the appellant was concerned in, and not a multitude of other things which other parties were concerned in.

I cannot find in the cases, as I read them, cited by respondent's counsel, anything to support such a contention as set up relative to this branch of the case.

Indeed, the cases so cited in principle render respondent responsible for the misapplication made by its servants of the appellant's cheques entrusted to them for the purposes indicated and nothing else. Not only was appellant's delivery thereof to them within the range of their ostensible but also of their express authority.

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Idington J.

The authority to make an entry or execute a bond or other instrument required by the "Customs Act," or to take an oath, did not justify anyone in respondent's service in supposing, if he ever did suppose, that the man carrying a cheque made to the order of respondent's collector, could properly hand it over to someone else to pay his customs duties, or cash it and pocket some of the proceeds. So far as the claim depends on any such like dealing, the appeal should be allowed.

The schedule "A" I imagine, falls entirely under this.

The broker, Hobbs, acting within his apparent authority, seems to have betrayed his trust in other ways.

He had occasion to pass material which he represented was either non-dutiable when dutiable, or dutiable at a lower rate than it actually should have borne.

In misleading the Customs House officers in any such regard, he was thereby acting in such apparent discharge of his authority as to render appellant liable for his fraudulent conduct. If any goods thereby escaped payment of duty, the appellant is liable.

Whether the total of these items exceed the amount paid into court, I cannot say.

The schedules "B" and "C," I imagine, fall within this latter expression of opinion.

The appeal should be allowed accordingly. Even if the majority of the court should reach the same conclusion I doubt if it is a case for costs.

The agent of appellant seems to have acted improperly in many cases falling within the apparent scope of his authority in dealing with items in schedule "A."

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Idington J.

Though I cannot find any justification in law for respondent seeking to recover what through its own servant was diverted to other uses than intended by appellant, I doubt if the latter's agent was not the original corrupter of the service. When apparently acting within the scope of his authority, he was playing false to both.

DUFF J.—The decision in this case turns, in my judgment, upon the effect of the power of attorney which is in the following words:—

Know All Men By These Presents, That,

We have appointed and do hereby appoint David Hobbs, of Montreal, to be our true and lawful attorney and agent for us, and in our name to transact all business which we may have with the Collector of the Port of Montreal, or relating to the Department of Customs of the said Port, and to execute, sign, seal and deliver for us in our name, all bonds, entries, and other instruments in writing relating to any such business as aforesaid, hereby ratifying and confirming all that our said attorney and agent shall do in our behalf aforesaid.

and of the statute, secs. 157 & 158 Revised Statutes of Canada, 1886, ch. 32.

Sec. 157. Whenever any person makes an application to an officer of the Customs to transact any business on behalf of any other person, such officer may require the person so applying to produce a written authority from the person on whose behalf the application is made, and in default of the production of such authority, may refuse to transact such business; and any act or thing done or performed by such agent, shall be binding upon the person by or on behalf of whom the same is done or performed, to all intents and purposes, as fully as if the act or thing done had been performed by the principal.

Sec. 158. Any attorney or agent duly thereunto authorized by a written instrument, which he shall deliver to and leave with the Collector, may, in his said quality, validly make any entry, or execute any bond or other instrument required by this Act, and shall thereby bind his principal as effectually as if such principal had himself made such entry or executed such bond or other instrument, and may take the oath hereby required of a consignee or agent if he is cognizant of the facts therein averred; and any instrument appointing such attorney and agent shall be valid if it is in the form prescribed by the Minister of Customs.

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Duff J.

The rule for construing powers of attorney is stated at p. 177 in *Bryant* v. *La Banque du Peuple* (1).

> Nor was it disputed that powers of attorney were to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by that power, it is necessary to shew that on a fair construction of the whole instrument the authority on question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shewn that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their Lordships, appear to be in harmony with English law and English authorities,

and at p. 180:—

> The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President &c., of the Westfield Bank* v. *Cornen* (2), cited by Andrews J. in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:—
>
> Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into the facts *aliunde*. The apparent authority is the real authority.

Applying this principle to the circumstances of the case before us it seems to follow that as regards the moneys paid by Meunier to Hobbs in cash as balances of cheques delivered to him by Meunier after deducting the duties payable in respect of entries made by Hobbs on behalf of the appellant company Hobbs must be taken as between the appellant company and the Crown as having been acting within his authority. Adverting to the language of the power of attorney, it seems clear that *primâ facie* "all business which we may have with the collector of the Port of Montreal

(1) [1893] A.C. 170. (2) 37 N.Y. 320.

or relating to the Department of the Customs of the said Port," would embrace the "business" of receiving payment of such balances; and applying the words of the statute it seems equally clear that the acts of Hobbs in receiving such balances are such acts as by section 157 are declared to be

> binding upon the person by or on behalf of whom the same are "done or performed" as fully as if they had been done or performed by the principal.

In the situation as on the facts known to him it presented itself to Meunier, these balances were payable to the appellant company and the receipt of them, therefore, being part of the "business" which the appellant company had to transact with the Collector of the Port of Montreal or the Department of Customs was an act "warranted by the terms used" in the power of attorney and an act made binding upon the appellant company by section 157.

A very different question, however, arises in relation to those moneys, residues of the appellant company's cheques, after deducting payment of the duties payable by the appellant company in respect of goods entered by Hobbs on behalf of the appellant company which by direction of Hobbs were applied by the Department itself in payment of duties payable in respect of goods entered by Hobbs on behalf of principals other than the appellant company. These acts of Hobbs cannot by any ingenuity be brought within the language of either the power of attorney or the statute. The entry of goods by Hobbs on behalf of other principals of his does not fall within the words of the power of attorney "business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port," nor does

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Duff J.

the payment of duties payable in respect of such goods. Nor can the language of the statute be given the effect of making such acts binding on the appellant company as the acts of the appellant company for the short reason that they are not done "by or on behalf of" the appellant company.

For such acts Hobbs had neither actual authority nor ostensible authority. To make the doctrine of ostensible authority applicable "*the act done by the agent*" to quote from the judgment of the Judicial Committee delivered by Lord Atkinson in *Russo-Chinese Bank* v. *Li Yau Sam* (1), at p. 184,

> and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled.

Paying duties on behalf of other principals payable in respect of goods entered on behalf of such principals did not belong to the particular class of acts which Hobbs was represented by the appellant company as having authority to do so.

The direction by which in any particular case Hobbs procured the appropriation of part of the proceeds of one of the appellant company's cheques in payment of duties payable in respect of an entry made by him on behalf of another principal may, no doubt, be conceived as in one aspect a receipt by Hobbs of moneys owing to the appellant company; but in fact the appropriation under Hobbs' direction was a single indivisible act incapable of being divided into two distinct acts, a receipt by Hobbs on behalf of the appellant company and a wrongful misappropriation of moneys so received for the benefit of another prin-

(1) [1910] A.C. 174.

cipal. For the purpose of deciding the legal question upon which we have to pass this single indivisible act must be looked at as a concrete fact and when regarded in that way it is quite impossible to bring it within the category of "business" that the appellant company had with the Customs Department or within the category of acts "done or performed" either really or apparently "on behalf of" the appellant company.

These directions given by Hobbs to Meunier, to apply the residues of the company's cheques from time to time in payment of goods which he was entering on behalf of other customers, being directions not only beyond the scope of his actual authority but beyond the scope of his apparent authority, unless there was something in the conduct of the appellant company disentitling it to insist upon its strict rights, it follows either that up to the amount of monies so appropriated the duties sued for have been paid or that these monies are still in the hands of the Crown subject either to application by the Crown in payment of some obligation by the appellant company to the Crown or subject to the direction of the appellant company itself.

I think there is nothing in the conduct of the appellant company to modify or affect its *primâ facie* rights. It is perfectly true that the beginning of the train of events and incidents which led to the loss, if loss there is to be, was in certain acts of Hobbs, fraudulent as against his principals, but "within the scope of his employment" according to the accepted meaning of that perhaps not very happy phrase. But if there is to be loss it must result from the fact that the Crown cannot now recover from Hobbs' principals the duties which he professed to pay by appropriation of the appellant company's balances, and of these acts it

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Duff J.

cannot be affirmed that in relation to such loss they were *fraus dans locum injuriae*. Two subsequently operative causes—first, the irregular conduct of Meunier, the Crown's own servant, secondly, the concurrence of Meunier with Hobbs in the final act which (and this is the decisive point) was an act beyond Hobbs' actual as well as his ostensible authority, as above pointed out, by which or in consequence of which the residues were appropriated in payment of duties owing by these other customers of Hobbs'—these were the effective causes of the loss, if such loss there is to be.

Whether strictly in contemplation of law there has or has not been payment to the extent mentioned may be an arguable question, but it is, I think, immaterial. Assuming that, in point of law, the duties must be considered to be unpaid but that the Crown has in its hands moneys of the appellant company which the appellant company intended to be applied in payment of the duties, and which from a time anterior to the commencement of the action down to the present moment, the appellant company has been insisting ought to have been and ought to be applied in payment of them; it is abundantly evident that the Crown could not, while retaining such moneys, maintain an action for the payment of the duties—for the short reason that the Crown declining to appropriate the moneys, the appellant company is entitled to direct the appropriation of them; and through the conduct of the appellant company, beginning with the sending of the cheques themselves, the Crown even before the commencement of the action had notice of the company's intention so to appropriate them.

The result is that, in my opinion, the appeal should

be allowed as regards the moneys wrongfully applied by Hobbs in the manner above indicated, and that there should be a reference to ascertain the amount.

ANGLIN J.—Upon the facts in evidence the only possible conclusion is that the defendant company has failed to discharge the burden placed upon it by the "Customs Act" (R.S.C., ch. 48, sec. 264), of proving that the customs duties claimed from it in this proceeding had already been paid to the Crown. It is admitted that delivery of the goods in respect of which those duties were payable was obtained for the defendant company through fraudulent devices practised by its customs broker without proper entries of them having been made. There was never an appropriation to these duties of any moneys in the hands of the Crown. No request or direction for such an appropriation was ever made or given to the officials of the Crown. Whatever other defence or ground of counterclaim (if any) the circumstances may present, they do not sustain the plea of payment of the duties in question.

Nor do I think that in respect of the moneys embezzled by its broker the defendant company could have successfully maintained a counterclaim against the Crown for moneys had and received to its use.

Collusion between the fraudulent broker and the Customs House cashier who paid out to him, or by his direction appropriated to other purposes, portions of the proceeds of C.P.R. cheques issued to the order of the Collector of Customs and intended to be used for payment of customs duties on C.P.R. importations has not been found by the learned trial judge; and, highly suspicious as some of the circumstances undoubtedly are, I am not prepared to make such a

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Anglin J.

finding. I am not to be understood as implying that proof of such collusion would necessarily involve responsibility of the Crown.

That there was gross carelessness and neglect of duty on the part of the Customs House cashier, which made the success of the broker's fraudulent scheme possible, is abundantly apparent. But, apart from statutory provision therefor, the Crown is not answerable for the consequences of laches or negligence on the part of its servants.

Ex facie it was within the scope of the power of attorney given to its broker by the defendant company that he should receive for it from the Customs officials moneys in their hands paid by it in excess of the amount of duties payable on goods entered on its behalf. I find nothing in the evidence to warrant a finding that any restriction on the scope of this apparent authority was ever brought to the notice of the Customs officials. The circumstance that all moneys paid by the C.P.R. for customs duties were paid by certified cheques did not amount to such notice. Though each cheque was intended when issued to cover duties upon a particular invoice, the cheque itself was not so earmarked and there was nothing to bring notice of that fact to the customs officers. I would therefore not be prepared to hold that the receipt by its broker of moneys of the C.P.R. Company from time to time in the hands of the Customs officials in excess of the amount of customs duties for which entries made on its behalf shewed the company to be liable was beyond the scope of his apparent authority. While the appropriation from time to time of a portion of these moneys in the hands of the Customs officers to payment of duties owing by another of the broker's clients would, at first blush, appear to have been

clearly beyond the scope of his authority from the C.P.R. Company, such a transaction may be regarded as having taken place merely as a convenient method of avoiding a roundabout process whereby the broker would receive a sum of money by way of refund upon C.P.R. account and would thereupon immediately hand over to the Customs cashier a like sum belonging to another client in payment of the duties of such other client—the net result being the same. A similar observation may be made as to the payments by direction of the broker to Customs officers, presumably as gratuities, of small sums taken from C.P.R. moneys in the hands of the Customs cashier.

The hardship to which the success of the Crown's claim subjects the appellant company is apparent. But we cannot for that reason afford it relief to which we are not convinced that it is legally entitled.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is an action for unpaid customs duty. Defendant (appellant) pleaded that it had paid the full amount of duty and was in fact in possession of cancelled cheques payable to the order of the Collector of Customs and of vouchers establishing such payment.

It appears that one David Hobbs was given by the C.P.R. Company a power of attorney reading thus:—

> To be our true and lawful attorney and agent for us and in our name to transact all business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port and to execute, sign, seal and deliver for and in our name all bonds, entries and other instruments in writing relating to any such business as aforesaid hereby ratifying and confirming all that our said attorney and agent shall do in the behalf aforesaid.

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Brodeur J.

Hobbs as such agent received and had charge of the invoices for all goods imported by the company and on his requisition cheques were issued to the order of the Collector of Customs for payment of duty. These cheques were made for fixed amounts corresponding to the invoices.

But instead of making his entries regularly with those invoices he concealed from the Customs authorities the quantities and values entered from day to day. He altered in some cases the documents on which the entries were to be made and his usual procedure was to prepare an entry for a definite number of cars and to attach to this entry an invoice which really covered a part only of the goods contained in the cars and in that way he succeeded in passing entries for much smaller sums than the quantity of goods required.

From time to time he was presenting to one of the cashiers of the customs some of the cheques which he was getting from the company. Sometimes those cheques were covering a larger amount than the entry passed and he was on his request reimbursed the difference by the cashiers and he misappropriated then the amount of the cheques which had been entrusted to him. Those cheques after being received by the cashier and the change given as I have said were handed over to the Collector of Customs by whom they were entered in the usual way and deposited to the credit of the Receiver-General.

There is no evidence that the Customs cashier benefitted by those transactions and so far the only man who seems to have benefitted from those frauds is Hobbs, the agent of the company.

In some cases the surplus cheques were applied in

payment of the duties due by other importers for whom Hobbs acted as customs agent.

Those frauds having been discovered, Hobbs was arrested, convicted of forgery of invoices and sent to the penitentiary. But it remains to be decided whether this loss of money should be supported by the Crown or by the Company.

The Company, as I have said, relies on the cancellation of the cheques and on the receipts which they have in their possession to prove their payment. There is no formal evidence as to whether the receipts which they have in their possession have been duly given by the cashier. They are stamped receipts which could have been very easily forged and the circumstances of the case lead me to believe that Hobbs got a stamp made up which he used on the document which he handed back to the C.P.R. authorities to show that the duties had been properly paid.

On the other hand, the official documents on which the official receipt appears would have been kept in his hands and would not have been, of course, handed over to the C.P.R. authorities; because if they had been handed over the fraud would have been easily detected and put an end to.

The terms of the power of attorney are as broad as possible. They gave authority to Hobbs to transact all business which the company might have with the Collector of the Port of Montreal and it is wide enough to cover all transactions in connection with the entry and payment of duties. He had power to make payments. He must have had power to receive change when necessary, such power being necessarily implied.

It is a well settled principle that the principal is responsible for the fraud committed by his agent

1917

CANADIAN PACIFIC RWAY. CO. v. THE KING.

Brodeur J.

while acting in the ordinary course of his employment, whether the result is or is not for the benefit of the principal.

In *Lloyd* v. *Grace* (1), the House of Lords applied that principle.

I will refer also to Story on Agency 9th ed., who says, (p. 374)

> In respect to the acts and declaration and representations of public agents, it would seem that the same rule does not prevail, which ordinarily governs in relation to mere private agents. As to the latter (as we have seen), the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But, in cases of public agents, the Government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act * * * Indeed, this rule seems indispensable, in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents.

In the circumstances of the case, it seems to me only fair that in a case of that kind the principals should be responsible for the misdeeds of their agents unless there is negligence on the part of the other party or unless the party has by words or conduct made a representation of facts either with a knowledge of its falsehood or with the intention that it should be acted upon. Those elements cannot be found here.

In these circumstances, I am of opinion that the company has failed to prove that it has paid the customs duties in question and the judgment which condemned it to pay them should be confirmed with costs.

Appeal dismissed on equal division.

Solicitors for the appellant: *Casgrain, Mitchell, McDougall & Creelman.*

Solicitors for the respondent: *Davidson & Wainwright.*

(1) [1912] A.C. 716.

FRANCO-CANADIAN MORTGAGE COMPANY (DEFENDANT)..... } APPELLANTS;

AND

R. B. GREIG AND T. E. THIRLAWAY (PLAINTIFFS)..... } RESPONDENTS.

1917

*Feb. 7, 8.
*Feb. 19.

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

Principal and agent—Ostensible authority—Acts beyond scope of agency —Contract—Rescission of —Sale.

The respondents, both residing in Great Britain, were in the habit of speculating in lands in Canada, employing as their agent and attorney one Cassels, a solicitor practising at Edmonton. An agreement of sale was passed between the appellant and the respondents represented by Cassels for the purchase of certain lands situated in Alberta; and it was therein provided that, on payment of the price of sale, the appellants would transfer the lands to the respondents "free and clear of all liens, charges, mortgages and encumbrances." The lands were not then owned by the appellants, but by other parties whom they represented, and who had acquired the property with the exception of "all coal and minerals and the right to work same." The first instalment of the price of sale was paid at the signing of the agreement; but, when the second instalment became due, the respondents being then aware that the lands bought by them did not comprise the coal and minerals, brought an action against the appellants for the rescission of the contract of sale and for reimbursement of the payment made under it.

Held, Brodeur J. dissenting, that if Cassels, professing to act on behalf of the respondents, assented to an agreement to purchase the lands in question *minus* the coal and minerals, he was acting beyond the scope of his agency.

It is no answer to the action to say that the appellants were prepared to carry out the terms of the written agreement by conveying to the respondents a valid title to the coal and minerals: the appellants having declared their refusal to be bound by the obligations by

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

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

which ex *hypothesi* they were legally bound, the respondents were entitled to treat the contract as rescinded and withdraw from it. The appellants having contracted in the agreement of sale without qualification as principals, it is not open to them, as between themselves and the respondents, to allege that the moneys paid under the contract were paid to them as agents only.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Hyndman J. at the trial (2) by which the plaintiffs' action was dismissed.

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

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

Tilley K.C. and *Woods K.C.* for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Duff.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—I concur in the opinion upon which Mr. Justice Scott and Mr. Justice Stuart proceeded, that if Cassels professing to act on behalf of the respondents (plaintiffs) did enter into an agreement with the appellants (defendants) which both parties intended to be and which in fact was an agreement to purchase the land in question *minus* the minerals and subject to all the rights given by the lease executed by Brutinel in favour of the St. Albert Collieries Company, then Cassels in assenting to that agreement on behalf of the respondents was acting beyond the scope of his agency. There is no evidence in the record supporting the suggestion of a general agency for the purchase of land; and I

(1) 10 Alta. L.R. 44. (2) 23 D.L.R. 860; 9 West. W.R. 22.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Duff J.

cannot agree that there is any ground upon which the question of the scope of Cassels' agency could properly be made the subject of further investigation. The issue of authority or no authority in Cassels to enter into the agreement which the appellants sought to enforce by their counterclaim was not overlooked at the trial and it appears to have been quite understood that the power of attorney under which Cassels professed to act was obtainable in the Land Titles Office. No suggestion appears to have been made in the Appellate Division that further evidence should be considered bearing upon the scope of Cassels' authority. Had such a suggestion been made, the Appellate Division would probably have examined this document.

The doctrine of ostensible authority has no application here. There is no evidence that Cassels was held out as a person having a general authority and, of course, no evidence that those who acted on behalf of the appellants were misled by a belief in the existence of such general authority resulting from any such holding out. See *Russo-Chinese Bank* v. *Li Yau Sam* (1).

The appeal must, however, be considered on the hypothesis that the contract between Cassels and the appellants was that which the respondents alleged it to have been, namely, a contract for the sale and purchase of the land in question subject only to such reservations as are expressed in the original grant from the Crown. On the assumption that this was the contract no question of Cassels' authority arises; but it follows that the appellants have undertaken an obligation which is the consideration for the payment of the purchase money to give to the respondents a

(1) [1910] A.C. 174, at p. 184.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Duff J.

good title to the land including the minerals. I am not now alluding to their obligation to "make title" in the sense of shewing their title which it has been held the purchaser may require the vendor to do before he can be called upon to pay any part of the purchase money. I am now speaking of the main obligation of the vendor, namely, the obligation to convey to the purchaser a good title to the subject matter of the contract.

It is abundantly evident that at the trial and in the Appellate Division there was no dispute that in October, 1914, when the question of the title to the minerals was first raised by Mr. Woods, the position was taken on behalf of the appellants that the contract with the respondents was that which they afterwards alleged it to be by the statement of defence, namely, a contract for the sale and purchase of the land minus the minerals. It was not then suggested that the vendors would or could procure a conveyance of the minerals to the purchasers. Their attitude was that this was no part of their contract and they required from the purchasers the fulfilment of the bargain as they alleged it to be by payment of the instalment of the purchase money then due according to the terms of the writing. I think the conduct of the vendors at this stage was such as to justify the purchasers in treating it as a repudiation of the principal obligation of the vendors arising *ex facie* from the terms of the written agreement; and that the respondents were consequently entitled to accept and act upon the repudiation by declaring the contract to be at an end and by taking the proceedings which they did take in the following month.

In these circumstances it is no answer to the action to say that the appellants if held to be bound by the

terms of the written agreement are prepared to carry them out by conveying a good title to the minerals to the purchasers. The appellants having declared that they refused to be bound by the obligations by which *ex hypothesi* they were legally bound, the purchasers were on that refusal entitled to treat the contract as rescinded and withdraw from it. *Frost* v. *Knight*(1); *Hochster* v. *De La Tour*(2); *Mersey Steel Co.* v. *Naylor* (3); *Cornwall* v. *Henson* (4); *Rhymney Railway* v. *Brecon & Merthyr Tydfil Junction Railway* (5).

The point must be briefly noticed that the moneys already paid, having been paid to the appellants in their character of agents and having by them been paid over to their principals, cannot now be recovered back.

Assuming, for the purpose of dealing with this argument only, that the relation between Barbey and Bureau on the one hand (the so called principals) and the appellants on the other was truly that of principal and agent, there is nothing to shew that Cassels, when he executed the agreement of purchase, was aware of the existence of this relation. On the contrary, the correspondence in evidence between Cassels and the respondents would indicate that Cassels believed the appellants to be the beneficial owners of the property. By the agreement itself, which is under seal, the appellants contract without qualification as principals for the sale of the land and covenant to convey it to the purchasers; in these circumstances it is not open to the vendors as between themselves and the purchasers to allege that the moneys paid under the contract were

(1) L.R. 7 Ex. 111.
(2) 2 E. & B. 678.
(3) 9 App. Cas. 434, at pages 434, 442 and 443.
(4) [1899] 2 Ch. 710; [1900] 2 Ch. 298, at page 303.
(5) 69 L.J Ch. 813.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Duff J.

paid to them as agents only, in other words, that the moneys paid under the contract were paid not to the appellants but to Barbey and Bureau through the appellants as conduit pipe.

I have fully considered the question whether in view of the alleged knowledge of Cassels touching the state of the title the appellants have any defence on equitable grounds in respect to the moneys already paid. I think there are no such grounds. The appellants being fully aware of the fact that Cassels was acting as agent, took no steps to inform themselves of the extent of his authority; and although they intended, as they alleged, to enter into a contract for the sale of a limited interest only in the lands in question, they executed an agreement which on the face of it was an agreement to convey a title to the fee simple to the purchasers; a document which they must have known would be sent forward by Cassels to his principals as containing the authentic record of the transaction into which he had entered on their behalf.

The difficulty in which the appellants find themselves must be ascribed to their own carelessness

ANGLIN J.—I concur with Mr. Justice Duff.

BRODEUR J. (dissenting) — This was originally an action by the respondents as purchasers on an agreement of sale to rescind the contract on the ground that the vendors, the appellants, were unable to carry out the sale and to give title.

The action was dismissed by the trial judge but the Appellate Division of the Supreme Court decided that there had been no contract and that the defendants-appellants should refund the sums paid on account on the purchase money.

The main point at issue is whether the mines and minerals did form part of the sale of land stipulated in the agreement.

The circumstances of the case are as follows:

The plaintiffs-respondents reside in England and Scotland and had been for some time speculating in lands in Canada and mostly in Edmonton and its vicinity. They had as agent in the city of Edmonton Mr. R. W. Cassels, a solicitor of that locality, who was looking after those speculations and was keeping them posted as to the advisability of making some new deals.

On the 10th of October, 1912, the agent, Cassels, cabled his principals, the respondents in this case, advising them to purchase a quarter section at $425.00 an acre. No description was given of the land, except that it was adjoining a railway; and he told them in the same cable that an immediate payment of $20,000 would be required, that the property was increasing in value rapidly and that they could sell all at a large profit very soon; telling them also that if they approved they could telegraph the money.

Greig, one of the respondents, answered that he could purchase only 140 acres.

But Cassels advised them by cable to take the whole quarter; and the money was cabled.

So far, the respondents had no other information with regard to the land in question, except what was mentioned in the telegrams of Cassels.

On the 22nd October Cassels agreed to purchase the property for the respondents. The beneficial owners of the property were two Frenchmen by the name of Bureau and Barbey and a Belgian by the name of Kimpe. As those people were not in Canada

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

they were being represented by the respondent company, the Franco-Canadian Mortgage Company.

The titles were passed to Cassels to be investigated and those titles shewed that the mines and minerals that could be found on the property had been leased or sold to a Montreal Mining Co. It did not prevent, however, Cassels to carry out the agreement and moreover it is in evidence that the situation of the property with regard to mines and minerals was discussed with Cassels and it was found by the trial judge that Cassels knew, at the time of the agreement, that the minerals were not handed by the vendors and that the plaintiffs-respondents were not purchasing the same.

The agreement of sale was prepared by Cassels himself. He knew that the vendors were not the owners of those mines and minerals, that they had been leased or sold to a mining company and besides it is evident that he had in view in this contract purely and simply the purchase of the land for subdivision purposes, because in a letter which he wrote to his principals on the 22nd of October, 1912, the same day that the agreement was signed by him as agent of the purchasers, he declared that at some future date the deal will be a proposition for subdivision. He speaks also of the title and he says that the title is in perfectly good order. He tells his principals also that he got a commission of $2,000.00 on that sale from the real estate agent who carried it through and that the taking of such a commission will give him the advantage of not charging the purchasers with any proportion of their profits when they come to resell the property.

Mr. Thirlaway, one of the respondents with whom he was communicating at the time, said that the charge was very reasonable.

Everything seemed to be satisfactory. The first

payment was made evidently after the title had been investigated by Cassels.

In 1913 those principals seem to be dissatisfied with Cassels and instead of sending him direct the money for the second payment they sent it to Mr. Woods, a solicitor of the city of Edmonton. The reasons why they were dissatisfied with Mr. Cassels are not in evidence but it must be with reference to some money matter and were likely referring to some other transaction, since in the agreement of sale in question in this case there was no money matter which could arise between Cassels and the respondents.

Mr. Woods investigated the matter and it was found by the trial judge, a finding which was not disturbed by the Court of Appeal, that he examined and perused the document of title before paying over the 1913 instalment and must have been aware of the state of the title at that time and must have been satisfied with the position of things. The payment then due in October, 1913, as I said, was made by Mr. Woods after making all the inquiries and examining the titles.

Another instalment became due in October, 1914.

The war had then been going on for some months: the money market was in a very bad condition and then the purchasers, for the first time, thought of repudiating the contract because the mines and minerals could not be handed over to them.

I am quite convinced, after reading the whole evidence, that this question of mines never entered into their minds. They never purchased the property on account of those minerals; they were simply buying the property for subdivision purposes and land speculation. Besides, we do not know whether those mines and minerals could then have been exploited.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

The sum which was to be paid each year during the existence of the lease was $160 and was naturally a very small sum compared with the $68,000, which was the purchase price of the property agreed upon by the respondents.

The respondents had given to Cassels authority to look after their land speculations in Edmonton; they are bound as regards third persons by every act done by their agent, which is necessary for the proper execution of that authority. They never contemplated the minerals in connection with those speculations, but whether or not the lands could be easily disposed of on the land market at a good profit. They were relying on the honesty of their agent as to the price at which those lands could be purchased or sold. The act done by Cassels with regard to the minerals was incidental to the ordinary scope of the business entrusted to him. Halsbury, vo. Agency, p. 201. It seems to me that the respondents are not exempt from liability in the circumstances of the case.

The knowledge that their agent received as to the minerals was their knowledge. Cassels was standing in their own name and the information conveyed to him was also binding upon them. If Cassels had been a purchaser for himself he could not complain about those minerals not being conveyed to him. The respondents are in the same position as Cassels himself. They cannot repudiate the agreement.

The trial judge granted the prayer of the appellant vendors to the effect that the agreement of sale should be amended in such a way that the mines and minerals would be excluded. I think this amendment is in conformity with the agreement made by the parties, accepted by the respondents' agent.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

I am, on the whole, of the opinion that the judgment of the Court of Appeal should be reversed, that the appeal should be allowed and the judgment of the trial judge restored with costs of this court and of the court below.

Appeal dismissed with costs.

Solicitors for the appellant: *Wallbridge, Henwood, Gibson & Mills.*

Solicitors for the respondents: *Wood, Sherry, Collisson & Field.*

1917
*Feb. 16.
*Feb. 19.

JOSEPH R. COLLINGS (PLAINTIFF) . . . . APPELLANT;

AND

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

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

Municipal corporation—Taxes—Payment—Cheque—Bill of exchange.

On a demand for taxes, the following words appear: "All cheques in payment of taxes must be made payable to the City of Calgary and accepted by bank." The appellant delivered to the tax collector of the city respondent an instrument purporting to be an accepted cheque on the Dominion Trust Company in payment of taxes due upon lands belonging to him. Before the presentation of the cheque for payment, the Dominion Trust Company ceased to do business.

The judgment of the Appellate Division of the Supreme Court of Alberta that the appellant's taxes had not been paid was unanimously affirmed.

Per Duff and Brodeur JJ.—The tax collector had no authority to receive in payment of taxes an accepted bill of exchange, and the order on the Dominion Trust Company was not an accepted cheque on a bank.

Per Brodeur J.—The tax collector was not authorized to receive payment of taxes otherwise than by legal tender.

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

Alex. Hannah, for the appellant, argued that the City of Calgary had confirmed the acts of its collector and that there was no provision in the respondent's charter forbidding it to accept cheques.

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

(1) 10 Alta. L.R. 102.

C. J. Ford, for the respondent, submitted that taxes are payable in lawful money only; and that the instrument given in the present case was not even a cheque accepted by a bank, as the Dominion Trust Company was expressly forbidden by sec. 12, ch. 89, Statutes of Canada, 1912, from engaging in the business of banking.

THE CHIEF JUSTICE.—Appeal dismissed with costs.

DAVIES J.—I concur in dismissing this appeal.

IDINGTON J.—This appeal must be dismissed with costs.

DUFF J.—I do not find it necessary to pronounce any opinion upon the legal power of the municipality to authorize the treasurer to receive payment of taxes otherwise than in legal tender or bank notes. It is very clear that he had in fact no authority to receive in payment an accepted bill of exchange which was not a cheque on a bank. The order on the Dominion Trust Company was certainly not a cheque either in contemplation of law or according to the common understanding.

The appeal should be dismissed with costs.

ANGLIN J.—I would dismiss this appeal with costs.

BRODEUR J.—I am unable to find that the appellant Collings has duly paid his taxes.

The tax collector had some duties to perform and those duties are defined by the statute and he was not authorized to receive payment of those taxes in other than legal tender. If the notice which had been given to the tax-payer that a cheque in payment of taxes could

1917

COLLINGS v. CITY OF CALGARY.

Brodeur J.

be made, provided accepted by a bank, is legal and proper, I should say that in this case a duly accepted cheque was not presented for payment. It was not accepted by a bank; and if, in order to oblige Collings, the collector has thought advisable to take the document which was presented to him, there is no reason why the city should suffer for the illegal and unauthorized action of its officer.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hannah, Stirton & Fisher.*
Solicitor for the respondent: *Clinton J. Ford.*

THE CANADIAN MORTGAGE INVESTMENT COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

W. F. CAMERON (DEFENDANT)..... RESPONDENT.

1917

*May 8.
*June 22.

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

Statute — Application — "Interest Act" — Mortgage — Blended payments—Statement—Rate of interest—R.S.C. [1906] c. 120, s. 6.

Section 6 of the the "Interest Act" (R.S.C. [1906] ch. 120) provides that "whenever any principal money or interest secured by mortgage on real estate is, by the same made on the sinking fund plan, or any plan under which the payments of principal money and interest are blended * * * no interest whatever shall be * * * recoverable * * * unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance."

Held, Davies and Idington JJ. dissenting, that the provisions of this section are complied with if the facts stated in the mortgage shew the amount of the principal and the rate of interest calculated as required; a special statement, complete in itself, of such amount and rate is not essential.

Therefore, where the mortgagor covenants to pay the principal and interest in ten half-yearly payments, and to pay interest on the principal, or so much thereof as remains due, at the rate of ten per cent. per annum and the same rate on any sum in arrear, the mortgagee is entitled to the interest.

Judgment of the Appellate Division, 33 D.L.R. 792, ([1917] 2 W.W.R. 18), affirming that at the trial (32 D.L.R. 54, 10 West. W.R. 959), reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), affirming by an equal division of opinion, the judgment at the trial (2), in favor of the defendant.

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

(1) 33 D.L.R. 792; [1917] 2 W.W.R. 18.

(2) 32 D.L.R. 54; 10 West. W.R. 959.

1917

CANADIAN MORTGAGE INVESTMENT CO. v. CAMERON.

Sections 6 and 7 of the "Interest Act" (R.S.C. [1906] ch. 120) provide that:—

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance. R.S., ch. 127, sec. 3.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement. R.S., ch. 127, sec. 4.

The mortgage in question in this case contains the following covenant by the mortgagor.

"First: That he will pay to them, the said mortgagees, the above sum of one thousand four hundred dollars and interest thereon at the rate hereinafter specified in gold or its equivalent at the office of the said mortgagees at the City of Toronto, in the Province of Ontario, as follows: That is to say, in instalments of one hundred and seventy-nine 90/100 dollars half-yearly on the 24th days of June and December in each year until the whole of said principal sum and the interest thereon is fully paid and satisfied, making in all ten half-yearly instalments. The first of said instalments to become due and be payable on the 24th

of December, 1907. All arrears of both principal and interest to bear interest at ten per centum per annum as hereinafter provided.

"Secondly: That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of ten per centum per annum by half-yearly payments on the twenty-fourth days of December and June in each and every year until the whole of the principal money and interest is paid and satisfied, and that after maturity interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether on principal or interest, and all sums of money paid by the mortgagees under any provision herein contained or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the twenty-fourth days of the months of December and June in each year until all such arrears of principal and interest are paid; and that he will pay the same and every part thereof on demand."

The only question for decision was whether or not this covenant contained the statement required by section 6. The trial judge held not and there being an equal division of opinion in the Appellate Division his judgment stood affirmed.

Nesbitt K.C. and *Ford K.C.* for the appellants, referred to *Credit Co.* v. *Pott* (1), at page 299; *Canadian Mortgage Investment Co.* v. *Baird* (2); *Colonial Investment Co.* v. *Borland* (3), at pages 97-8; *Biggs* v. *Freehold Loan Co.* (4).

G. F. Henderson K.C. for the respondent.

(1) 6 Q.B.D. 295.
(2) 30 D.L.R. 275; 10 West. W.R. 1195.
(3) 5 Alta. L.R. 71.
(4) 31 Can. S.C.R. 136.

1917

CANADIAN MORTGAGE INVEST-MENT CO. v. CAMERON.

The Chief Justice.

THE CHIEF JUSTICE.—This appeal was argued at the same time as the appeal from the Appeal Court of the Province of Manitoba of *Standard Reliance Mortgage Corporation* v. *Stubbs*. The question for determination in each case turns upon the construction to be put upon the "Interest Act" (R.S.C. 1906, ch. 120). Some minor objections to the judgment under appeal were taken by the appellant in its factum, but not pressed at the argument.

In the Manitoba case the defendant pleaded that under the provisions of section six of the "Interest Act," no interest was recoverable under the mortgage given by him and judgment was given in his favour on this issue. In the present case this defence was not pleaded at all, but at the conclusion of the trial leave was given to amend by pleading the statute. If the statement of defence was ever amended, it does not so appear on the record. I am disposed to think that leave ought not to have been given to make such an amendment, but it is unnecessary to decide this point in view of the conclusion which I have reached that in this as in the Manitoba case the requirements of section six of the statute have been sufficiently complied with.

I have in the Manitoba case sufficiently set forth my views of what, generally speaking, are the requirements of the statute and it is unnecessary to repeat them here. As I pointed out, however, it must depend upon the terms of the mortgage in each case whether or not it fulfils the conditions imposed by the statute.

The mortgage deed to be construed in the Manitoba case contains the provision:—

"It is further agreed between me and the said mortgagees that the principal of $700 and the rate of interest chargeable thereon is 10% per annum."

In the mortgage given by the respondent to the appellant, the information required to be given has to be sought first in a statement appearing on the face of the deed that the principal sum lent is $1,400, and, secondly, in the covenants of the respondent to pay the said sum of $1,400 and interest thereon at the rate of 10% per annum in half-yearly instalments of $179.90 on the days therein mentioned. This in my opinion sufficiently affords the information called for by section six. In this, as in the Manitoba mortgage, it clearly appears in the deed what is the amount of the principal money advanced and the rate of interest chargeable thereon calculated as provided by section six.

The appeal will be allowed and the judgment varied by allowing the appellant interest upon the mortgage. The appellant having substantially succeeded in its claim is entitled to the costs of the action and the appeal. The respondent will have the costs of the counterclaim.

DAVIES J. (dissenting)—The substantial question arising on this appeal is as to the proper construction of sections 6 and 7 of the "Interest Act," relating to mortgages of real estate in cases where the principal and interest

are made payable on the sinking fund plan or any plan in which the payments of principal money and interest are blended, etc.

These sections read as follows:—

Section 6.—Whenever any principal money or interest secured by mortgage or real estate is, by the same, made on the sinking fund plan, or any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such

1917

CANADIAN MORTGAGE INVESTMENT CO v. CAMERON

Davies J.

principal money and the rate of interest chargeable thereon calculated yearly or half-yearly, not in advance.

Section 7.—Whenever the rate of interest shewn in such statement is less than the rate of interest which whould be chargeable by virtue of any other provision calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement

The sections are carelessly drawn, and the language used somewhat ambiguous. It is not to be wondered at therefore that there has been much difference of judicial opinion as to their meaning.

I frankly confess myself I entertained much doubt as to their meaning alike during the argument and subsequently when discussing the sections with my colleagues.

I have, however, reached the conclusion, after consideration, that the majority judgment of the court of Alberta in this case and the unanimous judgment of the Appeal Court of Manitoba in the appeal case of the Standard Reliance Mortgage Company against Stubbs, the arguments in which appeals were heard by us together, were correct and that both appeals should be dismissed.

In the case of the Canadian Mortgage Investment Company, I concur in the reasoning of Mr. Justice Ives with whom Stuart J. concurred, confirming that of Chief Justice Harvey, the trial judge.

It seems to me that any other conclusion than that reached by them would render the sections valueless as a protection to the borrower, and defeat their clear object, intent and purpose.

I construe the sixth section as requiring in mortgages on any plan under which the payments of principal money and interest are blended that the "statement" called for by the section should shew plainly and separately the amounts of the principal and the interest

respectively contained in each blended stipulated payment with the rate at which the interest has been calculated and, as the section says,

calculated yearly or half-yearly, not in advance.

Now, it is absurd, to my mind, to talk about the *rate of interest* being "calculated yearly or half-yearly." What it must mean is that the statement must shew the interest calculated yearly or half-yearly but "not in advance" in each blended payment, and the rate of interest, so that the mortgagor might test its correctness.

I cannot accept the argument that section six requiring the "statement" referred to is complied with if the facts required to be shewn in it can be gathered from different parts of the mortgage. It must be, in my judgment, complete in itself—and one shewing the essential facts, principal, interest and rate of interest on each blended payment.

Section seven refers specifically to the "statement" required by section six in the absence of which

no interest whatever shall be chargeable.

It contemplates that there may be a difference between the rate of interest shewn in the statement and the rate stipulated for in

any other provision, calculation or stipulation in the mortgage,

and provides that in such case there shall not necessarily be a forfeiture of all interest but that no greater rate than that shewn in the "statement" required by the sixth section shall be recoverable.

The two sections, when read together, confirm me in the opinion that the mortgagor was not to be left to infer or gather from the "other provisions, calculations or stipulations" of the mortgage how the blended payments he was called upon to make were

1917

CANADIAN MORTGAGE INVESTMENT CO v. CAMERON

Davies J.

made up and how much was principal, how much interest and at what rate the latter was calculated, but, that the statement required by section six should furnish him with all that information, and that in the absence of any such statement no interest could be recovered and that no other provision in the mortgage however express it might be could make him liable for a higher rate of interest than the statement shewed.

Putting the best construction I can upon the admittedly ambiguous language used in the section, I can reach no other conclusion than the one I have attempted to express, that the "statement" required by the sixth section is one shewing separately in each blended stipulated payment how much of principal and how much of interest the blended payment comprised, and the rate of interest at which the calculation was made,

yearly or half-yearly, not in advance.

Otherwise, in my judgment, the whole object, intent and purpose of the sections are defeated.

We are not to speculate, of course, as to what were the objects, intents and purposes of the enactment but to construe its language. When that language is ambiguous and the object, intent and purpose of the enactment are plain, as I think they are in the sections under consideration, we are justified in putting such a construction upon the ambiguous language as will give effect to and not defeat such object and purpose. I have endeavoured to do so in this case without doing violence to the language of the Act.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting) — Contrary to my first impression, I have reached the conclusion that the "Interest Act" required something more than is to

be found in the covenants and other provisions in the mortgage in question, which clearly falls within section 6 of said Act, and in default thereof appellant cannot recover interest.

I suspect there never was a mortgage but contained statements of fact which, when coupled with the other fact, inevitably well known to the mortgagor, of the amount advanced, would enable him by what are called, perhaps ironically, simple questions of computation to ascertain

> the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The legislation in question seems to have been designed for the protection of those who perchance by improvidence or want of knowledge of those simple methods of calculation were incapable of determining offhand the meaning of the facts presented to them in such an instrument as this in the way of covenants or other provisions and thus needed to have resort to a simple statement of fact declaring

> the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance.

It was clearly intended that the borrower need not concern himself further with regard to the rate of interest and that if there were no such simple method provided, no interest could be recovered.

And if there were other stipulations in the mortgage in conflict therewith then that no greater rate of interest should be recoverable than shewn in such statement is provided by section 7.

The object of Parliament plainly was to remedy an abuse that had existed and could be successfully continued if resort had to be had to complicated calculations to determine the basic facts of what was

1917

CANADIAN MORTGAGE INVESTMENT Co v. CAMERON

Idington J.

implied in the blended periodical instalments of principal and interest.

As I agree in the reasoning of the Chief Justice and Mr. Justice Ives in the Court of Appeal, I need not elaborate.

I do not think we should interfere with the questions of costs or damages as disposed of in said court.

I think the appeal should be dismissed with costs.

DUFF J.—This appeal and that of *Standard Reliance Co.* v. *Stubbs* were heard together and the disposition of them must, in the main, be governed by the same considerations. Before proceeding to discuss the statute upon which the respondents rely in both cases I cite some words of Lord Haldane in *Vacher & Sons* v. *London Society of Compositors* (1), at page 113:—

> My Lords, we have heard, in the course of this case, suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of Parliament in the "Trades Disputes Act" of 1906, of presuming that the Legislature was acting with one or other of these points of view in its mind. For my own part, I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

It is in the spirit of these observations that the provisions of the "Interest Act," which have been the

(1) [1913] A.C. 107.

subject of the discussion on the appeals, must be examined.

These provisions are as follows:—

Sec. 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payment of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance: R.S., ch., 127, sec. 3.

Sec. 7.—Whenever the rate of interest shewn in such a statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement: R.S., ch., 127, sec. 4.

I can discover no ground for ascribing to the word "statement," in these sections, any unusual meaning. If the facts which the statute requires to be shewn are stated, then I think the requirement of section 6 is complied with.

I find no difficulty in applying the words of section 6 according to their natural meaning, to the mortgages before us.

First, as to the respondent Cameron's mortgage. The two important paragraphs are these:—

First: That he will pay to them, the said mortgagees, the above sum of one thousand four hundred dollars and interest thereon at the rate hereinafter specified in gold or its equivalent at the office of the said mortgagees at the city of Toronto, in the Province of Ontario, as follows: That is to say, in instalments of one hundred and seventy-nine 90-100 dollars half-yearly on the twenty-fourth days of June and December in each year until the whole of the said principal sum and interest thereon is fully paid and satisfied, making in all ten half-yearly instalments. The first of said instalments to become due and be payable on the 24th of December, 1907. All arrears of both principal and interest to bear interest at ten per centum per annum as hereinafter provided.

Secondly: That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of ten per centum per annum

1917

CANADIAN MORTGAGE INVESTMENT Co v. CAMERON

Duff J.

by half-yearly payments on the twenty-fourth days of December and June in each and every year until the whole of the principal money and interest is paid and satisfied, and that after maturity interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether on principal or interest, and all sums of money paid by the mortgagees under any provision herein contained or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the twenty-fourth days of the months of December and June in each year until all such arrears of principal and interest are paid; and that he will pay the same and every part thereof on demand.

Now these two paragraphs state with perfect clearness that each of the stipulated half-yearly instalments contains a sum charged for interest at the rate of 10% payable half-yearly and that interest, at this rate, is chargeable under the mortgage and payable at such intervals. That, I think, is a sufficient compliance with the statute.

As to the respondent Stubbs' case, the stipulation to be considered is as follows:—

In consideration of the sum of seven hundred dollars lent to me by The Sun and Hastings Savings and Loan Company of Ontario (who and whose successors and assigns are hereinafter included in the expression mortgagees), the receipt of which I do hereby acknowledge, covenant with the mortgagees that I will pay to the said mortgagees the above sum of seven hundred dollars in gold or its equivalent, together with interest thereon as hereinafter provided, at the offices of the said mortgagees in the city of Winnipeg, in the Province of Manitoba, or in the city of Toronto, in the Province of Ontario, said principal and interest being payable as follows: The sum of eight dollars and seventy-five cents on the first Monday of each month for the period of one hundred and thirty-five months next ensuing, the first of such monthly instalments to become due and payable on the first Monday of January, A.D. 1903, together with all sums, penalties and forfeitures which may become due or payable to the mortgagees by me by virtue of the by-laws of the said mortgagees.

Together with the further covenant in the following words:—

And it is further agreed between me and the said mortgagees that the principal is seven hundred dollars and the rate of interest chargeable thereon is ten per cent. per annum as well after as before default.

These two stipulations contain an explicit statement of the rate of interest chargeable; the rate is declared to be 10% and I think it is stated with sufficient clearness that is it to be payable annually.

ANGLIN J.—What I have stated in *Standard Reliance Mortgage Company* v. *Stubbs* disposes of the main question on this appeal—that as to the mortgagee's right to recover interest. The mortgage states that the sum advanced is $1,400 and by the second covenant the mortgagor agrees to pay thereon or on so much thereof as remains unpaid, interest at the rate of ten per centum per annum by half-yearly payments. This I regard as a statement meeting the requirements of section 6 of the "Interest Act."

Except an item of $200 allowed for damages for refusal to discharge the mortgage, several grounds of appeal taken by the appellant involving comparatively small amounts were not pressed by Mr. Nesbitt. In view of the disposition in its favour of the question as to its right to recover interest the appellant is also obviously entitled to relief as to the $200 item.

The appellant is entitled to recover from the respondent its costs in all the courts.

Judgment should be entered in the usual form for the taking of the mortgage accounts.

Appeal allowed with costs.

Solicitors for the appellants: *Emery, Newell, Ford, Bolton & Mount.*

Solicitor for the respondent: *John R. Lavell.*

1917
*May 8, 9.
*June 22.

STANDARD RELIANCE MORTGAGE CORPORATION (DEFENDANTS) ..... APPELLANTS;

AND

LEWIS ST. GEORGE STUBBS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Statute—"Interest Act" — Mortgage — Blended payments — Statement— R.S.C. [1906] c. 120, ss. 6 and 7.

A mortgage on real estate contained a covenant by the mortgagor to pay the combined principal and interest by monthly instalments and also provided that "it is further agreed between me and the said mortgagees that the principal is seven hundred dollars and the rate of interest chargeable thereon is ten per cent. per annum as well after as before default."

Held, reversing the judgment of the Court of Appeal (27 Man. R. 276), Davies and Idington JJ. dissenting, that these provisions constituted a statement of the amount of the principal and interest sufficient to satisfy the requirements of section six of the "Interest Act."

APPEAL from a decision of the Court of Appeal for Manitoba (1), affirming the judgment at the trial in favour of the plaintiff.

This appeal raises the same question as was raised on the preceding case of *Canadian Mortgage Investment* v. *Cameron*. The mortgagor sued for a declaration that no interest could be recovered on the mortgage debt.

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

(1) 27 Man R. 276.

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

Bergman for the respondent.

THE CHIEF JUSTICE.—The "Interest Act" (R.S.C. 1906, ch. 120) in part represents the statute 43 Vict. ch. 42. Until the year 1911, no case appears to have come before the courts depending upon this statute. In that year there was one in the court of the Province of Alberta and there were two last year. These three Alberta cases and the one now under appeal are the only cases in which the courts have been called on to construe the Act during the 37 years that have elapsed since it was passed.

In my opinion, the difficulties that have now been suggested regarding the requirements of the Act are largely imaginary and certainly very exaggerated.

Section 6 of the Act is as follows:—

> Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The purposes of this section and what it calls for are, I think, very fairly stated by Mr. Justice Walsh in the latest judicial pronouncement on the subject given on the appeal of the case of *Canadian Northern* (reported in error "Mortgage") *Investment Company* v. *Cameron* (1). He says:—

> The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system without the protection which this section affords a highly usurious rate of interest might be

(1) 33 D.L.R. 792, [1917] 2 W.W.R. 18.

1917

STANDARD RELIANCE MORTGAGE CORPORATION v. STUBBS

The Chief Justice.

wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it. And so parliament stepped in and decreed that such a mortgage should itself tell the mortgagor exactly how much of the aggregate of these blended payments represents principal and exactly the rate at which the interest included in them calculated yearly or half-yearly not in advance is charged under penalty of the loss of all interest for breach of this direction. I think that if such a mortgage gives all the information to which the mortgagor is entitled under the statute the exact form of words which it uses to convey it to him is absolutely immaterial. A statement is something which is stated. Surely if there is to be found within and as part of the mortgage something which states the amount of the principal money and the rate of interest chargeable thereon calculated in one of the methods prescribed by the section the mortgage does contain a statement of these things. The main thing, in fact the only thing needed is to give to the mortgagor the information to which the section entitles him and I think he can be given it just as effectually through the medium of his own covenants as he can by tabulating it in a formal statement.

If the blended payments of principal and interest amount to more than the principal and interest at the rate stated, then, by section 7 no greater interest is recoverable than the rate stated.

The meaning of the requirement in section 6 that the mortgage should shew

> the rate of interest chargeable thereon calculated yearly or half-yearly not in advance

is not perhaps altogether clear.

I have read very carefully all the judgments in the decided cases but I have failed to find in them any satisfactory explanation of the meaning of the provision though there are some conclusions as to what it does not mean. It is pointed out that "calculated" is not the same as "payable" but in the respondent's factum it is said:—

> Appellants' contention is that the interest here is payable monthly. Interest at the rate of 10 per cent. per annum payable monthly is more than 10 per cent. per annum.

Yet the Act cannot have intended to prohibit any such monthly payments of blended principal and interest.

I do not know what interpretation has been generally adopted as shewn by mortgage forms in common use in the country, but in the appeal to this court from the Ontario Appeal Court of the case of *Biggs* v. *The Freehold Loan & Savings Company* (1), the "Interest Act" was incidentally considered through the use that had been made of a printed form adapted to a loan repayable in one sum with interest in the meantime, and we read:—

> Then follows, in the printed form, a clause which is required by the statute to be inserted in every mortgage wherein the principal and the interest secured by the mortgage are blended together and made payable by instalments. It is as follows:—
>
> "The amount of principal money secured by this mortgage is $20,000 and the rate of interest chargeable thereon is 9 per cent. per annum *payable* not in advance."

It must be observed that whatever interpretation is put upon the words "calculated yearly or half-yearly not in advance," the difference in the *rate* chargeable would be only fractional, and, I think, it may well be that if all the information required to be given to the mortgagee is, as I think it is, that set forth by Mr. Justice Walsh then the statute is satisfied without absolutely exact figures which the difference in permissible schemes of repayment renders practically impossible to state. The statement of the rate is, I think, only required for the purpose of a standard of comparison.

The effect of judgments like that under appeal leads to extravagant results. These may sufficiently be seen summed up in a note to the report of this case in 32 D.L.R., at p. 60. The learned commentator concludes that,

> in a mortgage providing for periodical payments of blended amounts, there shall be a calculation in figures shewing how each amount is con-

(1) 31 Can. S.C.R. 136.

1917

STANDARD RELIANCE MORTGAGE CORPORATION v. STUBBS.

The Chief Justice.

stituted by distinguishing principal and interest and stating that the interest is calculated yearly or half-yearly, as the case may be, at a named rate. No other method would enable an illiterate or inexperienced man to do what the mortgagor, it is said, should be enabled to do, that is, amongst other things, be able afterwards to check over the amounts and see how he stands.

Now, in the first place, the Act says nothing about enabling illiterate or inexperienced men to understand a calculation which requires a skilled actuary to understand and is beyond the understanding of the majority of even educated men, and nothing about keeping him afterwards informed as to how he stands. But further, it hardly seems worth while blending the principal and interest if in the same deed they have to be separated and so stated in respect of each payment. Indeed, it would seem doubtful whether they could then be called blended payments at all, and as it is only with such blended payments that the Act is dealing, it might then have no application to the mortgage at all.

I think it is perfectly certain that it was never in contemplation that the Act should impose, in respect of all such mortgages as it provides for, an obligation to set forth all these calculations, and equally certain that it does not do so.

It is not necessary to consider the decided cases in detail because each case must depend to a certain extent on the wording of the mortgage deed therein called in question.

In the present case, I think the requirements of the Act are satisfied by the agreement between the parties expressed in the mortgage, "that the principal is $700 and the rate of interest chargeable thereon is 10% per annum."

The statement of claim asks for declarations that no interest whatever is payable on the mortgage and

that the same has been satisfied. As this claim fails, the action must be simply dismissed.

The appeal will therefore be allowed and the action dismissed, the costs of the appellant both in this court and the courts below to be paid by the respondent.

DAVIES J. (dissenting)—In the case of *Canadian Mortgage Investment Company* v. *Cameron*, which was argued with this appeal, I have filed my reasons for dismissing that appeal and would refer to them as my reasons for dismissing this appeal with costs.

IDINGTON J. (dissenting)—This case was argued together with the case of the *Canadian Mortgage Investment Company* v. *Cameron*, raising the same question as to the requirements of the "Interest Act," for a specific statement in the mortgage, in which payments of principal and interest are blended.

Of the respective mortgages in question that in this case is to my mind far more vicious on its face in disregard of the Act, than those in the other case.

Indeed its provisions bring to mind some of the very abuses which I have no doubt led to the imperative enactments now in question.

The mortgagor in this case covenanted as follows:—

> which I do hereby acknowledge, covenant with the mortgagees that I will pay to the said mortgagees the above sum of seven hundred dollars in gold or its equivalent, together with interest thereon *as hereinafter provided*, at the offices of the said mortgagees in the city of Winnipeg, in the Province of Manitoba, or in the city of Toronto, in the Province of Ontario, said principal and interest being payable as follows:—
>
> The sum of eight dollars and seventy-five cents on the first Monday of each month for the period of one hundred and thirty-five months next ensuing, the first of such monthly instalments to become due and payable on the first Monday of January, A.D. 1903, together with all sums, penalties and forfeitures which may become due or payable to the mortgagees by me by virtue of the by-laws of the said mortgagees;

1917

STANDARD RELIANCE MORTGAGE CORPORATION v. STUBBS.

Idington J.

and then after some pages of other stipulations it contains this:

> And it is further agreed between me and the said mortgagees that the principal is seven hundred dollars and the rate of interest chargeable thereon is ten per cent. per annum as well after as before default,

which is followed by a provision for the said payments of one hundred and thirty-five monthly instalments liquidating the debt and otherwise.

And then this curious provision follows, *i.e.*:—

> And for all purposes of this mortgage and for enforcing all rights and remedies of the respective parties thereunder, whenever it shall be necessary to ascertain the amount of principal or interest remaining due or in arrears, the same shall be ascertained by the actuary of the said mortgagees, and his certificate of the fact required shall be final and conclusive between the parties hereto and those claiming through or under them.

As the by-laws of the company to which the mortgage was given and of which appellant is only assignee, are not before us, the penalties and forfeitures covered by the foregoing covenant must be matter of speculation.

Its nature, however, I regret to say, reminds me of the old time abuses to which I have referred.

And the lastly quoted clause is not, I most respectfully submit, as contended by counsel for appellant, merely a collateral matter, but of the very substance of the covenant which is for payment of principal "with interest thereon as hereinafter provided," limited only by the determination of the mortgagee's actuary.

I think that these provisions must be taken as a whole when we are asked to find therein a substitute for the specific requirements of the "Interest Act," demanding that simplicity of statement I have adverted to in my opinion in the other case which I need not repeat here.

They seem like a determination on the part of the draftsman to circumvent the Act rather than an intention to submit to it.

I agree with the reasoning in the courts below and need not repeat what I said in the other case.

I think the appeal should be dismissed with costs.

DUFF J.—See ante page 418.

ANGLIN J.—The purpose and effect of the concluding clause of section 6 of the "Interest Act" (R.S.C. 1906, ch. 120) are certainly not as clear as could be desired. Consideration of its terms, however, has led me to the conclusion that it does not prescribe that the mortgage shall set forth the calculation by which the several blended payments or instalments of principal and interest are computed, or that it shall be shewn what amount of principal and what of interest is comprised in each such payment or instalment. What the prescribed statement is to shew is (*a*) "the amount of such principal money advanced," *i.e.*, the amount of the principal money secured which has been advanced and is to be repaid in the blended payments; (*b*) "the rate of interest chargeable thereon," *i.e.*, the rate at which the interest to be paid is to be computed. (*c*) The section further prescribes that such interest shall be "calculated yearly or half-yearly not in advance," and that the "statement" shall shew that it is intended to be so computed. The adjective "chargeable" clearly relates to and qualifies the word "rate." The participle "calculated" equally clearly relates to and qualifies the word "interest." It cannot apply to the word "rate"; a "rate of interest" is not "calculated." But the "rate" is distinctly affected by the frequency with which it is calculated or com-

1917

STANDARD RELIANCE MORTGAGE CORPORATION v. STUBBS.

Anglin J.

puted and interest in advance is appreciably more avantageous to the lender than interest not in advance. Ten per cent. per annum computed monthly is a rate materially higher than ten per cent. per annum computed yearly. There is nothing in the statute which precludes requiring payment by quarterly, monthly or even weekly instalments of blended principal and interest. But however frequently the payments are to be made, not only must the rate of interest chargeable be stated, but it must also appear that such interest is to be "calculated" (*i.e.*, computed) "yearly or half-yearly and not in advance." If the rate be stated to be say 10% per annum, although this is not an explicit statement that the interest is to be computed yearly, such a computation is implied, and I should regard it as a sufficient statement to that effect and as precluding the computation of interest on any other than a yearly basis. So too with the provision "not in advance." Unless the contrary is expressly stipulated, I would read a reservation of interest at 10% per annum as precluding computation of interest in advance. That the interest in such a case is to be computed "not in advance" is, I think, the reasonable implication from the stipulation. The statement in the mortgage before us that,

> the rate of interest chargeable thereon (*i.e.*, on the principal of $700) is 10 per cent. per annum as well before as after default

is, in my opinion, a sufficient statement of the rate of interest and that it is to be calculated yearly and not in advance.

Nor do I think it at all necessary that the statement required by section 6 should appear otherwise than in the expression of the consideration, in the proviso for redemption, or in the covenant for payment. Neither

is its form material if the information is given which the statute prescribes.

If the blended payments or the instalments stipulated in fact amount to more than the principal money and interest calculated at the rate and on the basis so stated, section 7 provides the mortgagor's remedy by restricting the mortgagee's right of recovery to the amount secured according to such statement. If the sum of the blended instalments amounts to less than the principal and interest secured by the mortgage according to the statement, and the mortgagee has agreed to be redeemed on payment of the specified instalments, it may be that he would have difficulty in seeking to avail himself of the statement to enforce payment of any larger sum. But any error in the computation of the blended payments or instalments does not affect the sufficiency of the statement to meet the requirements of the statute They are satisfied if the mortgage shews the amount of principal money advanced and to be repaid, the rate of interest per annum which it is to bear and, if it be so intended, that such interest is to be calculated half-yearly. A stipulation for interest to be computed in advance or more frequently than half-yearly is altogether forbidden; a statement shewing that interest is to be computed or is to be calculated in advance would not in either case render such a calculation legal; no interest whatever would be "chargeable, payable or recoverable," on such a mortgage.

One purpose of the statute is to protect the mortgagor against committing himself to an obligation to pay a higher rate of interest than he understood would be charged through the concealment of such higher rate in blended payments. This object is accomplished by requiring the statement shewing the

1917

STANDARD RELIANCE MORTGAGE CORPORATION v. STUBBS

Anglin J.

amount of principal advanced, and the rate of interest, depriving the mortgagee of any right to recover interest at a rate greater than that so shewn, and if the prescribed statement is lacking taking from him all right to recover any interest.

As I said at the outset, the construction of the statutory clause in question is by no means free from difficulty. I fully recognize that different views may be taken of its purpose and its purport. I have merely endeavoured to state them as they present themselves to me.

It follows that in my opinion the demurrer to the statement of claim must be allowed. The appellant is entitled to its costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellants: *McAllister & McCallum.*

Solicitors for the respondent: *Rothwell, Johnston, Bergman & McGhee.*

UPPER CANADA COLLEGE (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... RESPONDENT.

1917

*June 7.
*June 22.

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

Assessment and taxes—Exemption from taxation—Local improvements—Petition—Signatures—R.S.O. [1914] c. 195, ss. 5 and 6—R.S.O. [1914] c. 193, ss. 47 and 48—R.S.O. [1914] c. 280, s. 10.

Rates for meeting the cost of local improvements under the Ontario "Local Improvements Act" are taxation.

By sec. 10 of its Act of incorporation the property of the Upper Canada College is "exempt from taxation in the same manner and to the same extent as property vested in the Crown." Sec. 5 of the "Ontario Assessment Act" provides that "the interest of the Crown in any property is declared to be exempt from taxation" and sec. 6 that "the exemption provided for by sec. 5 shall be subject to the provisions of the 'Local Improvement Act' as to the assessment of land for local improvements which would otherwise be exempt from taxation." The "Local Improvement Act" contains no express provision for levying rates on Crown lands and no machinery for collecting any such rates.

Held, that under this legislation the property of the Crown was not subject to assessment for the cost of local improvements and that of the Upper Canada College was also exempt.

By sec. 47 of the "Local Improvement Act" "the land of a University, College or Seminary of learning * * * exempt from taxation under the 'Assessment Act' * * * shall be liable to be specially assessed."

Held, that this section does not apply to land of Upper Canada College which is not exempt under the "Assessment Act" but under its own special Act.

Sec. 48 of said Act provides that "lands exempt from taxation for local improvements shall, nevertheless, for all purposes except petitioning for or against undertaking a work be * * * specially assessed" but the special assessment shall not be collectable from the owner.

Held, that under this section Upper Canada College is not an essential party to a petition for local improvements affecting its lands.

Judgment of the Appellate Division (37 Ont. L.R. 665), affirmed.

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

1917

UPPER CANADA COLLEGE v. THE CITY OF TORONTO.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the hearing in favour of the respondent.

The action was brought by the College for a declaration that by-laws of the city ordering local improvement work to be done on the street on which the College property fronted were invalid as the College did not sign the petition for such work. The legislation relied upon is given in the above head-note.

Arnoldi K.C. for the appellant. Exemption from taxation does not embrace exemption from payment for cost of local improvements. *In re Leach and City of Toronto* (2), at pages 621 and 625; *City of Halifax* v. *Nova Scotia Car Works* (3); *Les Ecclesiastiques de St. Sulpice* v. *City of Montreal* (4).

The learned counsel also argued that the by-law was invalid for irregularity in procedure.

Fairty for the respondent.

THE CHIEF JUSTICE.—I agree with the judgment of the Appellate Division and for the reasons delivered by Mr. Justice Masten would dismiss this appeal.

DAVIES J.—I concur with the reasons given by Mr. Justice Anglin for dismissing this appeal.

IDINGTON J.—I am of the opinion that the appellant was not at the times in question liable to be specially assessed for the local improvement in question and hence has no right to complain. The appeal should, therefore, be dismissed with costs.

(1) 37 Ont. L.R. 665.
(2) 4 Ont. L.R. 614.
(3) [1914] A.C. 992.
(4) 16 Can. S.C.R. 399.

DUFF J.—By section 10 of ch. 280 R.S.O. 1914, all property of Upper Canada College is exempt from taxation to the same extent as property vested in the Crown for the public uses of Ontario. By section 5 s. s. 1 of the "Assessment Act," R.S.O. 1914, ch. 195, the interest of the Crown in any property is declared to be exempt from taxation. This enactment, however, must be read subject to the qualification imposed by section 6 of the same Act; the effect of which is, I think, clearly expressed in the argument of Mr. Fairty in his factum, and it is this: That as regards assessment for local improvements of land the exemptions created by section 5 are not to prevail as against the provisions of the "Local Improvement Act."

Turning now to the "Local Improvement Act," putting aside for a moment section 47, it is abundantly clear that there is nothing in the Act expressly aimed at the property of the Crown, and moreover, as Mr. Fairty points out, the Act contains no machinery for collecting local improvement taxes from Crown property; on the contrary, the first subsection of section 157 explicitly provides that no interest of the Crown shall be sold for arrears of taxes. Then as to section 47, that section, I agree, has no application here because it applies only to cases where the exemption is created by the "Assessment Act," the exemption enjoyed by Upper Canada College being created not by the "Assessment Act," but by its own special Act.

The result is that section 48 of the "Local Improvement Act" comes into play, by which it is expressly provided that land exempt from taxation for local improvements shall not be taken into account for the purpose of any petition under the Act. Such land is "assessed" in a qualified sense only; it is entered in the assessment roll and a valuation is set opposite to this

1917

UPPER CANADA COLLEGE v. THE CITY OF TORONTO.

Duff J.

entry, but that is done merely for the purpose of convenient book-keeping; because the taxes which would have been collectable had the land not been exempt from taxation are, by force of section 48, charged against the municipality itself.

The appeal should be dismissed with costs.

ANGLIN J.—The main ground of attack on the impugned by-laws is that Upper Canada College, which owns all the property abutting on one side of a projected extension of Oriole Avenue, in the City of Toronto, is liable to be specially assessed in respect of the cost of such extension, and that without its signature the petition for the work did not meet the requirements of sec. 12 of R.S.O. 1914, ch. 193:

> Sec. 12. The petition for the work shall be signed by at least two-thirds in number of the owners representing at least one-half of the value of the lots liable to be specially assessed.

I assume that the value of the lots owned by the appellant, if they were "liable to be specially assessed," in fact exceeded one-half of the value of all the property so liable.

The property of Upper Canada College is vested in a Board of Governors, a body corporate (R.S.O., 1914, ch. 280, sec. 3), and is

> exempt from taxation in the same manner and to the same extent as property vested in the Crown for the public uses of Ontario (sec. 10).

The question presented therefore is whether property so vested in the Crown is liable for local improvement taxation, that is, for the public uses of Ontario.

That rates levied to meet the cost of local improvements under the Ontario "Local Improvement Act" are "taxation" in my opinion admits of no doubt. Authorities binding on this court have so determined in

respect to strictly analogous rates levied in other provinces. *The City of Halifax* v. *Nova Scotia Car Works* (1), *Canadian Northern Railway Co.* v. *Winnipeg* (2), *Les Ecclesiastiques de St. Sulpice de Montreal* v. *City of Montreal* (3), at pages 403, 409. The Ontario "Local Improvement Act" (R.S.O. ch. 193) in sec. 48 itself terms such rates "taxation for local improvements."

By sec. 5 of the Ontario "Assessment Act" (R.S.O. 1914, ch. 195), "The interest of the Crown in any property * * * " is declared to be exempt from taxation. Nothwithstanding this provision, it is enacted by sec. 6 that:

> The exemptions provided for by sec. 5 shall be subject to the provisions of the "Local Improvement Act" as to the assessment for local improvements of land, which would otherwise be exempt from such assessment under that section.

The provisions of the "Local Improvement Act" thus referred to are ss. 47 and 48:

> Sec. 47. Land on which a church or place of worship is erected, or which is used in connection therewith, and the land of a university, college or seminary of learning whether vested in a trustee or otherwise, which is exempt from taxation under the "Assessment Act," except schools maintained in whole or in part by a legislative grant or a school tax, shall be liable to be specially assessed.
>
> Sec. 48. Land exempt from taxation for local improvements under any general or special Act shall nevertheless, for all purposes except petitioning for or against undertaking a work, be subject to the provisions of this Act and shall be specially assessed; but the special assessments imposed thereon which fall due while such land remains exempt shall not be collected or collectable from the owner thereof but shall be paid by the corporation.

The very presence of sec. 47 affords an almost conclusive indication that but for its provisions the property which it describes would have been exempt under sec. 5 of the "Assessment Act" from local improvement rates as taxation. Indeed the language of sec. 6 of the "Assessment Act" makes this certain. Admittedly the

(1) [1914] A.C. 992; 47 Can. S.C.R. 406. (2) 54 Can. S.C.R. 589.
(3) 16 Can. S.C.R. 399.

1917

UPPER CANADA COLLEGE v. THE CITY OF TORONTO

Anglin J.

appellant is a University, College or Seminary of learning and it is not a

school maintained in whole or in part by a legislative grant or a school tax.

But, as Mr. Fairty pointed out, it is not

exempt from taxation under the "Assessment Act,"

but is so exempt under s. 10 of the "Upper Canada College Act" (R.S.O. ch. 280). Its property is therefore not within sec. 47.

No provision of the "Local Improvement Act" renders property of the Crown liable to taxation for local improvements and of course the Crown is not bound by such legislation unless specially mentioned.

Sec. 48, as will be readily perceived, *ex facie* deals with

lands exempt from taxation for local improvements.

While directing that such lands shall nevertheless be subject to the provisions of the Act for certain purposes, it specifically excludes therefrom those provisions which deal with petitioning for or against undertaking a work, and it enacts that while (no doubt for convenience in working out the scheme of the Act), lands so exempted shall be specially assessed, yet the assessments thereon shall not be collected or collectable from the owner but shall be paid by the municipal corporation.

These provisions make it abundantly clear that the legislature did not intend to restrict the generality of the exemption from taxation of property of the Crown, declared by sec. 5 of the "Assessment Act," by excluding from it local improvement taxation. Since the property of Upper Canada College is by its Act entitled to the same exemption as if it were property of the Crown and does not fall within the provisions of sec. 47 of the "Local Improvement Act" (designed to prevent the exemption of certain defined classes of religious and educational

property from general municipal taxation extending to local improvement rates), and there is no provision which renders it liable for such rates, it follows that it is exempted from them and that, although liable to be specially assessed under sec. 48, the municipal corporation must pay its assessment; and the fact that it is so assessed does not bring it within the provisions of the "Local Improvement Act" which deal with

petitioning for or against undertaking a work.

The appeal upon this point therefore fails.

The other questions involved in the appeal concern alleged unfairness on the part of the respondent corporation in the laying out of the proposed roadway and in the location of a sidewalk upon it. It suffices to say that these matters are peculiarly within the jurisdiction of the municipal council. No fraud or absence of good faith in the exercise of its powers has been shewn. Any exercise of its discretion short of a plain and manifest abuse of its powers is not subject to curial control, *Montreal* v. *Beauvais* (1), *United Buildings Corporation Ltd.* v. *Vancouver* (2), merely because some benefit therefrom has accrued to particular persons. No case of abuse has been made here.

Appeal dismissed with costs.

Solicitors for the appellant: *Arnoldi & Grierson.*
Solicitor for the respondent: *William Johnston.*

(1) 42 Can. S.C.R. 211. (2) [1915] A.C. 345.

1917
*June 11.
*Oct. 9.

THE PREST-O-LITE COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE PEOPLE'S GAS SUPPLY COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade-mark—Infringement — Use — Selling marked goods — Covering trade-mark.

The Prest-o-Lite Co. manufacture tanks for storage of acetylene gas and are proprietors of the trade-mark "Prest-o-Lite" which is embossed upon each tank. The People's Gas Supply Co. manufacture acetylene gas and purchase said tanks, charge them with their own gas and sell or exchange them. On the tanks so sold is affixed a label covering said trade-mark, which states that the tank is filled with gas manufactured by The People's Gas Supply Co. This label is of paper affixed to the tank by shellac and can only be removed by scraping with a knife or other instrument. In an action by the Prest-o-Lite Co. for infringement of their trade-mark,

Held, Fitzpatrick C.J. and Duff J. dissenting, that such action must fail; that defendants did all that could reasonably be expected to prevent a prejudicial use of the trade-mark; and that they did not "use" the trade-mark within the meaning of sec. 19 of the "Trade-mark and Design Act."

APPEAL from the judgment of the Exchequer Court of Canada dismissing the plaintiffs' action.

The action was brought for infringement of plaintiffs' trade-mark. The material facts are stated in the above head-note.

The action was dismissed by the Exchequer Court and the following reasons assigned.

CASSELS J.—This action is brought by the plaintiffs to restrain the defendants from infringing the trade-

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

mark of the plaintiffs. The plaintiff company is an incorporated company having its head office at the City of New York, in the State of New York, one of the United States of America. The defendants are an incorporation with their head office at Ottawa, in the Dominion of Canada.

The contention of the plaintiffs is shortly as follows: Apparently in the United States patents were issued to them which covered not merely the process patent but also the tank in which the product of the process was stored. In Canada the only patent which the plaintiffs have is a patent for the process. There was no patent in Canada protecting the tank.

The Prest-o-Lite Company are manufacturers and distributors of acetylene gas for lighting automobiles and other vehicles. The plaintiffs stores its gas in portable steel cylinders l'ned with asbestos, which absorbs a quantity of acetone which in turn is saturated with acetylene gas introduced under pressure, the outflow for consumption being valve controlled.

It is conceded that the defendants have by virtue of the second section of chapter 103, of the statutes of 1913, the right to manufacture use or sell the process product in Canada. Their rights in this respect are not contested. It is also conceded by the plaintiffs that the tanks manufactured and sold by them have become the property of the purchasers; and it was stated by Mr. Chrysler, on the argument of the case, that the purchasers might utilize these tanks in any manner in which they chose, provided the trade-mark "Prest-o-Lite" was removed from the tanks. In other words, if it were feasible to remove the trade-mark, plaintiffs concede that the defendants have a perfect right to fill the tank with acetylene manufactured by them and to sell the same.

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

The contention, however, is that the defendants have no right to fill the gas into tanks containing the trade-mark of the plaintiffs, and to sell them to others with the trade-mark "Prest-o-Lite" on the tank.

Two classes of cases arise. One is cases in which the purchasers from the Prest-o-Lite Company in the United States take their tanks to the defendants to be refilled. This comprises the larger number of what the plaintiffs contend are infringements of their trade-mark. The other class of cases, is cases in which the defendants purchase the tanks out and out with the name Prest-o-Lite on them, refill them and sell them to others or give them in exchange for empty tanks for a consideration.

The plaintiffs' contention is that the defendants are infringers of their trade-mark.

Since the argument I have gone very carefully through all the authorities cited to me, and numerous other authorities, and have come to the conclusion that the plaintiffs' action fails. The cases are so numerous and the principles so clearly settled that it would be useless labour to comment in detail on these authorities.

It has to be clearly understood that the Exchequer Court has no jurisdiction in what are called "passing off" cases. The jurisdiction is limited purely to questions of infringement of trade-mark. This is conceded by counsel for the plaintiffs. It is also, as I have stated, conceded that the defendants have an absolute right to use the process and sell the product described in the Canadian patent.

It is proved before me clearly that in no case, except one or two of trifling importance, have the defendants ever refilled any of the tanks and let them go from their premises without the word "Prest-o-Lite" being completely covered over.

A notice is posted over the word "Prest-o-Lite" this notice showing on its face that the tank was refilled by the Ottawa Company.

The contention is that the defendants have covered them over with a substance which might be removed by a wrong-doer. In point of fact no evidence has been adduced to shew any such erasures of the covering placed on the tanks by the defendants, and I am not prepared to adopt the reasoning of some of the American authorities cited before me, in which comment is made upon the fact that the wrapper placed over the word "Prest-o-Lite" is capable of being removed.

As I have said, it has to be kept clearly in mind this is not the case of "passing off" or wrongfully attempting to steal the trade of the plaintiffs.

In the cases in the United States it is quite evident that the courts were influenced by the fact that the defendants were endeavouring to steal the plaintiffs' trade.

In one case, the *Searchlight Gas Co.* v. *Prest-o-Lite Co.* (1), before the Circuit Court of Appeals, Baker J., at page 696, uses the following language:—"Appellee is entitled to have its lifeblood saved from leeches and its nest from cuckoos."

The judges in these cases do dwell upon trade-mark, but it is so mixed up with the passing off, that evidently from a perusal of these particular cases the court was much influenced by the fraud of the defendants in seeking to rob the plaintiffs of the benefit of their trade. There is nothing in the case before me corresponding in any way to the facts of these cases.

The defendants as far as they can effectually covered the word "Prest-o-Lite" when refilling the tanks, and sending them out of their premises. There is no evi-

(1) 215 Fed. R. 692

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

dence whatsoever of any combination between the parties bringing the tanks to be refilled and the defendant company. Under the patent law there may be cases where a defendant may become what is commonly known as a contributory infringer. The term is a misnomer. If the circumstances are such that it is proved the party connives with another to defraud the patentee he becomes an infringer—but to be an infringer he must be a party to inducing another to break a contract or inducing him to infringe a patent. The law on the subject is very fully discussed by the late Mr. Justice Burbidge, in the case of *The Copeland Chatterson Co.* v. *Hatton* (1). This case was taken to the Supreme Court of Canada, and the judgment of the Exchequer Court was affirmed. The question there discussed was the right of a patentee to enter into a bargain for the use of a patented article. The point of contributory infringement does not seem to have been discussed, but evidently the views of the learned Judge were sustained.

In the case before me there is no pretence whatever of any dealings on the part of the defendants similar to the dealings in the *Copeland Chatterson Case*, (1) referred to. I find no law under the "Trade-mark Acts" which refers to contributory infringement.

It has to be borne in mind that the case before me is not brought for infringement of a patent. Some point is made that some of the tanks which were brought to the defendant or filled by the defendant, had the word "patented" on them. No doubt these were American tanks, and probably very rightly had this stamp upon them. It is of no consequence, and has no bearing as far as I can see on the case before me.

In the Ontario Courts, the case of *Prest-o-Lite*

(1) 10 Ex. C.R. 224.

Co. v. *London Engine Supplies Co.* (1), came up before Chief Justice Falconbridge. This case was taken to the Court of Appeal. On the appeal the reasons of the Appellate Division are set out in (2) (Dec. 22nd, 1916). As far as the reasons would shew this case rested to a very great extent on passing off. The contention was that there was unfair competition. I have looked at the pleadings in this case, and the claim of the plaintiff was not confined to passing off but the plaintiffs in that action also relied upon the infringements of their trade-mark "Prest-o-Lite."

I am unable to bring my mind to a conclusion, that what the defendants have done, having regard to the circumstances as detailed in the evidence, amounts to an infringement of the plaintiffs' trade-mark. One or two trifling instances have occurred in which the defendants may have sold the tank filled by them without obliterating the name. There is considerable doubt about this. In any event the amount is trifling.

No claim has been pressed that the tanks have not been sold out and out. Any notice such as set out in the defence is a notice under the American patents not in force in Canada.

It was argued by Mr. Sinclair that the word "Prest-o-Lite" is not the subject matter of a trade-mark, but that it became the generic name of the article sold. I cannot agree with this contention. The trade-mark was adopted for use by a company other than the company which had the patents under which the tanks and the compound in question were manufactured. It was the trade-mark first used by a company with another name, this company subsequently changing its corporate name into the name

(1) 10 Ont. W.N. 454. (2) 11 Ont. W. N. 225.

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

of the Prest-o-Lite Company. It is open to argument that the name may not be susceptible of a valid trade-mark under the principles laid down in the case of *Kirstein* v. *Cohen* (1). My own personal view is that it is a valid trade-mark and not governed by the principles decided in the *Kirstein Case* (1). It is, however, unnecessary to follow up this line of thought, as after the best consideration I can give to the case I am of the opinion that the plaintiffs are not entitled to succeed for the reasons I have given.

The action is dismissed with costs.

Chrysler K.C. for the appellants. The defendants used the plaintiffs' trade-mark within the meaning of sec. 19 of the Act. See *Bechstein* v. *Barker* (2); *Monro* v. *Hunter* (3); *Upmann* v. *Forester* (4).

Proof that any purchaser from or through defendants was deceived is unnecessary. *Millington* v. *Fox* (5); *Cellular Clothing Co.* v. *Maxton* (6); *Boston Rubber Shoe Co.* v. *Boston Rubber Co.* (7).

See also *Gannert* v. *Rupert* (8); *Prest-o-Lite Co.* v. *Davis* (9), at page 350; *Prest-o-Lite Co.* v. *Searchlight* (10).

R. V. Sinclair K.C. for the respondents. The tanks bought from appellants became the property of the defendants who can fill and sell them with the trade-mark on so long as the purchaser is not deceived. *Welch* v. *Knott* (11); *Prest-o-Lite Co.* v. *Auto Acetylene Co.* (12); Kerly on Trade-marks (2 ed.) p. 369; *Barret* v. *Gomm* (13); and *United Tobacco Cos.* v. *Crook* (14), were also referred to.

(1) 39 Can. S.C.R. 286.
(2) 27 Cut. P.C. 484.
(3) 21 Cut. P.C. 296.
(4) 24 Ch. D. 231.
(5) 3 Mylne & C. 338.
(6) [1899] A.C. 326.
(7) 32 Can. S.C.R. 315.
(8) 127 Fed. R. 962.
(9) 215 Fed. R. 343.
(10) 215 Fed. R. 692.
(11) 4 K. & J. 747.
(12) 191 Fed. R. 90.
(13) 74 L.T. Jour 388.
(14) 25 Cape G.H.S.C. 343.

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

The Chief Justice.

THE CHIEF JUSTICE (dissenting).—The case is unusual in that the tanks in respect of which the claim for infringement of trade-mark is brought, are not only things of intrinsic value but of themselves of far more value than their contents, whilst most, at any rate, of the decisions in similar cases deal with vessels or containers of little or no value in themselves, such as aerated water bottles with the trade-mark of the maker of the water embossed or blown in the glass. The difference does not, however, affect the principles on which the case turns.

Two classes of cases arise. One is that in which the individual owner of the tank takes it to be refilled. This he has a perfect right to do and the respondents putting their label over the trade-mark are justified in refilling it. No one can be deceived here and the respondents cannot be said to be using the trade-mark in disposing of their goods. The other class comprises the transactions in which the respondents purchase the tanks and refill and sell or give them in exchange for empty tanks for a consideration, which is the same thing, the empty tank being only part of the consideration given; and also those in which they refill tanks for owners of garages who dispose of them in a similar way to those making use of their establishments. The cases in this latter class constitute, I think, an infringement of the trade-mark.

It is well established that regard must be had to the possibility of the ultimate purchaser being deceived and such deception will be restrained even though the original purchaser is not deceived.

No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device, or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer.

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

The Chief Justice.

Per James L.J. in *Singer Manufacturing Co.* v. *Loog* (1); adopted by Lord Macnaghten in *Reddaway* v. *Banham* (2).

> If a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable.

Per Cotton L.J. in *Singer Mfg. Co.* v. *Loog* (1) at page 422.

It is clear that when the respondents sell the tanks which they have purchased and refilled to keepers of garages or others, particularly dealers, of course, or fill them for such persons they put it out of their own power to answer for the ultimate purchaser not being deceived as to the goods he is purchasing bearing the appellants' trade-mark.

In this connection it is insufficient that the respondents place their own label over the trade-mark. It was held by North J., in *Allan* v. *Richards* (3), that:

> If the defendant chose to buy second hand bottles bearing a trade-name and fill them with the same liquid as the owner of the name was in the habit of filling them with, the defendant was not in a position to resist an injunction if applied for. The affixing of the defendant's own label did not affect the question, for the label might get removed in a variety of likely ways, for instance, if the bottles were plunged in ice. If the label under such circumstances were to come off, there would be nothing to prevent the public from believing they were purchasing in the bottles stamped with the plaintiff's name ginger beer manufactured by the plaintiff. The injunction must therefore be granted.

But even if the putting on of the respondents' label were to be considered sufficient in the case of a sale to an individual it affords no guarantee whatever in the case of dealings with dealers who might well systematically remove the labels before selling the tanks to the ultimate purchasers.

(1) 18 Ch. D. 395 at p. 412. (2) [1896] A.C. 199.
(3) 26 Sol. J. 658.

In my opinion, however, the practice of buying up the appellants' tanks and refilling them for sale is unfair to them in any case. Let us suppose that the tanks were refilled with an inferior quality of gas; that I dare say is not the case in the present instance but it might well be so in others; it would be very injurious to the reputation of the appellants' tanks that a number of them should be about filled with a gas that could not be relied on; the public cannot be supposed to know the explanation of the difference between the tanks as originally filled and those same tanks still bearing the trade-mark but refilled either improperly or with an inferior gas by some other firm.

In the judgment appealed from it is said that

> the cases in which the purchasers from the Prest-o-Lite Company in the United States take their tanks to the defendants to be refilled comprise the larger number of what the plaintiffs (appellants) contend are infringements of their trade-mark.

If this is not meant to include dealers there is a dispute as to the facts because the appellants in their factum say,

> according to the evidence the greater number of transactions are between the respondent company and the dealers.

It is unnecessary, however, to go into the evidence on this point as the case should, in my opinion, go back to the Exchequer Court for re-consideration and determination upon the principle above indicated.

DAVIES J.—For the reasons given by Mr. Justice Sir Walter Cassels in the Exchequer Court I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The appellant complains that its trade-mark, duly registered, and engraved upon tanks which it has sold without restriction as to their future

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

Idington J.

use, has been infringed by the respondent refilling same for the respective owners thereof with its acetylene and charging therefor, or by exchanging the like tanks (which it had duly acquired) after filling same with acetylene for others brought to it empty.

Stress is laid in argument upon the fact that the tanks in question bore the engraving of appellant's trade-mark although that was carefully covered over by something intended to hide it which had an inscription thereon declaring the fact of the refilling having been effected with acetone and acetylene of the respondent's manufacture.

Is it conceivable that any one would attempt the maintenance of such an action if, for example, alcohol or buttermilk had been used instead of gas for refilling such a tank merely as a convenient vessel for carrying such or the like materials upon sale thereof?

I suggest such an improbable contention merely to illustrate and make clear the issue raised.

The nature of the offence against both law and honest dealing has to be considered in applying the "Trade-mark and Designs Act" which was enacted to furnish those concerned with a more efficient remedy against transgressors in that regard than had been obtainable at common law or in equity.

The action rests upon section 19 of the Act, which is as follows:—

> 19. An action or suit may be maintained by any proprietor of a trade-mark against any person who uses the registered trade-mark of such proprietor or any fraudulent imitation thereof, or who sells any article bearing such trade-mark, or any imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act.

It seems to me impossible to hold, under the facts in evidence and in face of the express declaration inscribed on the label used in such transaction by

respondents, which could not escape a purchaser's notice, that there was any use by it of appellants' trade-mark. It is not pretended there was "any fraudulent imitation thereof."

It is conceivable that if the label had been shewn to be of a kind easily removed by accident or design and the transactions were of such goods for the purpose of resale, then the case might have been brought within the principle enunciated by Lord Westbury in *Edelsten* v. *Edelsten* (1), at page 199.

There are many ways in which to my mind, by subterfuges such as are not supported herein by evidence or pretended in argument to exist, that the respondents might have executed the like transactions to those in question herein in such ways and manners as to offend against the Act. We need not speculate regarding these possibilities but simply say on the particular facts presented herein and arguments presented, that there has been no offence against the provisions of the Act of such a kind as to support this action, and therefore the appeal should be dismissed with costs.

DUFF J. (dissenting)—I think this appeal should be allowed. There was, I think, by the respondent a "use" of the trade-mark and I think it cannot be denied that the cylinders bore the trade-mark within the meaning of the statute.

The key to the solution of the question presented seems to be this: The fact that the cylinders handed out by the respondent company in exchange for others were complete Prest-o-Lite cylinders exchangeable at the Prest-o-Lite agencies and capable of identification as such, can by no means be regarded as a negligible

(1) 1 DeG. J. & S. 185.

1917

PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

Duff J.

circumstance in this trading that the respondent company carries on. One must ask one's self the question: Would the customers of the respondent company accept cylinders which, being minus the trade-mark, would not be exchangeable at the Prest-o-Lite Company's agencies? To ask that question is to answer it. The trade-mark is not obliterated, it is not intended to be obliterated; the device resorted to deceives nobody, is intended to deceive nobody and would defeat its purpose if it deceived anybody. The cylinder bears the trade-mark, is known to bear the trade-mark and has its value largely because it bears the trade-mark, and the trade-mark is used in that sense and is, I think, within the meaning of the statute. The appellant company is entitled to succeed.

ANGLIN J.—After consideration of the numerous cases cited at bar I am, with respect, of the opinion that the judgment in appeal is right and should be upheld. There is direct and irreconcilable conflict between United States authorities, such as *Prest-o-Lite Co.* v. *Heiden* (1), and *Searchlight Gas Co.* v. *Prest-o-Lite Co.* (2), and such English cases as *Welch* v. *Knott* (3).

The defendants completely covered the plaintiffs' trade-mark on each tank filled by them with an adhesive label, which stated in conspicuous characters that the tank had been refilled by them. This label was so securely fastened to the metal case with shellac that it was not removable by water and could only be taken off deliberately by scraping with a knife or other instrument; *Barrett* v. *Gomm* (4). The defendants did all that they could reasonably be expected

(1) 219 Fed. R. 845.
(2) 215 Fed. R. 692.
(3) 4 K. & J. 747.
(4) 74 L.T. Jour. 388.

to do to prevent any use of the trade-mark prejudicial to the plaintiffs. The tanks when they left their hands could have deceived nobody. They cannot be held responsible for any fraudulent removal of labels, so carefully designed and attached, by persons subsequently handling the tanks. There is no evidence of any such removal in the record. The case at bar is clearly distinguishable from *Rose* v. *Loftus* (1), and *Thwaites* v. *McEvilly* (2), where the embossed names of the plaintiffs were not covered by the labels pasted on the necks of the bottles, which were, moreover, easily removable. The bottles as sent out by the defendants in those cases might readily be sold as containing the plaintiffs' goods. I agree with the views expressed by Hopley J. in *United Tobacco Cos.* v. Crook (3), cited by counsel for the respondent.

Appeal dismissed with costs.

Solicitors for the appellants: *Chrysler & Higgerty.*

Solicitor for the respondents: *R. V. Sinclair.*

(1) 47 L.J. Ch. 576. (2) [1904] 1 Ir. R. 310.
(3) 25 Cape G.H.S.C. 343.

1917
*Feb. 19, 20
*June 22

BULLETIN COMPANY LIMITED (DEFENDANT)..... } APPELLANT;

AND

RICE SHEPPARD (PLAINTIFF)..... RESPONDENT.

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

Libel—Newspaper—Fair comment—Public interest—Personal corruption —Public and private reputation—Civic administration.

A newspaper article alleged that the members of a municipal council (referring to the plaintiff and others,) "will have to do a lot of explanation to satisfy the" public that their action "was for the protection of the city's interest and not because of a split as to a possible rake off . . . . We have had one year of Tammany. We can't stand another."

Held that no action for libel will lie against a newspaper which makes fair and reasonable comments upon the evil conditions prevalent in the city and upon corrupt and unlawful practices provided these comments do not exceed bounds of legitimate criticism and could not be construed as imputing personal knowledge and corrupt intention on the part of a member of the municipal council.

Per Davies and Brodeur JJ., the court must decide this question, not on any possible interpretation which might be suggested of the language complained of, but upon such interpretation as is reasonably fair and as would be understood by the people of the city in question.

Per Fitzpatrick C.J. and Anglin J. dissenting: The statements complained of amount to allegations of personal corruption against the respondent.

Per Anglin J., Those statements go far beyond a fair expression of a reasonable inference from any proven facts and indicate an absence of that "honest sense of justice" and of that "reasonable degree of judgment and moderation" on the part of the critic which are essential to sustain a plea of fair comment.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, (1) which reversed the judgment of Ives J. at the trial, by which the plaintiff's action was dismissed with costs.

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

(1) 27 D.L.R. 562.

The material circumstances of the case and the questions in issue on the present appeal are stated in the head-note and in the judgments now reported.

G. F. Henderson K.C. for the appellant.
E. B. Edwards K.C. for the respondent.

THE CHIEF JUSTICE (dissenting)—The appellant devoted much pains, both in the newspaper articles out of which the present libel suit arises and at the trial, to proving his assertion that there was in the Edmonton city council a party, to which the respondent belonged, known as the "administration party," the members of which held together on all matters of substance, and, composing the majority of the council, had the control of the affairs of the city. There is no point to the statement, unless the power of the alleged party was directed to improper and corrupt ends. The rule of the majority is necessarily incident to any elected council, and such majority has commonly stability through the party system as may be seen in Parliament, the chief council in the land. It was not necessary, as the appellant claims,

that the result of this system was to bring about a condition in Edmonton practically the same as the Tammany system in New York.

The appellant, in his defence, alleged that his attacks were directed against the system and not against the respondent as an individual. This is perhaps rather inconsistent with the argument advanced in the article of the 28th November,

that good government depends on men rather than on form,

but there can, I think, be no doubt that the innuendo in the article of the 2nd December is supported,

that the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure

1917

BULLETIN CO. LIMITED v. SHEPPARD.

The Chief Justice.

private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of Tammany.

As the learned judge delivering the judgment under appeal says:—

> There can in this matter be no way open for an interpretation which would not impute personal knowledge and participation;

it is personal corruption.

The appellant is really driven to the claim insistently made before this court that there is a difference between charges against the respondent in his public and in his private capacity. There is none; and I think this cannot be too emphatically stated. The morality which a man is bound to observe in his public life is the same as in his private life. There are not two persons in a man, neither are there two codes of morality but only one. Whilst a man has the same responsibility for his actions whether in his public or private capacity, he is also entitled to a corresponding protection when unjustly charged with immoral acts either in his public or private capacity.

I give the effect of the appellant's argument so far as I can gather it, but as it is to be found in his factum, it is certainly confused and apparently far from clear to the writer of it. In it we read:—

> The second point taken by the appellant is that the learned judges in appeal failed to appreciate the difference between criticism of the public action of a public man and an imputation upon the same person in his private capacity.

Criticism of a man is not synonymous with an imputation upon him. The passage proceeds:—

> The quotation from the judgment of Mr. Justice Stuart at p. 187 of the case, already given, shews that the judges in appeal had clearly in mind the proposition of law that there must be an imputation upon the private or personal character of the respondent in order that he might be entitled to judgment.

There is no such previous quotation, and I can

find nothing in the judgment to which counsel can be referring. Further, I do not know the proposition of law asserted. The learned counsel appears throughout to confound the words "private" and "personal "capacity" and "character." What is meant by a man's private character I do not know, but every imputation upon his character is a personal imputation whether in his public or private capacity.

Again, it is said:—

> The learned judges have surely gone too far in finding that the reasonably necessary result of the language was a charge of personal corruption. Had they kept in mind the distinction which is always made between conduct in a public capacity and conduct in a private capacity it would have been clear to them that the article not only did not make any charge against the respondent in his personal capacity but made it plain that the criticism was directed against the system and not against the individual.

There is no such distinction made or capable of being made and the confusion of language is worse than ever. What capacity can the respondent have which is not a personal capacity? Apparently the argument is that a charge against the respondent in his personal capacity is a charge against the individual, but a charge against a public man is not a charge against an individual but a system. It is idle to attempt to follow such arguments any further.

Mr. Justice Beck did not, as alleged, dissent from the judgment of the other judges of appeal; on the contrary, he agreed with it and went further. I do not find it necessary to say more than that I concur in the disposition of the case made by the Appellate Division and would dismiss this appeal with costs.

DAVIES J.—This action was one brought by the plaintiff against the defendant printing company for several alleged libels published respecting him in

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Davies J.

their newspaper the *Bulletin* in the City of Edmonton.

The plaintiff was an alderman of that city at the time the articles were published and the libels related to his actions and conduct as such alderman and as one supporting what was known as "the administration" in the city council of Edmonton. They were written on the eve of a city election for a number of aldermen. The plaintiff was not one of these, as he had been elected for a two year term, only one of which had expired.

The articles complained of were written in a very vigorous and forceful style and did not mince matters n charging that the civic "administration party," that is the mayor with a majority of the aldermen who usually voted with him to support and carry out the policy he advocated, had brought the affairs of the city, socially as well as financially, into a very disgraceful condition which could and should be remedied by the election of a new mayor and a body of aldermen who would support a new and better policy and method of civic government.

There were five distinct libels charged against the defendant as having been published in its newspaper. In order to understand these articles properly and to appreciate their true meaning and object and how they would be understood by an ordinary citizen of Edmonton, it is absolutely necessary to read the record we have before us, which includes not only the articles in full as published and the evidence given at the trial, but also many exhibits and amongst them an important report made by Mr. Justice Scott, who had been appointed to examine and report upon the existence of crime and vice within the city and whether its growth and extent had been such as to indicate a failure on the part of the civic authorities to enforce the law.

The learned judge, acting as such commissioner, found it difficult, if not impossible, to obtain the evidence of many witnesses who were in a position to know the facts on which he was asked to report, as they had been spirited away and could not be had.

But while he reported that

there is no direct evidence of the receipt by any alderman, commissioner or other officer, servant or agent of the city, of any money for the protection of vice,

he went on to say:

If the evidence of the prostitutes who left the city on the eve of the investigation could have been procured, more light might have been thrown upon the question. Some of those who were examined before me are shown to have stated that they were under protection by the police by reason of their having paid for it; but, upon their examination, they denied that they had paid any money for that purpose.

He winds up his report as follows:—

Having regard to the inconclusiveness of the evidence already given in some respects and to the number of witnesses whose absence has made it impossible to examine them, it is suggested that the present report be treated as an interim one, and the authority conferred by the council for the inquiry be extended, so that, if it hereafter becomes possible to obtain any further information, a tribunal for that purpose will be available. The general condition revealed is of the most serious possible character and it seems important, from the point of view of the citizens generally, that the fullest possible light should be thrown upon the subject and the persons responsible definitely ascertained.

The conditions the learned commissioner was able to report upon being, as he said, of the "most serious character" and "requiring the fullest possible light to be thrown upon the subject," it became not only the right but the duty of the press of the city thoroughly to discuss the deplorable situation revealed and to make such fair and reasonable comments upon it and upon the civic administration responsible for it as the revealed facts called for.

Such right and duty however would not, of course, justify unfair or unreasonable comment reflecting upon the characters and reputations of those more or

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Davies J.

less responsible for those facts. The defence set up by the defendant is that, in the discharge of its right and duty as a newspaper, it did not trespass or go beyond what was fair and reasonable comment upon matters of public interest.

Whether such defence has been made out is the question before us now, and, in determining it, we are practically acting as jurymen and must decide, not on any possible interpretation which might be suggested of the language complained of, but upon such an interpretation as is reasonably plain and fair and as would be understood by the people of Edmonton.

It is, in my opinion, most unfortunate that the issues had not been submitted to a jury—a tribunal recognized as peculiarly well qualified to pass on such a question as we have before us. But we have to deal with the case as it stands with a conflict of judicial opinion.

The learned trial judge held that each and all of the alleged libels were fair and reasonable comments upon matters of public interest and on such a finding of fact he dismissed the action.

The Appeal Court was divided.

Three of the learned judges agreed with the trial judge with respect to all of the alleged libels but one, that they were merely fair comment in matters of public interest; but with respect to that one, two of them concurred in the opinion delivered by Mr. Justice Stuart that,

> it contained beyond doubt an insinuation that the plaintiff was one of a number of aldermen who were acting corruptly and dishonestly in their dealing with the paving contracts

and that applying the meaning of the word "Tammany" to be that given by the defendant in its article of December 1st it clearly

supported the innuendo alleged in the fifth paragraph of the claim that the plaintiff conspired with other members of the council to introduce and carry on in the City of Edmonton corrupt and unlawful practices.

Mr. Justice Beck held that all of the articles charged as libellous were in fact so and was in favour of setting aside the verdict of the trial judge and entering judgment for the plaintiff and if he was not satisfied with nominal damages "there should be an assessment of damages."

The extract from the article of December 2nd, which the Appeal Court has held to be libellous, is as follows:—

> The members of the council (clearly referring to the plaintiff among others) who were so careful not to let a printing contract of $10,000 or $12,000 get by their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts running into the hundreds of thousands was for the protection of the city's interest and not because of a split as to a possible rake-off * * * We have had one year of Tammany. We can't stand another.

I have given the judgment of the majority of the Court of Appeal a great deal of consideration and do not find myself able to concur in the conclusion they reached as to the libellous character of this article.

In construing that article and forming a conclusion as to what is really meant, one must place oneself in the position of a resident of Edmonton to whom it was specially addressed on the then eve of an election for mayor and aldermen for the then coming year. One must ask oneself in view of the then existing proved conditions in civic matters, of Judge Scott's report, of the evidence given at the trial and of all other surrounding circumstances, whether, as the trial judge found, the article did not go beyond what, in the extraordinary and unfortunate civic circumstances, was fair and legitimate criticism or had crossed

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Davies J.

the line as the Appeal Court found and become libellous. But in forming one's conclusion, one must not confine one's mind to the *ipsissima verba* of the extract from the article in question found to be libellous but upon the language of the article as a whole and in the light of all the surrounding conditions and circumstances.

I do not think that the language of the article when so viewed necessarily "imputed personal knowledge and participation" on the plaintiff's part in civic corruption and dishonesty or of a corrupt conspiracy of which the plaintiff was a party with regard to the affairs of the City of Edmonton.

I fully agree with the statement of the learned judge (Mr. Justice Stuart) that

> when personal corruption is charged, there is no distinction between the plaintiff as an alderman and as a private citizen.

Where I cannot agree is in finding any charge of personal corruption at all.

The writer was referring to and considering the actions of "the majority of the administration" to which, it is true, the plaintiff was allied and with whom he as a rule voted. The learned judge himself says in his judgment:—

> After an examination of the reports of the proceedings of the council, I am of the opinion that it could with some appearance of reason by a fair and honest though vigorous critic be argued that there was such an administration party and that the plaintiff at least supported it.

I fully agree. I also concur generally in the reasons given by the learned judge for the conclusions reached by him and concurred in by the majority of the court with respect to all the other alleged libels that they did not exceed the bounds of legitimate criticism when read in the light of all the circumstances and should not be construed as "imputing personal

and corrupt intentions" on the plaintiff's part. The learned judge says in his judgment;

> I think I can go a step further and also say that an assertion that there was such a party, that the plaintiff was a member of it, that the policy of the party was one of corruption and dishonesty would also not be a libel upon the plaintiff except by an innuendo that the plaintiff knowingly and consciously assisted and supported such a policy. Assuming personal innocence of any corrupt or dishonest motive on the part of the plaintiff, that is, personal ignorance of the real aims and purposes of his party, there could be nothing but legitimate and fair criticism and comment upon his action as a public man in charging him with supporting a party having such corrupt and dishonest purposes because, *ex hypothesi*, he would not be personally corrupt or dishonest, but only innocently mistaken in his course of action. The presence of an innuendo or personal knowledge and participation would in my opinion clearly be necessary before a charge against him of being a member of such a party could be considered libellous.

Adopting and accepting as I do those reasons, however, I cannot concur in the conclusion reached by him respecting the article of the 2nd December. There is no charge that the plaintiff knowingly and consciously was a party to a corrupt conspiracy to defraud the city or that he personally was guilty of fraud or corruption. It was the "administration" of which the plaintiff was a member that was being attacked, not the plaintiff personally. He, it was argued, must be held responsible with the others comprising it for its acts and its policy. But to say that a member of a party must be held responsible for the acts of the administration he supports and to call that administration "Tammany" falls short in my judgment under such facts as are here disclosed of charging personal corruption and dishonesty.

I frankly admit that it is difficult sometimes to draw the line between libel and fair and reasonable comment upon matters of public interest.

In the instance before us, I feel compelled to hold, largely for the reasons advanced by the learned judge

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Davies J.

who delivered the majority judgment of the Court of Appeal when deciding against the libellous character of all the other charges, that the article in question of the 2nd December did not under all the circumstances exceed the bounds of fair and legitimate criticism upon a matter of great public interest and did not impute to the plaintiff personal fraud or corruption in connection with the affairs of the city of which he was an alderman or that he "had conspired with other members of the council to introduce and carry on in the City of Edmonton corrupt and unlawful practices."

I think undue weight has been given to the use of the word "Tammany" in the libel complained of Years ago in the United States the word was in very bad odour especially in New York under the "Boss" governments so called of Tweed and some of his successors. But a construction seems to have been placed upon the meaning of the word in the libel complained of which it does not necessarily bear. It is argued that Tammany government means the practical and systematic application to civic government of the old party cry "to the victors belong the spoils" not only with regard to appointments to office but with respect to the letting and awarding of civic contracts. That may be so; the policy may be a very vicious one and may be carried out in ways the most objectionable and corrupt. But it does not necessarily follow that it must be corrupt and it certainly cannot be said that it involves personal charges against each and all of those who supported the administration so called "Tammany." In fact, the defendant, when first charged with libel by the plaintiff, most emphatically disclaimed any intention of imputing personal corruption to the plaintiff or conspiracy on his part to abet, or procure, or maintain corruption. If

any such construction was put upon the language complained of, the defendant unequivocally repudiated it and expressed himself as willing and ready to make the most complete apology.

The substance of the charge was that the plaintiff as a public man and an alderman supported by his votes and maintained in power an administration that the paper held was corrupt—not that he did so for any personal benefit or knowingly and consciously abetted and assisted and supported corruption in civic government.

The plaintiff, it must be remembered, was not before the electors for re-election. He had another year to serve as alderman. The articles were written to defeat the mayor, "the Boss" of the administration, and those members of it seeking re-election. Looking at the conditions and circumstances and atmosphere surrounding the publication of the article complained of, the relation of the plaintiff to the attack made, and the purpose and object of the writer, so far as I acting as a juryman can determine them, I conclude that the court below has placed a meaning upon the article which it does not reasonably bear and that under all the circumstances it does not exceed the bounds of fair comment and criticism, though it may be fairly argued that it reaches to those bounds.

I would have been very much surprised if any independent witness, a citizen or resident of Edmonton, could have been found who would state that he understood the article to bear the meaning the learned judges determined it did.

I need hardly say that no such witness was found.

The law on this important subject of fair comment as concisely stated in 18 Halsbury, at p. 711, is, I

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Davies J.

think, correct and is supported by authorities which will not be challenged.

It reads:—

> The defendant may nevertheless succeed on his plea of fair comment if he shews that the imputation of which the plaintiff complains, although defamatory, and although not proved to have been true, yet was an imputation in a matter of public interest, made fairly and *bonâ fide* as the honest expression of the opinion which the defendant held upon the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair minded man might upon those facts *bonâ fide* hold that opinion.

The conclusions inferred as matters of opinion have not to be proved as facts and on the issue of fair comment the mental attitude of the commentator is immaterial.

I am of the opinion that the appeal should be allowed with costs here and in the Court of Appeal and that the judgment of the trial judge should be restored.

IDINGTON J.—The respondent was an alderman of the City of Edmonton when the appellant as the publisher of a newspaper called "The Bulletin," in evident anticipation of the annual city election, attacked in five different articles the conduct of the mayor and city council in relation to their management of the city's municipal government.

The respondent complained of these articles in an action tried in Edmonton before Mr. Justice Ives without a jury and he dismissed the action.

Upon an appeal to the Court of Appeal for Alberta that judgment was reversed and judgment entered for $450 damages and costs.

The opinion judgment of the majority of the court held that each one of the first three of said articles, taken by itself, was not libellous under the circumstances, but that the fourth, published on the 2nd of December, was so.

The part of the article which Mr. Justice Stuart, writing the majority judgment, quotes and relies upon is as follows:—

> The members of the council (clearly referring to the plaintiff among others) who were so careful not to let a printing contract of $10,000 or $12,000 get by their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts running into the hundreds of thousands was for the protection of the city's interest and not because of a split as to a possible rake-off * * * We have had one year of Tammany. We can't stand another.

The formal judgment of the court is expressed in general terms and makes no distinction between the several counts (if I may be permitted to use the old fashioned term) in the statement of claim. But in the argument of counsel before us, it seemed to be conceded that the judgment appealed from must rest upon this paragraph alone.

The innuendo thereto in the statement of claim is as follows:—

> meaning thereby that the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of "Tammany."

No witness was called to support this innuendo and we are left to conjecture.

I am unable from reading that article, indeed all the articles in their entirety, to attach any such meaning as Mr. Justice Stuart places thereon.

I think we must look at all the facts and read all the articles and understand so far as we can the situation with which the writer of the article is dealing before we can even approximately reach a correct interpretation of this paragraph.

The article was largely based on the action, or want of action, on the part of the mayor and those in the

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Idington J.

council usually supporting him. The respondent would have us believe he was a man of independent action in everything and not tainted with the common frailty of uniting with others to push forward any agreed on policy.

He seems to have been a respectable man who was nominated on a municipal ticket along with the mayor, and that ticket seems to have carried at the election in December, 1913, for the part of the council of 1914 to be then elected.

His knowledge of his colleagues was, according to his own story, so slight that I infer he knew little of Edmonton's chosen people.

Indeed he seems to have been such a stranger that I doubt if he could ever have been elected but by reason of his being placed on their ticket or some one else's ticket.

And at the organization of the council for the coming year, he was kindly taken by the hand on the part of those on whose ticket he was elected, and selected as one of the chosen three to strike the standing committees for the year.

That labour, he tells us, was not very arduous, for when he retired to a room with the other two, who were certainly then friends of the mayor, he found the lists all ready. All he had to do was to assent, and he instantly assented accordingly.

How could a stranger given a place on two committees, when some had to be satisfied with only one place, refuse to thus assent? Or had he been consulted beforehand?

Certainly if we analyse the composition of the committees thus struck and bear in mind so much of the council's doings as presented to us, someone close to the mayor had been consulted, unless we attribute

the result of these labours to some miraculous inspiration.

As any one of experience knows, the formation of these committees was perhaps the most important step of the year, either to promote the general good or the strengthening the hands of the mayor, or someone else, bent on dominating the council. Hence the due preparation of the lists of men constituting the needed committees. There is much in the result arrived at which shews the mayor had a policy of his own and saw to it he could control things generally as he desired.

The respondent, later, on the 3rd of February, although on two committees already, was chosen as a member of the Health and Safety Committee, when a Mr. Calder, of whose position as one of the opposition to the administration party there seems to have been no doubt, had resigned from that committee.

In light of the foregoing and what I am about to advert to, I think ordinary people, only conversant with ordinary actions of public men and their associates, would be quite justified in assuming and saying that the respondent was looked upon, by the other supporters of the administration, as a general supporter thereof. And as such men often know a man better than he knows himself, they might be quite justified in setting him down as such.

The organization for business seemed according to practice and policy to require commissioners to be appointed of whom each was in charge of the department allotted to him. This year, there were four such salaried officers of whom one was supposed to be under the Safety and Health Committee which had to deal with the police department. Perhaps it would be more correct to say the committee was under the

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Idington J.

commissioner. The commissioner assigned to the charge of the police was one that respondent had voted to place there.

The chief of police, an excellent officer, it is admitted, at the dictation of the mayor, was driven out of the service, and step by step the condition of things became so disgraceful that there was an outbrust of public indignation early in February.

The respondent admits having heard on the 1st of January and perhaps before, that prostitution was on the increase in the city. Mr. Justice Scott reports that the general increase of crime, which is the usual accompaniment of such a condition, is not traceable till about early February and so continued until the investigation.

The most pitiable thing in this case is the respondent's story of all he ever did to put a stop to this carnival of vice that Mr. Justice Scott's report sets forth as existent.

He voted for an investigation and brought a trifling incident or two to the notice of the commissioner besides asking him to restore a respectable policeman who had been dismissed.

If he had no more force of character than to rest satisfied with that course of conduct and serve on that committee in silence, as he seems to have done for four months, whilst the criminal part of the population were having a fine time, under the policy of the administration of the city, I assume he is, by reason of his thus lending his respectability for others to hide behind, not entitled to complain of being treated as one of the mayor's supporters.

It likely never would have been necessary to hold any expensive judicial inquiry such as began in the

following June after four months of agitation, had the respondent, and such as he, done their whole duty.

To remain almost dumb in such a position as he was given at the hands of the mayor and his friends was in my opinion an unworthy toleration of evil policies that was deserving of criticism and censure.

If not an active pandering to the desires of the seamy side of social life, it is a policy likely to reap its reward from that side, in kindly remembrance at election times.

If that is not in accord with just what "Tammany" sometimes stands for in popular estimation and expression, I misunderstand the term.

Neither Tammany nor any other organization ever sinks so low as to be in action wholly wicked or composed entirely of wicked men. The most deplorable thing about what Tammany and its like are betimes supposed to stand for, is the facility with which respectable men lend their support to those dragging down what was originally respectable. Alone they would be powerless. The aid of respectable men willing to give their countenance to those of evil mind is the menace of what may ultimately destroy free institutions.

It need not necessarily be a slavish and unfaltering support but yet enough to lend aid and encouragement to that combination of men who are pursuing an evil or dangerous policy which entitles the press to classify them as of that party or faction and subject to more or less severe criticism as the occasion calls for.

There are several incidents in the later development of the municipal mangement by the mayor and those supporting him, in which the respondent voted with them, which formed the subject of some of these attacks complained of.

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Idington J.

These incidents furnish concrete illustrations, either of the party alliance of respondent with the administration party (or faction as he on examination for discovery designated the parties in the council) or an identical conception of duty in given crucial tests of the principles which guided him as an alderman in the discharge of his duty. In either alternative he does not seem to me to have any right to complain of his classification by the writer of the articles, if his votes on these occasions reflect his views of public duty.

The mayor conceived the idea that the slow method of voting the moneys which lent itself to obstructing the aims and desires of the administration should be swept away and power sought to constitute a two million dollar fund for the council to draw upon, and for this proposal the respondent voted. It was adopted in haste and without due consideration submitted to the electors who refused their assent.

They were entitled to have the fullest consideration thereof by the council before being called upon to vote. They were entitled to assume that the council had only after such consideration decided to recommend the adoption of such a scheme before putting the city to the expense of such an election. Moreover they were entitled to look to these chosen men for guidance.

I am unable to justify the method of the submission or to understand how such risks as involved in the adoption of the scheme, liable to be operated by the men who had brought disgrace upon the city through the mismanagement of police affairs, could properly be supported by any one possessing the experience of that mismanagement, yet respondent tells us he was independent in so acting.

There is another concrete illustration of how the administration acted and in doing so got the support of the respondent in a way of which the objectionable feature is easily understood. I refer to the letting of a contract for printing the telephone directory.

Three tenders were the same on one basis affording greater service than a fourth for a less figure. It seems the superintendent selected that, of the three first named, given by the Esdale Press which had given satisfactory service. It is charged that the difference between that tender and the one favoured meant a loss to the city of $1,700, or, in another way of putting it, possibly $2,000 to $2,500. I cannot find these figures verified. But that there was a loss does not seem to be seriously denied.

The civic commissioners were approached by the printing company writing a letter and pointing out some things which possibly entitled it to some consideration from the point of view which had been taken earlier in the year.

And it then ended the letter thus:—

> It is the aim of the printers of the city to see the work equally distributed so that the condition of affairs that obtained during 1913, in which year the *Bulletin* Job or Esdale Press obtained seven-eighths of the city's printing does not occur again.
>
> We favour the distribution of the city's printing on the pay roll basis and are anxious to include the Esdale Press in a just distribution, but we feel that the letting to one firm of a contract that is likely to reach the $12,000 mark is putting the whole matter back where it was in 1913. Being taxpayers and employers of labor we feel that your Commission Board will see the justice of this course.

The council ultimately adopted this scheme in substance and the respondent supported it. It seems to me a most vicious principle of action on the part of the majority, including the respondent.

If proper to apply any such rule to printers why

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Idington J.

not extend it to contractors of every kind giving the city a supply of labour and material? And the same mode of reasoning would shut out all outside contractors. The printing or other contractors would no doubt thus get better prices and all classes so involved would if the scheme of division were fairly conducted have reason to rejoice. But what of the rest of the ratepayers who would not fall within the contracting classes yet had to help foot the bills in their taxes?

This, as I understand it, is alleged to be a leading feature of what is sometimes offensively referred to as the "Tammany System."

The reward the respectable alderman gets is electoral support and the baser elements occasionally get a something more commonly called a "rake off."

The adoption of such a method is doubly offensive in the case of the printers publishing newspapers. He who saps the independence of the press is the worst corrupter of the people in any community.

The amount involved in this case was small, but well tended and cared for the plant would grow.

Yet it is to the article complained of herein which trenchantly criticised this conduct of the majority, including respondent, responsible for the adoption of such methods, in dealing with the printing for the city, that the judgment below refers in order to find the meaning of the language used.

In the paragraphs I have quoted above as that upon which the judgment rests there is blended an allusion to this very transaction and to a something else I am about to deal with and explain how I understand it and the allusion respecting it.

So far as the paragraph alludes to the printing business I hold the appellant has amply maintained its plea of justification.

The "split on the paving contracts running into the hundreds of thousands," etc., cannot be understood without bearing in mind what is sworn to have taken place.

It was proven and not denied in argument that there were such paving contracts before the council in April, and that in relation thereto there seemed to have been some split, or division of opinion let us put it, between some members of the council usually referred to as the administration or its supporters or as a faction.

The result of that difference of opinion led the mayor to publish in a local newspaper an interview giving, as I infer from the evidence, his justification of some proposal to withdraw the proposed paving contracts. In that interview he had referred to "a gang of wolves" and as a result thereof no doubt there was much speculation as to who composed the "gang of wolves."

It is proven that, following that publication, Alderman Driscoll, up to then a steady supporter of the mayor, demanded, in council, an explanation from the mayor of whom he referred to, that the mayor refused and Driscoll left and said he would not attend till an explanation was forthcoming and ceased to attend council meetings for some weeks thereafter.

He did come back again though no explanation was offered so far as the public knew.

What was the meaning of all this? There certainly had been a grave difference of opinion and rupture of some kind between those concerned and it was a matter well deserving of criticism. Indeed, an investigation of some kind would have been in order but respondent did not move for it.

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Idington J.

The city's charter provides for several methods of investigation including a committee of the council and when respondent failed to move, he cannot have treated the matter so seriously as the Court of Appeal has done.

All the paragraph, upon which the judgment rests, says and means in that regard is that the electors were entitled to think in view of the printing contract business, and the mode of dealing with it, that there was a something in the split not merely for the protection of the city's interests, but because of a split as to a possible rake off. By whom that was expected is not stated. It certainly could not be by all, else there could have been no split. It certainly indicated something that those concerned had no desire to have cleared up. It did not involve the mayor for it is he that made the accusation.

Yet I most respectfully submit that he could maintain an action upon this paragraph by the same reasoning as the judgment puts forward to maintain that of the respondent.

All said therein relative to the "gang of wolves" cannot found any action. Indeed, no one seems at the trial to have supposed so. The respondent's answer as to it does not indicate he had any grievance as to it. But as to the printing business he assumed a different attitude and says there was nothing wrong in it he ever knew of. I differ from him for the reasons already stated.

I therefore cannot find anything in the paragraph but criticism of facts, well and amply proven and deserving what was said and needed to be said in the interest of the public.

There are many other illustrations of the curious views held by some of those concerned of their public

duty in transacting the city's business needless to dwell upon.

Moreover, it is to be observed that the appellant in the very article complained of set forth many of these cases as well as those I have mentioned and gave the division lists upon them, wherefrom the reader could see wherein the respondent occasionally opposed his colleagues, and whether or not he was in serious or important matters generally of the party supporting the administration.

Even if there had been something more than appears in the case as a whole when a learned trial judge has had before him the man and the situation during a long trial, as the learned trial judge here had, and he dismissed such an action, his finding should not, I respectfully submit, be lightly set aside.

If it had been the verdict of a jury, it must have stood unimpeachable.

In a case of this kind where the defendant had given in the strongest terms an explanation that should remove all suspicion of personal dishonesty and pointed out that anything said was relative to his public acts and these acts are plain and palpable so that any one reading can tell whether or not the criticism is fair and it is found by a learned judge fair, it should rest there.

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

DUFF J.—This appeal should be allowed and the action dismissed with costs. The primary tribunal in this instance was a judge without a jury; but that does not, in my judgment, in the circumstances of this case, greatly affect the principle upon which the verdict

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Duff J.

should be dealt with. It is impossible fairly to construe the publications of which the respondent complains without reference to the circumstances existing in Edmonton and to the atmosphere in which the articles were published and read. Having regard to the facts which were notorious and in the light of which the public would read the articles the learned trial judge might, I think, reasonably hold the expressions which the Court of Appeal held to be actionable to be a not unreasonable comment upon the conduct of the group of municipal politicians controlling in part, at least, through the plaintiff's assistance, the municipal administrative machinery which was notoriously exerting its authority and influence in ways tending to destroy respect for the law and to propagate public immorality.

The conduct of this group, when considered as a whole as exhibited in the evidence, gave too much ground to suspect some of its members of designs in relation to the municipal finances; strong language with regard to the group as a group was both natural and justifiable; and I am by no means satisfied that the learned trial judge was wrong in holding that the plaintiff was not charged with anything more disgraceful than giving his support generally to this ring —and by means of that support enabling it on critical occasions to retain control—a charge proved in fact to have been true.

ANGLIN J. (dissenting)—The holder of an elective public office seeks damages from the proprietor of a newspaper for the publication of a series of articles which he alleges contained libellous statements in regard to his discharge of the duties of his office. The defences set up are "no libel" and "fair comment."

In dealing with such a case two dangers confront the courts, which are veritably a Scylla and a Charybdis. On the one hand the right of fair comment on the conduct of public business must not be so restricted that one of the chief instruments for protection against corruption and maladministration in public affairs will be rendered impotent. The publicist who attacks corruption and incompetence in the conduct of public business and has the courage, when justified by facts, to say to a guilty public representative "Thou art the man," should have the assurance that he can rely upon the courts to protect him against the blackmail of the unmeritorious action for libel. On the other hand, a newspaper writer cannot be allowed, under the cloak of fair comment, to make with impunity against a public man in regard to the transaction of public affairs, charges which are not merely untrue but for which there is in fact no foundation on which they could reasonably be based and the libellous character of which, if made against the same man in regard to the administration of a private trust committed to him, no one would dream of questioning. By permitting such libels on public men to pass without condemnation the courts would not only discourage the citizen who esteems his good reputation at its true value and is properly sensitive to attacks upon it from undertaking public office, but would go far towards stamping with approval the wholly vicious idea that the conduct of public business is not subject to the same code of morals as that which governs the performance of fiduciary duties in private life.

What else is meant by the contention, thinly veiled, if at all, that, while such conduct is "reprehensible," so long as the writer abstains from suggesting

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

the motive of personal pecuniary profit or advantage, it is not libellous to charge an alderman with having been a party to the manipulation of contracts involving the expenditure of civic funds "with a view to securing the interests of 'the boss' and his friends rather than those of the city"—"with a view to private profit rather than civic gain," and in such a manner that "the taxes are made to pay for the votes which keep the controlling majority in their places as aldermen?" What other significance has an "apology" in which, after setting forth the following paragraph from the notice served complaining of the alleged libel:—

> The statements complained of are false and malicious and are libels upon Mr. Sheppard in that they falsely charge him with being guilty of the crime and offence of aiding, abetting and protecting crime and criminals, encouraging and protecting vice, and as an alderman, conspiring with others to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of "Tammany," and in that they falsely charge him with fraudulent, dishonest and dishonourable conduct and motives as an alderman of the City of Edmonton, and by the production of the findings of Judge Scott and otherwise attempt to prove the truth of the statements against him,

the writer, while disclaiming an intention to reflect on the personal character or motives of Mr. Rice Sheppard, and withdrawing and expressing regret for the publication of any statement which could be reasonably so construed, asserts, as to *Alderman* Sheppard, the right "to take an entirely different stand," adding:—

> It is not necessary to reiterate the statement of the *Bulletin's* position regarding the results of Tammany administration or its membership.

I agree with Mr. Justice Stuart that

> It is fallacious to say that any man leaves behind his personal character when he enters public life by accepting an office of honour, or that he can be safely though untruthfully accused of dishonesty and corruption merely because it can be pleaded that he was being referred

to in his capacity as a public man. A man's moral character is the same whether in private or public life and is in either case equally entitled to the protection of the law from libellous attacks.

A homily on false standards of morality in public life is not the purpose of these observations. They are intended merely to indicate the point of view from which, in my opinion, the consideration of the case at bar should be approached.

I agree with the learned judges of the Appellate Division that their function in dealing with an action for libel tried by a judge without a jury is the same as in any other case where that has been the mode of trial. Our statutory duty is to give the judgment which they should have given.

The inquiry with which we are immediately concerned is whether the judgment of the Appellate Division holding that the *Bulletin* Company had libelled the plaintiff Sheppard is right or wrong. Did that company's newspaper charge the plaintiff with having been guilty of the gross breach of the public trust committed to him as an alderman which conscious participation in the handling of municipal affairs and the awarding of civic contracts for the purposes above indicated would involve? Upon the facts in evidence is such a charge defensible as "fair comment?"

I put aside the alleged libels on the plaintiff in connection with matters dealt with by the report made by Mr. Justice Scott, who had held a judicial investigation into the manner in which the "social evil" had been dealt with by the city council and the police of Edmonton. In this particular, affirming the judgment of the trial judge, the majority of the judges of the Appellate Court held that what the defendant company had published, though no doubt

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

perilously near the line in view of the attitude of the plaintiff upon that question, did not exceed the bounds of fair comment because in their opinion

> fairly and fully read in the light of all the circumstances (it) could not be taken as imputing (to the plaintiff) a personal and corrupt intention to encourage vice and crime.

Mr. Justice Beck thought otherwise. I am not prepared to hold that the conclusion of the majority on this branch of the case was so clearly wrong that we should reverse it.

A civic election took place in Edmonton on the 14th of December, 1914. At the same time the question whether a new charter introducing municipal government by a commission should be sought from the legislature was submitted to the electors. The plaintiff had been elected in December, 1913, as alderman for a term of two years and was therefore not a candidate for election in December, 1914. The defendant affirmed in its statement of defence, and (speaking generally) I think it proved, that during the year 1914 the affairs of the city had been controlled by a "party" in the city council which usually supported Mayor MacNamara and comprised a majority of the members, including the plaintiff, and that this "party" was known as the MacNamara administration.

The publication of the series of articles in which the alleged libels appeared began on the 21st of November, 1914. I make extracts from them, necessarily somewhat copious, confined however to the portions relevant to the crucial question whether they charge the plaintiff with having committed the gross breaches of public trust in regard to civic expenditure outlined above. The passages set forth in the statement of claim and alleged to contain this charge are italicized.

In his plea the defendant has claimed—and it is his right—that the series of articles should be read and considered as a whole. I have so dealt with them.

An article, published on the 21st of November, contains these passages:—

The *Bulletin* has received from W. H. Todd, secretary of the "Charter Committee," what the committee is pleased to call "an open challenge" to W. T. Henry, Hon. Frank Oliver, James Douglas, M.P., George S. Armstrong (postmaster), A. F. Ewing, M.P.P., Dr. H. R. Smith (deputy mayor), and W. J. Magrath, to debate the question: "Shall Edmonton adopt Elective Commission Government as provided in the new charter upon which the electors will vote on December 14th?" Evidently the charter committee is looking for a line of advertising that will achieve the main purpose they have in view—namely, to take public attention away from the matter that is of immediate and pressing concern by directing it towards a subject that is at the moment rather of academic than of practical interest.

* * *

The men who bedevilled the city's affairs during the current year are the men who are shouting for a new franchise and a new form of government. If there had been another or any other form of city government that they had control of, would the results have been different? Would the election of Messrs. McNamara, Clarke, East, May, Driscoll, Kinney and Sheppard, or any five of them as commissioners, with absolute and arbitrary power to do just what they pleased, have made them do any less harm than they did when they had control by being a majority of the council?

Would they have been less likely to use the taxpayers' money to build up a Tammany organization on strictly New York lines?

Having been served on behalf of the plaintiff and others with notices of their intention to bring actions for libel on account of these statements in the article of the 21st of November, and others not now relevant, the defendant, on the 28th of November, published another article from which I extract the following passages:—

TAMMANY SHOWS ITS TEETH.

Aldermen Sheppard, Driscoll and Kinney give notice of libel suits against the *Bulletin*, while Alderman Clarke threatens the "Unwritten Law" against Rev. Stewart—a new way of establishing confidence in the good faith and fair play of the Tammany candidates.

There is just one specific statement in the extract complained of:—

"The men who bedevilled the city's affairs during the current year are the men who are shouting for a new franchise and a new form of government."

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

If the three martyrs take exception to this statement, the public will be delighted to hear from them or their colleagues now offering for election in what particular it is not correct and the *Bulletin* will be pleased to retract, apologize and pay costs to date if it can be shown not to be true in substance and in fact, or not to have been made purely in the public interest. Messrs. Sheppard, Driscoll and Kinney will surely not deny that the city's affairs have been "bedevilled" during the current year. *Neither can they successfully deny that they formed part of the council majority that controlled civic affairs during that part of the year when the "bedevilling" was done.*

The members constituting that majority are mentioned for the sole purpose of fixing in the public mind the fact that there was a definite majority—as it could not be definitely fixed in any other way—and not with any intent of reflecting upon their personal characters, action, or motives or the personal characters, actions, or motives of any one of them. In no way can the extract be fairly construed as such a reflection except in so far as the personal character of a public servant may be affected by his public actions, or the result of actions or failure to act for which he as a public servant is responsible.

If it is not the duty as well as the privilege of the press to criticize the results of the administration of public affairs by the elected representatives of the people, and to fix responsibility for acts of administration and their results upon the men from time to time elected or seeking election, we have passed from a condition of democratic government to that of irresponsible tyranny, which is none the less tyranny because it has the sanction of law—if it has that sanction.

An article of Dec. 1st opened as follows:—

HOW TAMMANY BUYS CONTROL OF THE PEOPLE WITH THE PEOPLE'S MONEY.

Tammany tactics are the methods by which the taxes of the city are made to pay for the votes which keep the members of the controlling majority in their places as aldermen. That is, money is paid out for work or material, either directly as wages or for purchases, or by the awarding of contracts to such persons and in such manner as may be expected to ensure their support and the use of their influence at the polls for the aldermen who do the bidding of the "boss" at the council board.

In the first place, the business of the city is dealt with as being the business of the "boss," not of the citizens, and in the second place it is directed with a view to securing the interests of the boss and his friends rather than those of the city. When the city's business is handled with a view to private profit rather than civic gain it is inevitable that it is not well done, or not done at all, while the city's money is spent and the city's credit destroyed.

The article proceeds to deal with steps taken in the council which resulted in the awarding to the Edmonton Printing and Publishing Company of a large printing contract for work which had previously

been done by The *Bulletin* Job, or Esdale Press, Aldermen Clarke, Kinney, Sheppard and Driscoll having supported the change. The article proceeds:—

The foregoing recital of facts shews that the contract for telephone directory was:—

Not let to the firm which could give the most efficient service.

Not let to the firm that tendered at the lowest price.

That the Tammany majority in the council took out of the hands of the commissioners the letting of this and other contracts because they were determined they should go to the firms that could and would be of most advantage to them in the coming elections without regard to the interests of the city.

The Esdale Press was absolutely boycotted from city work from May 1st until November 1st for no other known reason than that the *Bulletin* company held a part of the stock in the Esdale Press and the *Bulletin* did not support the administration. No doubt the *Bulletin* could have traded its support of the interests of the city and of common decency for fat printing contracts for the Esdale Press, but neither the *Bulletin* nor the Esdale Press are in that line of business.

In this connection it is in order to point out that the evident reason why the Tammany majority was so insistent that the telephone directory contract should go to the Edmonton Printing and Publishing Company was because there is produced in the office of that company the only surviving representative of journalistic thuggery in the city since the decease of the *Official Gazette* and the *Daily Capital*. No doubt the grass has been short in recent weeks, and unless the city till could be tapped it would have to follow its late confreres, and Tammany would have been without an instrument of ruffianism with which it might hope to frighten off criticism and opposition at the polls, during the present contest.

Tammany always works for Tammany, and the joke is that the taxpayer "pays the freight."

An article of Dec. 2nd, contained the following:—

WHO IS TAMMANY?

Why did it split—And, Why Again Unite?

We have government by majority in Edmonton civic affairs. A majority of the electors voting elect the council. A majority of the Council hires or fires the commissioners, appoints the committees, votes the estimates, passes by-laws, and generally governs the city. The mayor is the administrative head of the city government and the members of the council usually acting with him form the majority that enables him to carry out his policy and constitute the "administration." If the administration is conducted on Tammany principles and for Tammany purposes—that is, to secure private ends instead of the public good—the members of the council who usually form part of the administration majority are properly responsible to the people for what is done and for the results of its being done. It is not necessary, nor would it be advisable, that the supporters of

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

the administration should always vote together. So long as enough of them vote together to maintain Tammany control of the city's affairs, it diverts public attention from the true conditions if from time to time one or another votes the other way—assumedly for reasons of principle.

The aldermen who always voted against the mayor's proposals are of course not members of the "administration" or Tammany, and are not responsible for the mayor's policy or its results.

The Bulletin is now being threatened with three actions for libel because it intimated that Mayor McNamara and Aldermen Clarke, East, Driscoll, Sheppard, Kinney and May were, as members of the administrative majority, responsible for the condition of city morals and finances. As to whether there was or was not such a majority and whether these men or any of them were members of it, it is necessary to go to the records.

The writer then gives what purports to be an analysis of votes in council during the year to demonstrate the existence of an administration party of which the plaintiff was a member. The analysis includes this paragraph:—

On April 29th, the administration apparently split on the question of paving. The mayor's proposal to drop the entire paving programme was opposed in discussion by Driscoll and Sheppard. Later Driscoll ceased attending the sittings of the council, pending explanations by Mayor McNamara as to who were members of the "gang of wolves" to whom he had alluded in a published interview. Still later Driscoll again attended council meetings without any public explanation, such as he had demanded.

Continuing, the writer says:

It will be noted that although Messrs. Sheppard, Driscoll and Kinney from time to time voted against the administration, of all the instances mentioned above only in the case of the motion to withdraw the three money by-laws did the vote of any one of the three prevent the will of the administration from being carried out. On that occasion, the mayor—the then boss—was absent which no doubt accounted for the error. Or it may have been to shew the acting mayor that although acting mayor he was not actually "boss."

Nothing more seems to be necessary to shew that there was an administrative majority at the council board until the time came for awarding the paving contracts. The paving contracts ran into a great deal of money, and amongst a large number of paving contractors there is always a possibility that one or more may be approachable. The members of the council who were so careful not to let a printing contract of ten or twelve thousand dollars get by their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts, running into the hundreds of thousands, was for the protection of the city's interests

and not because of a split as to a possible rake-off. Mayor McNamara's reference to his efforts to protect the city against a "gang of wolves" in connection with the paving contract still stands without public explanation to the man who publicly held himself to be affronted by it. We have Mayor McNamara's word that there was a "gang of wolves." His statement has not yet been challenged. He and his colleagues are the men who ought to know—and evidently they do know. We have had one year of Tammany. We can't stand another.

On Dec. 5th appeared an article intituled

AN APOLOGY, TWO LETTERS AND CIVIC COMMENT.
Apology to Mr. Rice Sheppard.

This apology has been already noticed. The article concludes with this paragraph:—

It is not necessary to reiterate the statement of the Bulletin's position regarding the results of Tammany administration or its membership. Alderman Sheppard and his advisers are necessarily aware that the present general financial stringency affects the newspapers, as well as other lines of business. They know that one daily paper in Edmonton has recently suspended and that those which remain have to struggle to keep their heads above water. At such a time it has no doubt been figured out by Tammany that the Bulletin could be made to "lie down" during the civic elections, if plenty of libel suits were threatened or brought. The Bulletin has been in business for some years in Edmonton. During those years it has maintained a measure of reputation for dealing with public affairs from the standpoint of the public interest, frequently at considerable risk and cost. A libel suit is a serious matter under present conditions. But the most valuable part of the capital of a newspaper is its reputation. The Bulletin is placed in the position that it stands to lose either capital or reputation, if Alderman Sheppard can use the courts of the country to that end. Under all the circumstances it will have to take a chance on losing the capital, rather than the reputation. How far the citizens will on the 14th condone a system of terrorism ranging from threats of the "unwritten law" to libel suits, as a means of preventing criticism and deterring opposition to Tammany and its candidates, remains to be seen.

At the trial the president of the defendant company in his evidence gave a definition of the word "Tammany" similar to that above quoted from the article of the 1st of December. That word as used in the articles complained of probably required neither innuendo nor definition to make plain and obvious its defamatory signification. If a glossary were necessary the defendant supplied it in the article

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

of the 1st of December. After having read and re-read the articles complained of I entertain no doubt that they charge the defendant pointedly and directly with having been a member of a "Tammany" party in the city council, which had had control of civic affairs for the current year—that they thereby charge him with having, as a member of that party, pursued

methods by which the taxes of the city (were) made to pay for the votes which (would) keep the members of the controlling majority (the Tammany party) in their places as aldermen,

with having "dealt with" the business of the city

as being the business of the "boss" (the mayor; see article Dec. 2nd), not of the citizens,

with having aided in directing the conduct of civic business

with a view to securing the interests of the boss and his friends rather than those of the city,

and with having been a participant in handling

the city's business * * * with a view to private (whose?) profit rather than civic gain.

After having on the 1st of December explicitly stated that the Tammany majority in the council (including the plaintiff) had manipulated a large printing contract and other contracts to the prejudice financially and otherwise of the city,

because they were determined they should go to the firms that could and would be of most advantage to them in the coming elections without regard to the interests of the city,

and having added an insinuation of direct corruption by saying,

no doubt the *Bulletin* could have traded its support of the interests of the city and of common decency for fat printing contracts for the Esdale Press, but neither the *Bulletin* nor the Esdale Press are in that line of business,

in its article of the 2nd of December it pointed out that the plaintiff and Alderman Driscoll had opposed

a proposal of the mayor in regard to paving contracts and then proceeded to suggest that the

split on the paving contracts, running into the hundreds of thousands, was not

for the protection of the city's interest but because of a split as to a possible rake-off.

The indirect form adopted by the writer takes nothing from the force of the charge thus made. It rather serves to emphasize it. This same article had stated that

the administration *apparently* split on the question of paving,

this observation having been preceded by another—

It is not necessary—nor would it be advisable—that the supporters of the administration should always vote together. So long as enough of them vote together to maintain Tammany control of the city's affairs, it diverts public attention from the true conditions if from time to time one or another votes the other way—assumedly for reasons of principle.

The innuendo at the close of the 5th paragraph of the statement of claim,

that the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of Tammany

is fully warranted by the terms of the articles complained of. Indeed they are not susceptible of any other interpretation, and the innuendo was probably quite superfluous. Evidence to prove it was certainly not required. I agree with Mr. Justice Stuart that—

There can in this matter be no way open for an interpretation which would not impute personal knowledge and participation. And when personal corruption is charged there is no difference between the plaintiff as an alderman and as a private citizen.

If what the defendant published of the plaintiff was not defamatory and libellous,

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

written words which expose the plaintiff to hatred, contempt, ridicule and obloquy has ceased to be an accurate definition of libel or is inapplicable where the plaintiff happens to be a public man.

But it is claimed for the defendant that the matter complained of is merely "fair comment," consisting not of bare allegations of fact but either of mere expressions of opinion honestly held or of statements fairly made of inferences or deductions reasonably drawn from facts.

The statements complained of in my opinion cannot properly be regarded as mere expressions of opinion or as inferences drawn by the writer. They amount to allegations of disgraceful and corrupt conduct by the plaintiff and of grave and wilful breaches of the trust committed to him as an alderman in consciously and deliberately participating in the misuse of public moneys. *Davis* v. *Shepstone* (1).

No attempt was made to prove facts from which the truth of any of the charges might possibly be a reasonable inference. No evidence was given that civic money had been expended corruptly or dishonestly for private gain; no testimony that a single contract had been given for improper motives or otherwise than in what might fairly be regarded as the best interests of the city. There was not a shred of proof of a rake-off or of a conspiracy to blind public opinion by "apparent" splits. Nothing in the nature of "a Tammany organization on strictly New York lines" was shewn to have existed.

Moreover, statements of fact and comment are so intermingled in the matter complained of that it would be difficult for any reader to discern what pur-

(1) 11 App. Cas., 187, at page 190.

ports to be the one and what the other. *Hunt* v. *Star Newspaper Co.* (1).

But if the statements in question could be regarded as merely expressions of opinion or of inferences and therefore comment, they appear to lack the necessary quality of good faith and to go far beyond a fair expression of a reasonable inference from any facts, which the evidence establishes, to have been truly stated. They indicate an absence of that "honest sense of justice" and of that "reasonable degree of judgment and moderation" on the part of the critic which are essential to sustain a plea of fair comment. *Wason* v. *Walter* (2).

In this connection our attention is drawn to the fact that the so-called administration party had diverted from the "*Bulletin* Job or Esdale Press" some large and, no doubt, profitable printing contracts. But even a person who has a spite against another or who feels that he has been grievously wronged by such other may bring a dispassionate judgment to bear upon a discussion of his work as a public representative. *Thomas* v. *Bradbury Co.* (3). No doubt that is scarcely probable; and, where the imputation of evil motives and the suggestion of deliberate breach of public trust is made so persistently as it was in the articles now under review and rests upon so little of proven fact, the suspicion that the writer was actuated by malice is necessarily grave. I prefer, however, to rest my rejection of the defence of fair comment in this case on the ground that the statements complained of cannot be regarded as mere expressions of opinion and that no facts have been established from which an

(1) [1908] 2 K.B., 309 at pages 319 and 320.
(2) L.R. 4 Q.B. 73 at page 96.
(3) [1906] 2 K.B. 627 at page 642; 18 Halsbury, p. 707, note (*m*).

1917

BULLETIN CO. LIMITED v. SHEPPARD.

Anglin J.

inference could reasonably be drawn that the plaintiff's actions as an alderman had been influenced by the wicked motives and dishonourable purpose imputed to him. *Dakhyl* v. *Labouchère* (1).

No doubt a personal attack which imputes base and sinister motives is not necessarily and as a matter of law outside the limits of fair comment, *ibid.* But

> one man has no right to impute to another whose conduct may be fairly open to ridicule or disapprobation base, sordid and wicked motives unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements but that his belief was not without foundation * * * It is not because a public writer fancies the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest * * * *Campbell* v. *Spottiswoode* (2).
>
> It is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a *bonâ fide* belief that he is publishing what is true, that is any answer to an action for libel: *ibid.*, p. 778: *Merivale* v. *Carson* (3).

He may not make statements which "convey imputations of evil sort" not warranted by the facts truly stated. *Joynt* v. *Cycle Trade Publishing Co.* (4); *Walker* v. *Hodgson* (5). That which the defendant seeks to justify as comment was, in my opinion, neither fair nor such as might reasonably be made under the circumstances. There are no facts in evidence which would warrant any man in attributing to the plaintiff that he had participated in the expenditure of civic funds "with a view to private profit rather than civic gain"—that he had knowingly aided in directing the conduct of civic business "with a view to securing the interests of the 'boss' and his

(1) [1908] 2 K.B. 325, at page 329.
(2) 3 B. & S. 769 at pages 776 and 777.
(3) 20 Q.B.D. 275 at page 280.
(4) [1904] 2 K.B., 292 at page 294.
(5) [1909] 1 K.B., 239 at pages 251 and 252.

friends rather than those of the city"—that he had voted as he did in the matter of the paving contracts "because of a split as to a possible rake-off." To bring such imputations within a plea of fair comment a defendant must establish a foundation of facts upon which they can be reasonably based. That the appellant has failed to do.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the Supreme Court of Alberta *en banc*, and that the judgment of the trial judge should be restored. I concur with Sir Louis Davies.

Appeal allowed with costs.

Solicitors for the appellant: *Griesbach, O'Connor & Cormack.*

Solicitors for the respondent: *Edwards, Dubuc & Pelton.*

1917
*May 1
*June 22

HENRY CLEMONS MEEKER (DEFENDANT)..... } APPELLANT;

AND

NICOLA VALLEY LUMBER COMPANY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale—Option—Condition precedent to payment—Prevention of fulfilment by purchaser—Vendor excused from making title.

The respondent sold to appellant a mill site comprising 108 acres of timber limits. At the time of the sale, the respondent was operating a temporary mill (the permanent mill having been destroyed by fire) situated at the northern end of the site. The purchase money was $25,000, the agreement of sale providing that the appellant was to pay $10,000 cash and take possession of the mill site and limits, and that the balance of $15,000 was to be paid by the appellant as soon as the respondent had obtained title to the mill site from the Crown. Acting on expert advice, the appellant built a permanent mill at the southern end of the 108 acres, so that the portion at the north end, where the mill had formerly stood, was so wholly disconnected and so far away from the mill that the Crown refused to regard it as a part of the mill site and the respondent was therefore unable to obtain a patent to 81 acres of the original 108 acres.

Held, Fitzpatrick C.J. and Idington J. dissenting, that the appellant was precluded by his conduct, from insisting upon the exact fulfilment of the condition that the respondent should make title to the parcel of 81 acres, before requiring payment of the last instalment of $15,000.

Per Fitzpatrick C.J. and Idington J. dissenting.—The respondent had no right to exact payment of the balance of the purchase money, as there was no provision in the agreement of sale obliging the appellant to erect a mill at all, much less obliging him to erect one upon any particular part of the land sold.

Per Idington J., the respondent, to his knowledge, allowed the appellant to go on and build the mill without remonstrating or proposing a rescission of the agreement.

Judgment of the Court of Appeal (31 D.L.R. 607, 1 W.W.R. 566), affirmed.

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

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison J. at the trial, by which the plaintiff's action was dismissed with costs. The material facts of the case and the issues raised on the present appeal are fully stated in the above head-note and in the judgments now reported.

J. A. Harvey K.C. for the appellant.
W. B. A. Ritchie K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The respondent, plaintiff in the action, by deed dated the 10th June, 1910, agreed to sell to the appellant:—

> All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia heretofore occupied and used by the said vendor as a sawmill site comprising 108 acres more or less,

also eight timber licences therein described.

And all the personal property save as therein mentioned of the vendor situate on said mill site and at other points in said County of Cariboo.

The respondent never owned the land it agreed to sell and admits that it can now never acquire title thereto.

Under ordinary circumstances when a vendor fails to make a good title to property he has agreed to sell the purchaser is entitled to recover back his deposit together with the costs of investigating the title. Further, if he undertakes to sell knowing that he has no title he may be liable in damages to the purchaser for the loss of his bargain.

At first sight, therefore, it seems rather surprising that a vendor who never had even any colour of title should claim not only to be under no liability for the

(1) 31 D.L.R. 607; [1917] 1 W.W.R. 556.

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

The Chief Justice.

performance of his contract, not only to be entitled to retain the deposit paid on account of the purchase money but to sue the purchaser for the entire balance of the purchase money.

No doubt other things besides the lands were included in the sale, but in this action at any rate the court cannot decide what is the value of the annual timber licences assigned or apportion the purchase money even if this were asked, which it is not.

It is of course necessary for the appellant to find some ground on which his claim can be supported and the only one put forward, so far as I am able to see, is that the appellant by his own acts prevented the respondent acquiring title to the land.

The land was the property of the Dominion Crown and the respondent had made application to the Dominion Government for a homestead grant of it and was in possession at the date of the agreement sued on. The mill had then been recently burned down and the appellant did not rebuild on the same site. The Minister of the Interior was of opinion that the 108 acres applied for by the respondent were not needed in connection with the mill on its new site and refused the application accordingly.

Now it was not the act of building the new mill which could be said to have prevented the respondent obtaining its grant but rather the failure by the appellant to rebuild the mill burned down upon its old site. But what was the obligation of the appellant to do this? Clearly he had entered into no express contract to that effect. McPhillips J., who has delivered the most elaborate judgment in the Court of Appeal, admits that it is necessary to find that "*it was incumbent upon respondent* (the present appellant) *to place the saw mill upon the mill site.*" I can however

find no ground by which on any principle of law we are justified in imposing such liability upon the appellant when the contract between the parties did not even contain any provision obliging the purchaser to erect a mill at all.

The courts can only adjudicate upon the legal rights of litigants and cannot undertake to make such settlement between them as they may think fair without regard to any such rights. In any event, I think it would be difficult to hold that a purchaser agreed to waive his right to have the property contracted for whilst remaining liable to pay the whole of the purchase money.

The learned trial judge went as far as he properly could in urging upon the parties the desirability of a settlement of the case and I agree in thinking that this would have been the best course. The respondent, however, rejected any such suggestion and I do not see therefore that the judge could have made any other disposition of the action than he did.

Although the three judges who sat in the Court of Appeal reversed the judgment, they did so apparently on different grounds, as Martin J.A. in his reasons for judgment says, "*there is no real dispute about the law,*" whilst McPhillips J.A. says: "*this appeal raises a very difficult question of law.*"

I would allow the appeal with costs.

DAVIES J.—I concur in the reasons of Mr. Justice Anglin for dismissing this appeal.

IDINGTON J. (dissenting)—The respondent on the 21st March, 1910, gave the appellant an option in writing to purchase eight timber claims or limits in British Columbia and a quantity of timber and lumber and mill machinery and other personal property and a

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington J

mill site situate at the confluence of Nicola River and Spius Creek containing 108 acres more or less

for the sum of $25,000, of which $10,000 was to be paid on or before the 1st June, 1910.

The recital in said option represented, amongst other things, as follows:—

> And the vendors are also the owners of that certain mill site situate at the confluence of the said Nicola River and Spius Creek containing 108 acres more or less.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the said option and either within the time specified or thereabout the balance thereof when the bargain was concluded and an agreement of sale and purchase in writing, dated the 10th day of June, 1910, was executed by said parties.

That agreement recited the facts that the vendor had agreed to sell and the purchaser had agreed to purchase the lands and hereditaments, timber licences issued by the Province of British Columbia, and personal property as thereinafter specified.

Of the property thus specified the first item is as follows:—

> All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia, heretofore occupied and used by the said vendor as a sawmill site, comprising one hundred and eight (108) acres more or less.

The receipt of the $10,000 is acknowledged and the balance was to be paid in two years from date together with interest for the first year at six, and the second year at eight per cent. per annum.

Then follows a covenant as follows:—

> The said purchaser doth hereby covenant, promise and agree to and with the said vendor that he will well and truly pay or cause to be paid to the said vendor the said sum of money above mentioned together with interest thereon at the rates aforesaid on the days and times, and in the manner above mentioned; and also shall and will pay and

discharge all taxes, rates and assessments wherew th the said land and goods and chattels may be rated or charged from and after this date; and also shall and will so long as any portion of the said principal money or interest shall remain unpaid, duly renew and keep renewed the said timber licences and pay to the Province of British Columbia, all annual or renewal fees or charges which may hereinafter become payable in respect of said timber licences or any of them. In consideration whereof and of the payment of said sum of ten thousand dollars, the said vendor hath assigned and transferred or caused to be assigned and transferred to the said purchaser, the said timber licences and all renewals thereof, and hath assigned and transferred to the said purchaser, all the said personal property, goods, and chattels freed and discharged from all encumbrances.

And it is hereby further agreed by and between the parties hereto that the said vendor shall forthwith take all the proceedings necessary to obtain a patent or Crown grant of said lands and hereditaments from the Government of the Dominion of Canada. And the said vendor doth hereby covenant, promise and agree to and with the said purchaser that on the receipt by the said vendor of said patent, the vendor shall and will convey and assure to the said purchaser by a good and sufficient deed in fee simple, the said lands and hereditaments together with the appurtenances thereto belonging or appertaining, free and discharged from all encumbrances, and such deed shall contain the usual statutory covenants. When the said deed shall have been duly executed, the said deed shall b placed in escrow in the Bank of Montreal, aforesaid, and shall be delivered to the said purchaser on the due payment in manner aforesaid, of the balance of said purchase money and interest.

Provided and it is expressly understood and agreed that the said vendor shall not be entitled to the payment of said moneys until the said deed has been placed in said bank as aforesaid.

Upon this covenant so conditioned the respondent sued for the $15,000 with interest from the 12th June, 1912, although the patent for the mill site had never been procured and, of course, the conveyance of the said lands in fee simple has never been given as agreed upon.

The learned trial judge, who heard all the witnesses and was in better position to determine than we can be what weight, if any, is to be attached to such statements of fact as relied upon by the Court of Appeal and in argument by counsel for respondent here for excusing the performance of respondent's agreement

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington J.

constituted as above a condition precedent to the right to recover the said sum of $15,000, held that there was no excuse, that the action was premature, and offered to allow plaintiff to withdraw it without prejudice to pursuing such remedy as it might be advised.

It is somewhat difficult to grasp exactly what is relied upon.

One oft repeated statement is that the appellant with others had induced some capitalists to join them in the procuring of the incorporation of a company to take over the purchase and develop the property and it had erected a mill for the purpose of doing so.

In one way the matter is put it is urged that this mill is not on the mill site in question and hence the respondent has become entitled in law to recover the full price for the property it sold. Surely it is a novel proposition that because a man is a member of a corporate company that erects a sawmill, therefore he has done some wrong to his covenantor and hence the latter has thereby become entitled to disregard his obligations.

Again, when it is shewn that the company has in fact built a mill at least partly on the mill site and has occupied in the carrying out of the project about thirty acres of the said hundred and eight acres for the purposes thereof, it is urged that that part of "the mill site" is not the part where the respondent once had erected a mill which was burnt down and which it replaced by a portable mill forming part of the personalty sold to the appellant, and that the expectation of its re-erection exactly on that part of the mill site was so reasonable as to constitute an implication of an obligation that it would be done and hence the omission to do so relieved the respondent from the condition precedent imposed by above contract.

It appears that the original application of the respondent for a patent for the mill site was the result of two similar applications in 1907, each for a hundred acres having been consolidated and converted into an application for two hundred acres being made in 1908.

The application is not produced or its contents proven, but I gather from the evidence that pending the consideration of it by the department, one Ross had located a parcel of land which so cut into that covered by respondent's application as to leave in substance two separate parcels of irregular shape and approximately equal in quantity which together would measure a total of 108 acres of land with only a small strip of land connecting them.

It was on the northerly one of these parcels that respondent's mill which had been burnt down and said portable mill were respectively placed and used preceding the sale now in question. It is claimed that there was an implied duty resting on the appellant to build, when building, on same site. How can anything of the kind be properly imported into this contract without a shred of expression pointing to such an obligation? There never was imposed any obligation to build any mill or refrain from doing so.

I am unable to understand how there could be implied in the agreement any obligation to erect a mill at all, much less an obligation to erect one upon any particular part of the land in question.

Although the application of the respondent had been before the department for all that time under these circumstance and the urgent need of expediting the business in light of the covenant to do everything to produce a deliverance from the department answering the application, nothing effective seems to have been done.

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington J.

Let us assume respondent had done everything it could during the three months which elapsed between the completion of the agreement and the time when the company promoted by the appellant was formed, and had come to a decision to build, then the appellant had, I think, no reason to suppose either he or his company had, if ever, any obligation resting upon them to wait longer.

The company was advised by experts to build on the southerly part near where its operation could be most profitably carried on by reason of the facility afforded for forming a pond for storage of logs and other features of the property. Moreover, that was the only way the appellant could find the financial support to build a mill at all.

It is quite evident the appellant's own preference was for the northerly part of the mill site until thus convinced. What else he could do I fail to see unless to rescind the contract entirely. He was not bound to that alternative.

The company then proceeded to build but before doing so made an application to the department to be assured by it that a title could be obtained for the land actually needed to be used for buildings and the storage of logs.

The appellant made a declaration on the 13th September to facilitate this being done.

I think he had a perfect right to do so, at least after the failure of the respondent to get the assent of the department to a grant of the "mill site" it had covenanted to procure.

How long must he wait?

The judgment appealed from proceeds upon the assumption that there was a breach of good faith on

the part of the appellant by reason of some failure on his part to observe some implied obligation.

I cannot find the implied obligation. And if it ever existed three months was more than necessary to respondent to have availed itself thereof.

This judgment appealed from I respectfully submit rests upon making a contract for the parties which they did not make for themselves.

Moreover, it is abundantly clear that the whole difficulty arises from the policy of the Department of the Interior which forbade the giving of what might constitute two or more mill sites in its view.

Mr. Cowell, later on, endeavoured to get his superiors to waive the objections but the narrower view was taken and a grant refused.

The appellant cannot, in my opinion, be held bound by reason of the failure to abandon his rights. And the court has, I submit, no right to impose upon him any such obligation.

Again, the respondent relies upon the alleged statement of Mr. Cowell that appellant had said something to indicate that he had no use for this northerly part of the "mill site" sold him.

Not only does appellant contradict this but the evidence establishes clearly he always did so and that in time to correct any misapprehension in the department before ruling upon the application of respondent.

One can easily see how the misunderstanding arose. Speaking of the use of the northerly part as a place in which to erect a mill he could have no use for it, but, in the larger sense, as part of a "mill site," in the sense used by the parties to this contract, he clearly had a use for it or of some equivalent thereof.

The learned trial judge saw and heard the parties and must have accepted appellant's view of what was said.

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington J.

I do not think it is of very much importance. However, to try to attach to what was a clear misunderstanding as to something that in either view cannot help here, indicates to what respondent was driven.

It is quite clear from what transpired at the trial that less land than one hundred and eight acres would give appellant what he wants.

And it is equally clear that the quantity of land he has got does not suffice.

His good faith as well as these facts seem established by the offer made at the trial to accept forty acres instead of nearly eighty that is in question and pay the full amount.

Why such a proposition should have been spurned instead of being given a prompt response and ready and willing attempt to bring its acceptance about passes my understanding.

I am of the same opinion as the learned trial judge that upon this record the respondent has no right to succeed.

It allowed the new company and appellant to go on and build the mill it did, well knowing the fact, without a word of remonstrance.

If it had remonstrated and proposed a rescission of the agreement, or even tried to enforce that, by reason of all that had preceded and succeeded the contract, it is quite possible evidence might have been adduced (which is not in this record) entitling it to a rescission.

It might even in this case have presented an alternative claim to specific performance, and been granted relief instead of rigidly abiding by that impalpable thing called waiver when there never was any.

If the parties choose to treat the pleadings as if so

amended and take a judgment based upon the principles that a Court of Equity should act upon there does not seem much difficulty in dealing with the case. Indeed, I think it is quite reasonable to assume that such is the possible case the appellant must have faced in proceeding to build instead of proposing rescission of the agreement. Quite probably either party would have failed in September, 1911 to have got specific performance with compensation unless as an alternative to rescission of their contract.

It is one for compensation. And the basis proposed by the appellant at the trial might well be kept in view in such a reference as that relief would require.

I do not think we have any power on this record to deal with such alternative and hence need not elaborate the suggestion.

If not acted upon the appeal should be allowed with costs without prejudice to any future action.

DUFF J.—On the twenty-first of March, 1910, the respondent gave the appellant company an option in writing to purchase certain timber limits together with certain timber and lumber and mill machinery and other movable property and a "mill site situate at the confluence of Nicola River and Spius Creek containing 108 acres more or less," for the sum of $25,000, of which $10,000 was to be paid on or before the 1st June, 1910.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the option and the residue when the bargain was concluded and an agreement of sale executed, dated the 10th day of June, 1910.

The agreement contained the following covenant:—

Th said purchaser doth hereby covenant, promise and agree to and with the said vendor that he will well and truly pay or cause to be

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Duff J.

paid to the said vendor the said sum of money above mentioned together with interest thereon at the rates aforesaid on the days and times and in the manner above mentioned; and also shall and will pay and discharge all taxes rates and assessments wherewith the said lands and goods and chattels may be rated or charged from and after this date; and also shall and will so long as any portion of the said principal money or interest shall remain unpaid, duly renew and keep renewed, the said timber licenses and pay to the Province of British Columbia all annual or renewal fees or charges which may hereinafter become payable in respect of said timber licenses or any of them. In consideration whereof and of the payment of said sum of ten thousand dollars, the said vendor hath assigned and transferred or caused to be assigned and transferred to the said purchaser the said timber licenses and all renewals thereof, and hath assigned and transferred to the said purchaser all the said personal property, goods and chattels freed and discharged from all encumbrances.

And it is hereby further agreed by and between the parties hereto that the said vendor shall forthwith take all the proceedings necessary to obtain a patent or Crown grant of said lands and hereditaments from the Government of the Dominion of Canada. And the said vendor doth hereby covenant promise and agree to and with the said purchaser that on the receipt by the said vendor of the said patent, the vendor shall and will convey and assure to the said purchaser by a good and sufficient deed in fee simple, the said lands and hereditaments together with the appurtenances thereto belonging or appertaining, free and discharged from all encumbrances, and such deed shall contain the usual statutory covenants. When the said deed shall have been duly executed, the said deed shall be placed in escrow in the Bank of Montreal, aforesaid, and shall be delivered to the said purchaser on the due payment in manner aforesaid, of the balance of said purchase money and interest.

Provided, and it is expressly understood and agreed that the said vendor shall not be entitled to the payment of said moneys until the said deed has been placed in said bank as aforesaid.

I concur with the opinion of the judges of the Court of Appeal for British Columbia that the appellant company is precluded by its conduct from insisting upon exact fulfilment of the condition that the respondent should make title to the parcel of 81 acres, which, by the terms of the contract, was attached to his right to require payment of the last instalment of $15,000. When the agreement was executed all parties contemplated that a title to this property should be acquired under the provisions of the law

and the practice of the department governing the granting of mill sites; and without going so far as to hold that by implication the appellant company was bound actively to take all steps with regard to actual use of the property and the improvement of it as might prove to be necessary to enable the respondent to comply with the conditions exacted by the department, there appears to be abundant ground for holding that the appellant company, at least, assumed the onus of an obligation to do no act in relation to the property or by any communication with the departmental authorities, which should hinder or be calculated to hinder the respondent in his efforts to obtain a grant of it for the purpose of a mill site.

That must necessarily be so because as it would be the duty of the departmental officers to satisfy themselves upon the subject of the purpose for which the applicants intended to use the property, the conduct and the representations of the respondent's assignee if inconsistent with respondent's representations as to the destination of the property, might gravely compromise or entirely neutralize the respondent's exertions. To apply the test often suggested by eminent judges—it is not possible—having regard to the dictates of common experience—to doubt that if the subject had been mentioned at the time the contract was entered into that the appellant would not have been left free to obstruct by its conduct and declarations the respondent's application for a grant while retaining in full literal force the condition that the grant should be produced in order to entitle the respondent to receive the final instalment of the purchase money.

This obligation assumed by the appellant was not fulfilled and in consequence, mainly if

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Duff J.

not entirely, of the non-fulfilment of it, it became impracticable to obtain a grant in the manner contemplated or without the expenditure of a sum of money so much greater than the expenditure that would have been required, if events had been allowed to pursue their normal course, as to make it impossible to require the exact performance of the condition without plainly defeating the intention of the parties.

What is the legal result? Mr. Ritchie contends, and the court below has held, that the plaintiff is entitled *ex debito juris* to the sum of $15,000 on the ground that the condition has been purged and a good deal, no doubt, can be said for this view. Indeed, the language of Mr. Justice Willes in *Inchbald* v. *Western Neilgherry Coffee Co.* (1), cited with approval in *Burchell* v. *Gowrie Colleries Co.* (2), appears to support it; but the actual decision in *Inchbald's Case* (1) was that the plaintiff was entitled to recover such a sum as the jury, or the court substituted for the jury, might consider to be reasonable.

On principle, I think that it is the proper result in the present case. The respondent was entitled to recover the sum of $15,000 less an allowance reasonable in all the circumstances.

A reasonable allowance must clearly include the difference in cost to the respondent of obtaining the two sites. Ought it to include more? Ought it to include compensation for the loss of the site of 80 acres or rather for the failure to acquire it? After a good deal of consideration, I have come to the conclusion that it ought not. The appellant had gone into possession of the assets which he had purchased as a *unum quid*; rescission was impossible;

(1) 17 C.B.N.S. 733. (2) [1910] A. C. 614, at page 626

and he chose for his own reasons and quite properly to put into operation a plan with respect to the lay out of the property more advantageous as he conceived than the plan their predecessors had been pursuing. The departure from the old plans involved a change in the locality of the mill and together with the declarations made by the appellant's agent led to the difficulties which have given rise to this litigation. It would not, I think, be just or reasonable from the point of view of the respondent to accede now to the demand of the appellant, that the respondent should be required to compensate him for the value to him in the present circumstances of the 80 acre site, the loss of which or the failure to acquire which was mainly, if not entirely due to the course taken by him in his own interests.

ANGLIN J.—The plaintiffs seek to recover $15,000, a balance of $25,000, the purchase money for a mill site with storage pond, etc., comprising 108 acres, some timber limits and other property. A mill situated on the northern end of the site, about a mile and a quarter from the storage pond at the southern end, had been destroyed by fire. At the time of the sale the vendors were operating a portable mill where their permanent mill had formerly stood. The agreement for sale provided that the purchaser should pay $10,000, should take possession of the mill site and limits and should work the latter. The vendors undertook to obtain title from the Crown to the mill site and the $15,000 was to be held until that was done and thereupon paid over to the vendors.

Acting on expert advice the purchaser, instead of erecting a mill where the vendors had had their mill, built it at the other end of the 108 acres, placing it

1917

MEEKER v. NICOLA VALLEY LUMBER CO.

Anglin J.

beside the storage pond in a 30 acre parcel consisting partly of the pond and land included in the 108 acres and partly of seven or eight acres additional land in which he procured the rights of a homesteader—one Ross. With the mill at its north end and the storage pond at its south end, the whole 108 acres might not improperly be dealt with as a single industrial site. But with the mill at the south end beside the storage pond the 30 acre parcel formed in itself a fairly complete mill site. At all events the portion of the 108 acres at the north end where the mill had formerly stood was so wholly disconnected and so far away from the 30 acre parcel that the department, on the advice of its agent, refused to regard it and the communicating strip between it and the 30 acres as a part of the mill site on which the new mill and the pond were situated. Hence the vendors were unable to obtain a patent for 81 acres of the original 108 acres as part of an industrial site in connection with the new mill. Upon the evidence, I am satisfied that the purchaser, either because he recognized this impossibility or because, having regard to the altered situation of the mill, he regarded the 81 acres as practically useless for his purposes, informed the Crown Lands' agent that his company would not require the 81 acres and applied, apparently informally, for a grant of 29.4 acres at the south end, including the seven or eight acres over which he had acquired the rights of Ross. The Crown Lands' agent thereupon wrote the department that,

> the present company have no further use for the land originally applied for, and I would, therefore, suggest that it should be released and the application cancelled;

and he advised a grant of the 29.4 acres.

Under these circumstances I agree with the learned

judges of the Court of Appeal for British Columbia that the vendors were excused from making title to the 81 acres as a condition precedent to their right to payment of the $15,000 balance of the purchase money.

Although the action is framed simply as a common law action to recover the balance of the contract price, I see no serious objection to treating it as an equitable action for specific performance or other relief, if that be necessary, in order to make a disposition of the case which shall do justice between the parties. As a matter of equity and fair dealing, I think the vendors should give credit to the purchaser for the $5 per acre that they would have been obliged to pay to the Crown in order to obtain a patent for the 81 acres for which their application had been rejected, and also upon the same basis for the remaining 27 acres of the original 108 acres which they undertook to sell, since the purchaser will be obliged to pay the Crown its price upon this latter acreage before he can obtain a patent therefor. In all $540 should be credited on this account.

With this comparatively slight variation in the judgment *a quo*, I would dismiss the appeal. The appellant should pay four-fifths of the respondents' costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

1917
* Feb. 14
* May 1

THE BANK OF TORONTO (PLAINTIFF)..... } APPELLANT;

AND

M. M. HARRELL (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Fraud—Misrepresentation — Evidence — Bu den of proof — Promissory note—Renewal—Jury trial—General verdict—Specific answers—Judgment non obstante veredicto—Order 58, r. 4, Supreme Court Rules of British Columbia, 1906.

The respondent made a promissory note, upon the assurance by one Vanstone, a local manager of the bank appellant, that no part of the proceeds of it should be applied otherwise than as agreed upon between themselves. The respondent, however, with full knowledge of the violation of such assurance, but on being promised by said Vanstone that he "would take care of the loan," was induced to renew the note. In an action by the appellant for the payment of the renewal note the trial judge put certain questions to the jury which were answered, but a general verdict in the respondent's favour was also rendered by the jury.

Held, Idington and Duff JJ. dissenting, that no reasonable view of the evidence supports the conclusion that the renewal of the note sued upon was procured by fraud. That being the sole defence, the general verdict for the defendant must be set aside.

Per Fitzpatrick C.J.—Misrepresentation, such as in the circumstances of the present case, even if it amounted to what was called legal fraud, is not sufficient to found an action for deceit, but actual fraud must be proven.

Per Davies and Anglin JJ.—The general verdict in the respondent's favor being inconsistent and irreconcilable with the jury's specific answers to the questions put, must be ignored; and the verdict for the appellant as entered by the trial judge, and based on these specific answers, should be restored.

Per Idington J. (dissenting).—The dishonest expression of an intention having an important bearing upon the business which contracting parties are about may be just as gross a fraud in law as a misrepresentation of any other fact.

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

Per Idington and Duff JJ. (dissenting).—The admission of the evidence of the assurances alleged to have been given by Vanstone and acted upon by respondent in executing the renewals, was not in any way in conflict with the rule which forbids the reception of parol evidence to contradict, vary or add to the contents of a written instrument which the parties have intended to be the record of a transaction.

Per Duff J. (dissenting).—The execution of renewals by respondent with a knowledge of fraud, standing by itself, is indubitably an "unequivocal act" whereby he was manifesting his intention to treat the contract as binding upon him, unless attendant circumstances justify the inference that the execution of these renewals was to be treated as a provisional measure until some future settlement might be arrived at.

Per Anglin J.—Upon the evidence, respondent's acts in renewing the note were unequivocal and amounted to communications of his election not to repudiate his liability.

Judgment of the Court of Appeal (23 B.C. Rep. 202) reversed, Idington and Duff JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Murphy J. at the trial, by which the plaintiff's action was maintained with costs.

The Rex Amusement Company, of which one D. H. Wilkie (a member of the firm of Campbell & Wilkie), was a director and treasurer, was in financial difficulties. One Vanstone, manager of a local branch of the bank appellant, induced the respondent to make in favor of the Amusement Company a note for $10,000 to be discounted by the appellant, and the respondent was to be secured by a chattel mortgage on the furniture and accessories of the company, which however were subject to unpaid vendors' liens. The firm of Campbell & Wilkie was also creditor of the Amusement Company, and the bank appellant was interested in the liquidation of their claim. The chattel mortgage security could have any value only if the claims of the lien-holders were discharged by the proceeds of

(1) 23 B.C. Rep. 202.

1917

BANK OF TORONTO v. HARRELL.

the note, and the respondent alleges that he was assured by Vanstone that it would be so and that no part of such proceeds should be applied on Campbell & Wilkie's account. But $5,000 of these proceeds were so applied. Respondent, with full knowledge of such violation of the assurance given, renewed his note, though for a smaller amount, payments having been made on account, and in his evidence, respondent alleged that he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it.

On an action brought by the bank appellant, a trial was held, with a common jury. Answers were handed in by the jury to the questions put, and a general verdict was also given in favor of the respondent. The trial judge found the specific answers inconsistent with the general verdict and he gave judgment for the bank appellant for the amount of the note. The Court of Appeal reversed this judgment, finding that there was evidence to support the general verdict in favor of respondent.

Wallace Nesbitt K.C. and C. C. Robinson for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I can find no ground on which the respondent can avoid liability on the renewal note which he signed.

The trial judge in his reasons for judgment says:—"The case went to the jury on the issue that there had been again fraud in obtaining these renewals * * * the case must now be decided on the issues as submitted to the jury."

Prior to the case of *Derry* v. *Peek* (1), it might perhaps have been held that misrepresentation such as in the present circumstances amounted to what was sometimes called legal fraud. By the decision of the House of Lords, however, it must be considered to have been conclusively established that this is not sufficient, but that the law is that actual fraud is essential to found an action for deceit. The expression of an opinion honestly held, "the languagc of hope, expectation and confident belief," will not amount to a misrepresentation having legal consequences.

The jury have expressly negàtived actual fraud and I think it must be recognized that their verdict for the defendant was given on the assumption that the misrepresentations by which, according to their finding, the respondent was induced to renew that note were sufficient for their verdict.

The learned trial judge held that if the jury intended by their answers to impute fraud to Vanstone at that juncture there was no evidence on which they could make such a finding. Perhaps, in view of this, the correct course would have been for the judge not to have left the question to the jury.

I am content to restore his judgment but reducing the rate of interest from 8% to 5%.

DAVIES J.—I think this appeal must be allowed and the judgment of the trial judge in plaintiff's favour for the amount of the note sued on restored.

The action was tried before Murphy J. and a jury. In charging them the learned judge said with respect to the questions he asked them to answer:—

There are at any rate three propositions in it and they involve some law. Therefore i will be very much in the interests of the

(1) 14 App. Cas. 337.

1917

BANK OF TORONTO v. HARRELL.

Davies J.

litigants if you will answer these questions. The questions are only put to enable you to understand what I have said to you, and bring before your minds exactly what is required to be dealt with in deciding the case,

and added:

I have been requested by counsel to tell you that it is the law of British Columbia that you need not answer these questions. I have already told you that it would be very much in the interests of the parties, in my opinion, if you would answer them, but it is the law of this province that you can bring in a verdict for the plaintiff or for the defendant without answering the questions at all.

The jury answered most of the questions put to them and added a finding of a general verdict for the defendant.

The trial judge concluded that the specific answers given by the jury to the questions asked them made their general verdict for the defendant impossible and entitled the plaintiffs to judgment.

On appeal this judgment was set aside and a verdict entered for the defendant.

Macdonald C. J. did not think the answers and the general verdict inconsistent and concluded that accepting both the defendant was entitled to judgment.

Galliher J. A. agreed that the answers and the general verdict could be read together and was of the opinion that neither the renewal in February, 1915, of the original note given by defendant induced as it was by the promise of the branch bank manager Vanstone that the defendant would not be called upon to pay, nor the facts found by the jury as to the subsequent renewal given to the manager Ball and sued upon could be regarded as an election by defendant to confirm the original contract.

Martin J. A. thought the answers to the questions should be disregarded and the general verdict alone

considered and that there was evidence to support this general verdict.

McPhillips J. A. held there should be a new trial on the ground that the verdict was not unanimous and the jury had not been out the full three hours which under the law of British Columbia must elapse before any verdict other than a unanimous one could be received.

I am not able to agree with the learned judges who held that the specific answers of the jury to the questions put to them by the trial judge are consistent or reconcilable with their general verdict or that the specific answers should be disregarded and the general verdict alone accepted.

The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered. There seems to be some conflict between the authorities as to whether the same result would follow answers given to questions of the trial judge as to their reasons for their general verdict, after it has been rendered in cases where they had not been asked previously to giving their verdict to give their reasons.

In this case, however, and apparently with consent of both parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They however did answer most of them and added a general verdict for defendant.

Under these circumstances, I think the general

1917

BANK OF TORONTO v. HARRELL.

Davies J.

verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put must be ignored and the verdict entered as was done by the trial judge on these specific answers for the plaintiffs.

The jury found in answer to the first four questions, and there was evidence justifying the finding, that the respondent was induced to sign the original note through the fraud of the appellant's branch manager, Vanstone.

Counsel for the appellant admitted that on these findings it was Harrell's right upon discovery of the fraud to repudiate his liability but contended that, although in February, 1915, he discovered the fraud he waived his right and signed a renewal note for the unpaid balance of the original note.

The jury found that he was induced to sign this renewal note "by promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them," and they stated the details of such promises in answer to the 5th question by saying that they accepted Harrell's evidence and "the architect's statement that Vanstone said to him (Harrell) that he (Vanstone) would take care of Harrell's loan and would see that he was looked after. That he had taken care of Harrell so far and would still do so."

The jury further found that in signing that renewal Harrell acted upon these promises and that Vanstone's promises were not intentionally fraudulent.

A very strong argument was advanced by Mr. Nesbitt that the defendant by signing this renewal note in February, definitely elected not to repudiate the transaction on the ground of the fraud already then discovered and known to him and that Vanstone's promise made at the time that if he (Harrell) did sign

it he would not be held liable, did not release him from the liability he incurred by signing the renewal.

In other words, as I understand the contention, it was that Vanstone's promises which induced the signing of the renewal note in February were mere promises as to the future only, that they were not fraudulently made and that in so far as it was attempted to construe them as an agreement that the defendant should not be liable it must fail as such a verbal agreement would be a contradiction of the terms of the renewal note and that at any rate no such issue was presented at the trial. The trial judge says in hi judgment:—

> The case went to the jury on the issue that there had been again fraud in obtaining these renewals. Possibly it might have been contended that there was at the time of the renewal an agreement not to enforce the note, but this line was not taken before the jury, entailing as it would have grave difficulties under the decisions relative to introducing parol evidence to vary the tenor of a promissory note. Whatever the reason, the case must now be decided on the issues as submitted to the jury.

I admit the great force of the contention and it does seem clear on principle that no evidence of a verbal agreement made at the time of the signing of the note contradicting its terms would be admissible.

I however prefer to base my judgment upon the specific findings of the jury with respect to the further renewal note of August, 1915, now sued on and signed by defendant at the request of the manager of the bank in Vancouver, Mr. Ball. At this interview with Ball, Harrell went fully into the whole transaction with Ball. Harrell says in his main examination:—

> I told him then what the arrangement was I had made with Vanstone, and the way Vanstone had acted in the matter—that he hadn't carried o t his agreem nt * * * and * * * that he had taken this money and applied it to Campbell & Wilkie's account when it should have gone to pay off these liens. * * * I told him the arrangement I had * * * with Vanstone * * * that he

1917

BANK OF TORONTO v. HARRELL.

Davies J.

was to carry it, and it was never to cost me a dollar, and that he would see to it. * * * I told him that I didn't owe the note. I told him all the arrangements I had with Mr. Vanstone, that I was never to pay this thing. Ball's reply was, "Yes, Mr. Vanstone has done a lot of foolish things down there. It is not the only foolish thing he has done." Ball then told him that the Amusement Company could not even pay the interest at that time, and said, "You give me a demand note and as soon as the Rex Amusement Company get this money or Wood, Vallance & Leggatt are in a position to pay you any money, they can apply it on this note, and we won't have to wait its stipulated length of time." Thinking (says the defendant) everything was all right, I simply signed the demand note and gave it back to him."

The seventh question put to the jury and their answer is as follows:—

Did Ball by word or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? Ans. No.

Now it seems to me beyond reasonable doubt under this evidence of the defendant himself and this finding of the jury that the defendant signed the note sued on with full knowledge of Vanstone's broken, unfulfilled promises, and without any promise or inducement by words or conduct on Ball's part leading him to believe he was not incurring liability upon it and without any fraud practised upon him.

By doing so under the circumstances stated and found he definitely elected not to rely upon the alleged fraud in connection with the original note, and I cannot see that he has any legitimate defence to the action. As I have already said, I think the general verdict is irreconcilable with the jury's specific findings on the question No. 7 and is also contrary to the evidence and must be ignored and judgment entered upon the specific finding of the jury for the plaintiffs.

IDINGTON J. (dissenting)—I do not think we should interfere with the conclusion of the Court of Appeal relative to any question herein arising out of the rules

in British Columbia governing the time within which the jury are entitled to render a majority verdict or the right of a jury to render a general verdict.

In the broader way of looking at the case it is reduced to a question of fraud or no fraud in the representation made by appellant's agent and whether or not such fraud (if any) had been waived by the respondent, or he had not made his election in regard thereto, the general verdict is I think maintainable.

We were strongly pressed in argument by the proposition that the misrepresentation which can be held to support a defence of fraud must be of an existent fact.

Numerous cases of undoubted authority were cited to maintain that proposition but the question of misrepresentation of an intention as a fact was either brushed aside by the statement, equally undoubted in law, that honest intention honestly expressed, which in the result proved disappointing, could not be held fraudulent or, so far as the authorities are concerned, was passed by as if there could be no such thing.

I am of opinion that the dishonest expression of an intention having an important bearing upon that business which contracting parties are about, may be just as gross a fraud in law as a misrepresentation of any other fact.

It may be more difficult to prove such a fraud than one relative to the existence or non-existence of some physical object.

Nevertheless it may be established, as was held in the case of *Edgington* v. *Fitzmaurice* (1).

In that case there were some minor misrepresentations of fact as well as the main one expressing to

(1) 29 Ch. D. 459.

1917

BANK OF TORONTO v. HARRELL.

Idington J.

investors the intention on the part of the company to apply the money to be got by such representations as made, to certain named purposes which would indicate a possibly prosperous condition of the company's affairs when in truth the intention was to apply the money to other and more pressing needs which if truly stated would or might have indicated the reverse, and tended to prevent possible investments.

I think we can apply the law laid down there to the facts in this case. There is a very striking resemblance between the cases as to the nature of the intention.

The only difference I can see between these cases is that relative to the position of those there making the representations and that of the appellant's agent here.

It may be somewhat more difficult to understand why such an agent should misrepresent his intentions than it was to understand the directors doing so in that case.

The expression of Mr. Ball as to the agent in question, or his management of the dealing with respondent not being his only foolish act as an agent, when coupled with his relations with the firm, which profited by his success, in so inducing the respondent to become liable at all, helps to solve the mystery.

It is quite clear when one realizes the financial condition of the Rex Amusement Company and the position of the firm of Campbell & Wilkie as the creditors of that company, and debtors to the appellant, how such an agent might be so tempted.

And if he assented there is indubitable proof in the immediate transfer by the appellant's agent of a large part of the proceeds of the respondent's note to the said firm's account that he never in truth could

have had the intention, as he represented, that they were not to get any of the proceeds and that they should go to other purposes desired by the respondent.

It is equally clear how very important it was for the respondent, dependent upon security he had taken to indemnify himself, to be assured that the money being raised by his suretyship should not go to the said firm but be applied to liquidate liens or some of the liens on the company's buildings and thereby improve his position.

Leaving the firm to help itself in many conceivable ways might help to strengthen the respondent's position. The jury have by their verdict established the fact.

Can the respondents, however, be held entitled to the benefit of that in the action upon the renewal note now in question?

Or had the respondent not elected to waive and waived the fraud committed on him by his repeated renewals, though protesting all the time, and accepting reassurances of the agent that he would never have to pay a cent of the debt?

His doing so may not have been prudent, but I cannot hold that he thereby elected to waive his right to repudiate, on the ground of fraud, the original transaction which was the only foundation for liability at all.

To give effect to the contention that he had so elected would be but to help the successful promotion of the fraudulent purpose of him who had committed the fraud.

It seems idle to contend that to admit the evidence of these assurances was an infringement of the rule against varying by oral evidence the obligation contained in a written contract.

1917

BANK OF TORONTO v. HARRELL.

Idington J.

It is not at all in that sense that such oral evidence was admissible, but to rebut the possible presumption arising from signing renewals, of his election to abide by the contract, and forego his right to repudiate for fraud, the very basis of the transaction and hence that appellant could claim nothing upon such a promissory note for which there could be found no consideration if only founded on fraud.

The evidence, for example, admissible to prove fraud itself is not tendered to vary the nature of the written instrument itself.

Accommodation makers can often in particular circumstances shew by oral evidence why they should not be held liable, but such evidence is not adduced to suggest the slightest variation of the written instrument.

The evidence so understood was admissible and entitled to weight.

I think when so applied there is no more reason to contend the fraud had been waived, or respondent had elected not to repudiate, than there was in the case of *Clough* v. *The London & North Western Railway Co.* (1), or *Erlanger* v. *New Sombrero Phosphate Co.* (2), at 1277 *et seq.*, and still less than in *Lindsay Petroleum Co.* v. *Hurd* (3).

These three cases which suggest that the respondent might well have taken the ground that as a surety he was entitled to have come into court, and on the facts that are apparent, or at least possibly easier of establishment than that he risked on the issue raised, he was not treated as a surety should be, and asked as he does in fact to have the note delivered up to to be

(1) L.R. 7 Ex. 26. (2) 3 App. Cas. 1218.
(3) L.R. 5 P.C. 221.

cancelled. The law sought unsuccessfully to be applied in *Hamilton* v. *Watson* (1), and illustrated in cases cited therein, if followed, might have brought the result reached much easier.

The facts may all be in the pleading but are not so marshalled as we might desire to see in making such a case, or the principles of law I refer to clearly rested upon.

However, I need not pursue that, for I think in whichever way one looks at the whole of the evidence and questions tried, the general verdict is maintainable, and I have no doubt of the justice of the result, especially in view of the suggestion I have just made of the applicability of the facts found in the answers to the questions put to the jury, had we need to resort thereto.

A clearer conception on all hands of the many sided sort of case there is in evidence and possibility of it being presented from other points of view than taken, may have been desirable but in my view no new trial is needed.

The appellant cannot now be heard to complain of the learned trial judge's charge which was not against it on the issues as fought out and the evidence justifies a general verdict for the defendant.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—In this appeal I think there must be a new trial although the necessity is regrettable. I agree with the Court of Appeal that there was evidence which could not be withdrawn from the jury on the issue of the voidability of the promissory note sued upon because of the alleged deliberate misleading of the defendant as to the purpose for which the bank was making the advance.

(1) 12 Cl. & F. 109.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

But there was another issue raised by the pleadings in respect of which the course of the trial was so unsatisfactory as in my opinion to entitle the appellant bank to a new trial. The issue was this; the bank contends that admittedly after full knowledge of the fraud alleged the respondent executed a series of renewal notes and that this conduct constituted an election to affirm the contract as a binding contract, notwithstanding the fraud within the rule that a person entitled to avoid a contract by fraud, who, with knowledge of fraud, does some unequivocal act whereby he manifests his intention to treat the contract as binding upon him, thereby makes his election against attacking it in such a fashion as to preclude him from doing so forever.

The view of the trial judge was that as regards this issue there was in truth no question for the jury because the facts admitted by the defendant Harrell entitled the bank to judgment upon it and that is the first point to be considered under this topic.

Such an issue obviously raises two questions. First, the question of the knowledge of the person alleged to have elected to abandon the remedy he is seeking to enforce and, secondly, the significance of the act relied upon as an unequivocal act manifesting the intention to abandon his remedy. As to the first question, I gather from the charge of the trial judge that Harrell's knowledge of the fraud was not disputed at the trial, although looking at the evidence alone I should have had little hesitation in holding that there was a question for the jury whether Harrell had brought home to him before the execution of the renewals the fact found by the jury, namely, that Vanstone was deliberately misleading him as to the intention of the bank with respect to the application

of the advances—in other words, that Harrell's conduct was not only morally reprehensible but of a kind entitling him in law to rescind the contract; and one may remark in passing that it seems a little paradoxical that knowledge of the legal right to impeach the contract should, in this court, be imputed to Harrell from the knowledge of facts which the Chief Justice of this court holds conferred no such right upon him.

I proceed, however, upon the assumption founded upon the observations of the learned trial judge and strongly supported by the frame of the question submitted without objection that Harrell's knowledge was admitted.

The answer to the second question turns upon a point of law touching the admissibility of evidence. The execution of a series of renewals by Harrell with a knowledge of fraud standing by itself comes indubitably under the category of "unequivocal act" within the meaning of the rule above referred to; that is so because *ex facie* the renewal notes executed by Harrell affirmed Harrell's responsibility and affirmed his responsibility under the original contract (the promissory note first executed) since renewals given in the circumstances in which these were given do not destroy the original obligation, they merely suspend the debt. (Byles on Bills p. 257.) On behalf of the respondent, however, it is said that in order to determine whether or not the execution of the renewals with knowledge of fraud manifested an intention on Harrell's part to abandon his rights we must ascertain the circumstances known to Harrell and known to the bank and the communications which passed between Harrell and Vanstone, the bank's representative, acting on behalf of the bank in which and with reference to which the renewals were given; and it is argued since the attend-

1917

BANK OF TORONTO v. HARRELL.

Duff J.

ant circumstances justify the inference that it was understood by Harrell and by the bank, that is to say, by Vanstone, acting for the bank, that the execution of the renewals was between them to be treated as a provisional measure, all questions as to Harrell's ultimate responsibility being postponed until the affairs of the Theatre Amusement Co., for which Harrell was surety, were finally sifted, it follows that the execution of the renewals cannot be properly regarded as an "unequivocal act."

There can, I think, be little doubt that in principle the argument, up to this point, is well founded. If a letter had been written expressly embodying the terms of such an understanding, nobody would argue that the execution of the renewals amounted to an election and if the existence of such an understanding were a proper inference from facts legally admissible in evidence and proved the case could not legitimately be distinguished from the case in which the understanding was expressed in a written stipulation.

In the present case oral communications between the parties were proved, that is to say, between Harrell and Vanstone, which in themselves would support the conclusion that Harrell's execution of the renewals was not unequivocal, that is to say, that it did not convey to Vanstone the belief in a fact and was not calculated to convey to Vanstone any such belief, that Harrell was abandoning any rights he might prove to have arising out of the fraud if the bank should ultimately attempt to hold him accountable. Here emerges the point of the controversy, was evidence of these communications admissible? Broadly speaking, they consisted of assurances alleged to be given by Vanstone, and acted upon by Harrell in executing the renewals that he (it would be a question for the jury

whether Vanstone might reasonably consider Harrell's assurance to be given on behalf of the bank) would protect Harrell against responsibility. The jury has in fact found that such assurances were given, and that Harrell in fact acted upon them in executing the renewals. On behalf of the appellant bank it is contended that evidence of these assurances is not admissible as being evidence contradicting the terms of the documents which constituted the contract between the parties.

I have come to the conclusion that this contention on the part of the appellant bank is not well founded. Fraud of the kind relied upon by the respondent gives a person wrongfully affected by it a right to elect whether the contract shall be avoided or not. So long as no election takes place the contract remains on foot and especially where the contract takes the form of a negotiable instrument, the wronged person may easily lose his remedy entirely in consequence of the innocent third person acquiring rights.

The admission of the evidence was not in any way in conflict with the rule which forbids the reception of parol evidence to contradict, vary or add to the contents of a written instrument which the parties have intended to be the record of a transaction. The respondent does not attempt to contradict, vary or add to the instrument but to impeach the consideration for it, the original obligation which he alleges to be voidable by reason of the original misrepresentation, a course always held admissible and consistent with the maintenance unimpaired of the above mentioned rule. *Goldshede* v. *Swan* (1); *Morrell* v. *Cowan* (2).

The respondent's *primâ facie* right to impeach the consideration being attacked on the ground that he

(1) 1 Ex. 154. (2) 7 Ch. D. 151.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

abandoned it by executing the renewals with knowledge of the alleged fraud, it was open to him to shew circumstances from which an agreement could be inferred that his act in doing so was to be treated as done in ignorance of the circumstances pointing to the fraud, of which he was in fact aware.

Such evidence being admissible it follows, I confess I can perceive no reason for doubt upon the point, that this issue presented a question which it was the duty of the learned trial judge to leave to the jury. In view of the difference of opinion between some of my learned brethren and myself upon the point it is right to dwell a little upon it. The question was much debated in *Dublin, Wicklow and Wexford Rly. Co.* v. *Slattery* (1), and there was much difference of opinion upon it whether a trial judge might withdraw an issue of fact from the consideration of the jury where there is conflicting evidence, but where—the onus resting upon one side—there is, to use the language of Lord Blackburn, "no reasonable evidence to rebut it." The majority of the House took the view that it is beyond the province of the trial judge where there is any evidence that is anything more than a scintilla adduced by the party on whom the onus of proof lies to withdraw the issue from the jury and the distinction between "cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by the jury," is a distinction which must be recognized. (*Paguin* v. *Beauclerc* (2).) Here the incidence of the issue was as a matter of substantive law on the appellant bank. Assuming that proof of execution of the renewals with knowledge of the facts constituting the fraud alleged would, in the absence of countervailing

(1) 3 App. Cas. 1155. (2) [1906] A.C. 148, at page 161.

evidence, justify a direction to the jury to find a verdict for the appellant bank upon this issue, it is doubly clear that as against the respondent who was not supporting the burden of the issue such a direction could not after production of evidence of the assurances referred to properly be given.

The issue ought, therefore, to have been submitted to the jury. In concrete form for the purposes of this case the question for the jury was this: Did the respondent by his conduct in executing the renewals considered in the light of the communications which had passed between him and Vanstone and from the point of view of reasonable men accustomed to business, manifest on his part an intention to abandon his right to avoid the obligation he had *ex facie* undertaken in favour of the bank in such a way as to lead Vanstone, in other words, the bank, to believe that he had made that choice? This form of the question, I may say in passing, is based upon the judgment of Lord Blackburn in *Scarf* v. *Jardine* (1), at pp. 360 and 361, a case of a somewhat different character but which Lord Blackburn held to be governed by the principles expounded in the judgment of the Court of Exchequer in *Clough* v. *London & North Western Railway Co.* (2); a judgment which Lord Blackburn mentions was written by himself although delivered by Mr. Justice Mellor. In *Codling* v. *Mowlem & Co.* (3), at pp. 66 and 67, Mr. Justice Atkins applies the judgment of the Court of Queen's Bench in *Curtis* v. *Williamson* (4), at page 59, in which it is stated that "in general the question of election can only be properly dealt with as a question of fact for the jury."

This question was neither in substance nor in form

(1) 7 App. Cas. 345.
(2) L.R. 7 Ex. 26, at page 34.
(3) [1914] 2 K.B. 61.
(4) L.R. 10 Q.B. 57.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

submitted to the jury as one of the specific issues on which they were asked to pass. And it cannot be contended that any decision upon it is involved in the general verdict because the learned trial judge's charge leaves it almost untouched; indeed, the one observation directly pointed to the question, namely, that the defendant was bound to elect within a reasonable time, is an observation which cannot be supported by authority (1), at p. 35.

It is quite true that the jury finds in the answer to one of the specific questions submitted that the respondent was induced to execute the renewals upon the assurances already referred to; but the ultimate question involved in the issue of election or no election, which was a question for the jury, is not dealt with.

It follows therefore that there must be a new trial. It cannot be said that the Court of Appeal was invested with authority to give judgment for either the plaintiff or the defendant and that one or the other of them has made out a case entitling him to such a judgment.

Any power possessed by the Court of Appeal to give judgment in this case is derived from Order 58, Rule 4, which enables the court on an appeal to "draw inferences of fact and to make such further or other order as the case may require." This rule has been the subject of a good deal of discussion and it must be taken as settled that it applies to the case of an appeal from a judgment after trial by a judge and jury, *McPhee* v. *Esquimalt and Nanaimo Railway. Co.* (2); *Dominion Atlantic* v. *Starratt* (not reported); and that it enables the court in cases in which, although there was some evidence for the jury (and the trial judge consequently would be obliged to give effect to the verdict), to give judgment either against or in absence of a find-

(1) L.R. 7 Ex. 26. (2) 49 Can. S.C.R. 43.

ing on the whole case or on a particular issue involved in favour of the party on whom the burden of proof does not lie on the ground that no reasonable view of the evidence could justify a verdict in favour of the party on whom the *onus probandi* falls. That is settled by the decision in *McPhee's Case* (1) (see p. 53) and the authorities therein referred to.

But has the court power under this rule to give judgment in favour of the party on whom the law casts the burden of proof?

The discussion of this question requires some reference to the senses in which the term "burden of proof" is employed. These are conveniently indicated in the treatise on evidence in Lord Halsbury's Collection, vol. 13, at pp. 433 and 434, in the following paragraph:—

> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him. * * *
>
> The burden of proof, in the sense of adducing evidence, on the other hand, is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates. This burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings, *i.e.*, who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side.

As regards the issue of election raised by the appellant bank in answer to the respondent's defence of fraud, the burden of proof was cast by the pleadings upon the former, but the burden of proof in the second of the two senses indicated in the passage just quoted,

(1) 49 Can. S.C.R. 43.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

would have been shifted by proof of the execution of the renewals coupled with an admission of the respondent's knowledge of the fraud at the time of the execution of them. These facts, however, being coupled with further evidence, the evidence of the assurances alleged to have been given by Vanstone, the onus remained upon the appellant bank in the first sense to establish to the satisfaction of the tribunal of fact that the respondent had elected not to raise the defence he now relies upon. The jury has in fact accepted the respondent's testimony as to the assurances and I have already said sufficient to shew that, in my judgment, these assurances being treated as proved there was a question which the jury might not unreasonably find in favour of the respondent; and I am satisfied that on the same hypothesis a verdict in favour of the appellant bank if the jury had so found could not have been set aside as unreasonable.

Such being the circumstances of this particular case the Court of Appeal could not consistently with sound principle give judgment in favour either of the appellant bank or of the respondent.

I add for the purpose of avoiding a misconception that it is unnecessary to express an opinion as to the power of the Court of Appeal to give judgment in favour of the appellant bank on this issue (in respect of which the onus, in the first of the senses above mentioned, was cast upon it by the pleadings) if the correct view had been that there was no reasonable evidence to outweigh or bring to an equipoise the considerations which from the facts alone of the execution of the renewals and the respondent's knowledge of the fraud would require the inference to be drawn that the respondent had elected to abandon his remedy. I

should be disposed in such a case to apply the reasoning of Lord Blackburn in *Dublin etc. Rly. Co.* v. *Slattery*, (1) at pp. 1200 and 1202, but as the point does not arise I express no decided opinion upon it. I may add that the rule as to the burden of proof to which I have just referred is admirably illustrated in the judgments of Brett LJ. in *Pickup* v. *Thames Ins. Co.* (2), at page 599; in *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.* (3), at page 366; and *Lindsay* v. *Klein* (4), at page 204.

ANGLIN J.—The Rex Amusement Co. was in financial difficulties. The defendant, on being secured by a chattel mortgage on its furniture and accessories (which, however, were subject to unpaid vendors' liens) agreed, in March, 1914, to make in its favour a promissory note for $10,000 to be discounted by the plaintiff bank. In addition to the lien-holders the firm of Campbell & Wilkie were also large creditors of the company and the bank was interested in the liquidation of their claim. The value to the defendant of his chattel mortgage security would depend upon the claims of the lien-holders being discharged or substantially reduced. He asserts that as an inducement to him to give the company his note he was given by the bank manager, Vanstone, an assurance that no part of the proceeds of it should be applied on Campbell & Wilkie's account. In violation of that assurance (if given) $5,000 of those proceeds was immediately so applied. The defendant, however, was afterwards apprised of that fact and with full knowledge of it, in February, 1915, he renewed the company's note for a smaller amount to which the bank's claim had been reduced by payments in the interval. In his evidence at the trial he alleged that

(1) 3 App. Cas. 1155.
(2) 3 Q.B.D. 594.
(3) [1901] A. C. 362.
(4) [1911] A. C. 194.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it. Concurrently with the giving of this renewal, however, the defendant obtained from the company's landlords an undertaking that they would collect the company's earnings, that after making necessary disbursements for expenses and on account of lien payments and taking for themselves $1,000 a month on arrears of rent, they would hand any balance of the net receipts to the defendant to be applied on his chattel mortgage, and that after their arrears of rent should have been reduced to $6,000 they would distribute the net receipts *pro ratâ* between the two accounts—their own and the defendant's. At this time the defendant appears to have acted in reliance on the payments which he expected to receive under this arrangement sufficing to meet his liability on the note. This expectation was not realized, and in August, 1915, the company being again on the verge of an assignment, the defendant signed the renewal note sued on for $6,448. On the occasion of this renewal he saw not Vanstone but Mr. Ball, the manager of the main office of the bank at Vancouver. His own account of this interview shews that he was fully cognizant of the payment of $5,000 which had been made to Campbell & Wilkie, as he claims in breach of the original understanding which he had with Vanstone, and that he asserted that he had been thereby relieved from liability on the note. Yet he gave a renewal note payable on demand, no doubt in the hope that money to meet it would be forthcoming under the arrangement with the landlords.

Probably because the defendant's advisers appreciated the legal obstacle in the way of attempting to establish by oral testimony anything in the nature

of an agreement by Vanstone with the defendant inconsistent with the liability evidenced by his note, the only defence pleaded was that the note had been procured by fraudulent misrepresentation.

This action was tried by a jury. Under instructions that they might return a general verdict and were not obliged to answer the questions put to them (although the learned trial judge expressed his opinion that it was advisable that they should do so) the jury returned the following verdict:—

1. Was the making of the note induced by any representations made by Vanstone to Harrell? 7 in favour, 1 opposed.

2. If so, were such misrepresentations false to the knowledge of Vanstone and made with intent that Harrell should act on them? 6 in favour, 2 opposed.

3. If so, what were such representations? Give full particulars. That Vanstone intended to allow part of the money obtained by loan to be paid to Campbell & Wilkie after promising not to do so.

3a. Did Harrell sign the note relying on such representations? Not answered.

4. After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them? 6 for, 2 opposed.

5. If so, give details of such promises made by Vanstone. By taking Harrell's evidence here and the straightforward manner it was given, and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so.

5a. Did Harrell act upon such promises? 6 in favour, 2 opposed.

6. Were Vanstone's promises fraudulent? In regard to question 5, Vanstone's promises were not intentionally fraudulent.

7. Did Ball by words or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? No.

8. If "yes," did Ball, when causing Harrell to believe this, intend to hold Harrell if the bank failed to get its money from the Rex Amusement Company?

9. Did Harrell act on such belief? 8 and 9 answered by 7.

We the undersigned jury find a verdict in favour of the defendant.

For the defendant it is contended that the answers to the questions should be ignored and effect given

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

only to the general verdict in his favour, because the questions are not completely answered and because, even if they were, the general verdict must prevail.

The only question unanswered is No. 3a. It was so left, no doubt, because the jury regarded it as covered by the answer to the first question. If the defendant was induced to give the note by Vanstone's representations, it would certainly seem to follow that he did so relying on them. Questions 8 and 9 were put contingently. They were meant to be answered only if the answer to question No. 7 should be "yes." It was "no." I am, therefore, unable to accept the view that the answers are incomplete.

I am also of the opinion that inasmuch as the jury saw fit to answer the questions put to it, thus informing the court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict the latter cannot be sustained.

> They have explained what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. . We must take it as we find it.

If any judgment is to be entered upon it, it must be that which it warrants when taken as a whole. That I understand to be the effect of the decision in *Newberry* v. *Bristol Tramways and Carriage Co.* (1), and *Dimmock* v. *North Staffordshire Rly. Co.* (2).

Brown v. *Bristol & Exeter Rly. Co.* (3), cited by counsel for the respondent, was a case of refusal by a trial judge to question the jury after they had returned a general verdict in order to ascertain on what ground

(1) 107 L.T. 801; 29 Times L.R. 177.
(2) 4 F. & F. 1058, at page 1065. (3) 4 L.T. 830.

they had found it—a refusal which the court held to be within the right of the learned judge and proper. See too *Arnold* v. *Jeffreys* (1), where Bray J. stated the distinction between cases in which questions are put before verdict and are answered by a jury and cases in which no questions are put until after a general verdict has been given.

Taking the term "representations" in the first and second questions and the word "promising" used by the jury in their answer to the third question, there is perhaps room for doubt whether they appreciated the difference between a misrepresentation of fact such as would constitute fraud and a breach of a mere promise or contractual undertaking. But I shall assume in the respondent's favour that they did and that they meant to find a misrepresentation of present intention on the part of Vanstone, which would be a misrepresentation of fact amounting to fraud.

On the jury's answer to the sixth question and the facts in regard to the renewal in February, 1915, as given by the defendant himself, I think that he then waived any defence which Vanstone's former conduct might have given him and elected to abide by his liability to the bank. He was then admittedly aware of the payment to Wilkie & Campbell. Any misleading or inducing effect of the misrepresentation which he says Vanstone made when the original note was given was thus removed. He has not attempted to allege ignorance of the common and well-known legal effect of such a fraudulent misrepresentation probably because advised of the futility of such an attempt. *Carnell* v. *Harrison* (2). Had he done so

(1) [1914] 1 K.B. 512, at page 514. (2) [1916] 1 Ch. 328, at page 343.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

the burden of proving such ignorance at all events would have rested upon him. It could not be presumed. No new misrepresentation is suggested. He merely alleges some sort of promise or undertaking by Vanstone, clearly contractual and contradictory of the obligation evidenced by his indorsement. No such promise or contract is pleaded. Fraud is the sole defence and the jury's sixth finding is explicit that there was nothing fraudulent in what Vanstone said or did on this occasion.

The jury has again explicitly found that there was neither misrepresentation nor promise of any kind, by words or conduct, of the bank manager, in the obtaining of the renewal note of August, 1915, which is sued upon—obviously the only finding that could be made in view of the admitted facts and the circumstances above stated under which that renewal was given. Whatever fraud or misrepresentation may have induced Harrell originally to become an indorser to the bank did not affect this last renewal. He gave it with full knowledge of all the material facts affecting the existence of his liability and in reliance not upon any representation or promises that the liability thus acknowledged would not be enforced against him, but upon the outcome of an arrangement as to which he had knowledge and means of knowledge quite as complete as had the bank manager.

His acts in renewing the note on this and the former occasion were unequivocal and amounted to communications of his election not to repudiate his liability. *Scarf* v. *Jardine* (1). On each occasion the bank, on the faith of what he did, changed its

(1) 7 App. Cas. 345, at page 360.

position by extending the time for payment by the maker of the note.

The seventh finding of the jury like the sixth is inconsistent with a general verdict for the defendant based on fraud—the only defence raised on the pleadings or at the trial. Notwithstanding that general verdict, applying the doctrine of the *Newberry Case* (1), upon the verdict as a whole, judgment should, in my opinion, be entered for the plaintiffs.

But if the general verdict alone should be considered I am convinced that it must be set aside because there is no evidence to support it. It is also perversely opposed to the direction of the learned trial judge, who expressly instructed the jury that they could return a general verdict for the defendant only if they should find in his favour all the facts covered by the questions put to them. Upon the defendant's own story it is too clear to admit of doubt or controversy that when he signed the renewal of February, 1915, he elected to waive any defence that earlier misrepresentations by Vanstone might have given him. On his own version of his interview with Ball it is obvious to me that he then abandoned any idea of repudiating liability either because of alleged misrepresentations or of alleged promises made by Vanstone—which he says Ball had characterized as "foolish things"—and accepted the position of maker of the note liable to the bank in the hope and expectation that under his arrangement of February with the Amusement Company's landlords the bank's claim would be satisfied out of the proceeds of the company's business—thinking, as he puts it, "that everything was all right." Any other than a verdict for the plaintiff would, in my opinion, be so palpably perverse that it could not stand for a moment.

(1) 107 L.T. 801.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

Under these circumstances, having regard to the power conferred on the Court of Appeal by Order 58, r. 4, of the Supreme Court Rules of British Columbia, 1906, to give judgment *non obstante veredicto* for one of the parties where no reasonable view of the evidence could justify any other result, and it is satisfied that it has all the evidence before it—a power, no doubt, to be exercised sparingly and with caution (see *McPhee* v. *Esquimalt & Nanaimo Rly. Co.* (1), and *Skeate* v. *Slaters* (2), the proper course in the present case, in my opinion, is to order the entry of judgment for the plaintiff. Indeed, I strongly incline to the view that the learned trial judge should have directed the jury to return a verdict for the plaintiff.

I am, for these reasons, with respect, of the opinion that this appeal should be allowed with costs in this court and in the Court of Appeal and that the judgment of the learned trial judge should be restored, subject, however, to a variation reducing the rate of interest from 8% to 5%. *McHugh* v. *Union Bank* (3).

(3) [1913] A.C. 299.

Appeal allowed with costs.

Solicitors for the appellant: *Bird, Macdonald & Ross.*

Solicitors for the respondent: *Duncan & Duncan.*

(1) 49 Can. S.C.R. 43. (2) [1914] 2 K.B. 429.

THE TOWN OF MONTMAGNY (PLAINTIFF) ..... } APPELLANT;

AND

LUDGER LETOURNEAU (DEFENDANT) ..... } RESPONDENT.

1917
*May 30.
*June 22.

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

Expropriation—Arbitrators—Excess of jurisdiction—Award final and without appeal—Compensation—Building lots—Articles 5790 to 5800 R.S.Q.

The appellant, by means of expropriation proceedings, obtained a servitude over lands of respondent, and, under the authority of articles 5790 to 5800 R.S.Q., an arbitration took place to decide the amount of compensation payable to respondent. Prior to expropriation, the respondent laid out as building lots part of his lands, which were devoted mainly to agricultural uses. Article 5797 R.S.Q. provides that the award of the arbitrators should be final and without appeal. Appellant took an action to set aside the award of the arbitrators.

Held, per Fitzpatrick C.J. Duff and Anglin JJ.—The arbitrators were within the scope of their jurisdiction in valuing the lands of respondent as town building lots instead of as agricultural property, as the decision, as to whether the lands had a present marketable value as town lots or not, was a question of fact upon which it was the duty of the arbitrators to pass.

Per Duff J. Upon the evidence of the arbitrators, it has not been proven that they had based their award upon an appraisement of something which was not the thing they were authorized to appraise, which they would have done if they had taken, as their starting point, not the value of the property as of the date of the expropriation, including the value as of that date of its economic potentialities, but the value as of a later date.

Per Duff J.—An award, being a decision of one having limited authority, whether given by agreement of the parties or by statute, is *pro tanto* void if the arbitrator appraises something he was not directed to appraise and void altogether if that part which is void cannot be severed from the rest, it being immaterial whether the arbitrator has acted by mistake or by design.

Appeal dismissed, Davies and Idington JJ. dissenting.

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

1917

TOWN OF MONTMAGNY v. LETOURNEAU.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Flynn J. in the Superior Court for the district of Montmagny, which maintained the action of appellant and quashed the award as granting an excessive indemnity.

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

L. G. Belley K.C. for the appellant.
Maurice Rousseau K.C. for the respondent.

THE CHIEF JUSTICE.—The appellant, by means of duly authorized expropriation proceedings, had obtained a servitude over lands of the respondent for laying and maintaining a pipe line. In due course, an arbitration took place to decide the amount of compensation payable to the respondent. In these proceedings, the appellant is resisting payment of the amount awarded.

Prior to the expropriation, the respondent laid out part of his lands, which were devoted mainly to agricultural uses, as building lots with a view, as is claimed by the appellant, of enhancing the compensation which he could claim at the arbitration.

It is unnecessary to consider in particular what he did, with what purpose or with what effect, for it must be conceeded that a man has a perfect right to do what he pleases with his own property; it suffices to say that there is in the case no suggestion of anything fraudulently done in subdividing the property or in any other respect in connection with the arbitration.

The arbitration proceedings were admittedly regular. The appellants knew the basis on which the arbitrators were proceeding to make their valuation and acquiesced therein by calling no evidence to shew that it was erroneous.

Article 5797 of the R.S.Q. provides that the award of the arbitrators shall be final and without appeal.

Now, on the ground that the amount awarded is excessive and that the arbitrators proceeded on a wrong basis in estimating the compensation, the appellant is inviting the court to re-open the whole question and has put the respondent, whose property is forcibly expropriated, to all this enormous expense of legal proceedings carried from court to court in an attempt to avoid payment of part of an award of some $4,000.

It must be conceded that we cannot disturb the award merely because we deem the compensation allowed to be too great. To do so would obviously be to entertain the prohibited appeal. The appellant seeks to escape this difficulty by suggesting that the compensation was assessed on a wrong basis—*i.e.*, on the footing that the lands affected should be valued as town building lots instead of as agricultural property—and that the arbitrators thereby exceeded their jurisdiction. But whether the land had a marketable value as town building lots or had no such value and was available only for farming or market gardening purposes was certainly a question of fact upon which it was the duty of the arbitrators to pass. It is very difficult to appreciate the contention that, in doing so, they exceeded their jurisdiction. To review their determination of this issue would be to entertain the appeal which the statute excludes, and in reality to interfere with their decision as to the value of the land injuriously affected, which is of course one of the chief elements in fixing the amount of the damage for which the owner is entitled to be compensated.

I am glad to think that there is no ground on which the court is in any way justified in entertaining

1917

TOWN OF MONTMAGNY v. LETOURNEAU.

Davies J.

such a claim. The appeal should be dismissed with costs.

DAVIES J. (dissenting)—I concur with the reasons stated by Cross J. (dissenting) in the appeal court of King's Bench, Quebec, for dismissing the appeal to that court, and would therefore allow the appeal and confirm the judgment of the Superior Court.

IDINGTON J. (dissenting)—I think, for the reasons assigned by Mr. Justice Cross in his dissenting opinion in the court of appeal, that this appeal should be allowed with costs and the judgment of the learned trial judge be restored.

The latter judge has assigned some further cogent reasons, with some at least of which I incline to agree, in support of his judgment, but I am unable without further examination, which in the view I take is unnecessary, to say whether or not I can agree in all the reasons so assigned. For example, the question of the arbitrators disregarding the benefit to be derived by respondent from the projected work in arriving at their conclusion, is one of those considerations which would require perusal of the whole evidence owing to the fact that the point was not much pressed and fully argued. Thorough examination of the evidence may support the position that the board disregarded its duty in this behalf or might lead to the conclusion that the appellant did not bring the necessary evidence before the board. However, one good ground, as it seems to me, being sufficiently apparent requiring a reversal of the judgment appealed from, it is unnecessary to labour further I think.

DUFF J.—The proceedings of the municipality were taken under the authority of articles 5790 to

5800 R.S.Q. The principles governing the determination of compensation under these articles are concisely explained in the judgment of Lord Buckmaster, speaking for the Judicial Committee in *Fraser* v. *Fraserville* (1), at p. 194:—

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas & Water Board* (2); *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (3); and *Sidney* v. *North Eastern Rly. Co.* (4). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.

Their Lordships held that as the arbitrator, instead of determining the value of the property to the seller, had arrived at the amount of compensation awarded by fixing its value to the persons buying the award could not be upheld.

Their Lordships add:—

> That it is plain from the language of the statute making the award of the arbitrators final and without appeal, that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed.

On behalf of the municipality, it is contended that the arbitrators, whose award is now the subject of consideration, proceeded upon an erroneous basis, since, in estimating compensation to be awarded to the respondent, they took, as their starting point, not the value of the property affected at the date of the expropriation including the value as of that date of its economic potentialities, but the value as of a later

(1) [1917] 2 A.C. 187.
(2) [1909] 1 K.B. 16.
(3) [1914] A.C. 569.
(4) [1914] 3 K.B. 629.

1917

TOWN OF MONTMAGNY v. LETOURNEAU.

Duff J.

date. It is argued that this is proved by the evidence of the arbitrators themselves; and, if this were established, it would follow that, the arbitrators having based their award upon an appraisement of something which was not the thing they were authorized to appraise, the appellant municipality ought to succeed. The majority of the court below appear to have held that even such a departure from the principles of compensation prescribed by law would not vitiate the award. The judgment of the Judicial Committee, in the case above referred to, is so apt an illustration of the principles on which the courts have always acted in setting aside the awards of arbitrators in compensation cases that it is unnecessary to refer to the long line of authorities establishing that, since an award is a decision of one having limited authority, whether given by agreement of the parties or by statute, the award is *pro tanto* void if the limited authority has not been pursued and the arbitrator has appraised something he was not directed to appraise and void altogether if that part which is void cannot be severed from the rest; that it is immaterial whether the arbitrator in such a case has acted by mistake or by design and that the fact that his authority has not been pursued may be proved by the testimony of the arbitrator himself. *Buccleuch, Duke of*, v. *Metropolitan Board of Works* (1); *Falkingham* v. *Victorian Railways Commissioner* (2).

It is sometimes difficult, very difficult indeed, to determine where an arbitrator has made a mistake of law or of fact, whether the mistake amounts to such a departure from authority as to invalidate the award.

(1) L.R. 5 Ex. 221; L.R. 5 H.L. 418.

[(2) [1900] A.C. 452.]

The question before us on this appeal is whether the opinion of Mr. Justice Cross in the court below is right, that the arbitrators have shewn, by their own evidence, that they exceeded their authority. My conclusion is that excess of jurisdiction is not proved.

In *Falkingham* v. *Victorian Railways Commissioner* (1), at p. 464, Lord Davey, speaking for the Judicial Committee, uses these words:—

> Where * * * there is jurisdiction to make an award and the question is one of a possible excess of jurisdiction, the rule (that the onus rests upon those who allege that an inferior tribunal has acted within its jurisdiction) has no application. In such a case the award can only be impeached by shewing that the arbitrator did in fact exceed his jurisdiction.

While the evidence of the arbitrators cannot be said to be wholly satisfactory, I think it is not inconsistent with the hypothesis that what they really had in view in estimating the compensation to be made was value as of the date of expropriation of the economic potentialities of the land as capable of subdivision.

For these reasons I should dismiss the appeal with costs.

ANGLIN J.—I concur in the judgment of my Lord the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *L. G. Belley.*

Solicitor for the respondent: *Maurice Rousseau.*

(1) [1900] A.C. 452.

1917
*Feb. 6.
*March 22.

JAMES WILLIAM MURPHY AND ROBERT SEDGWICK GOULD (DEFENDANTS) ..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Yukon Territory—Gold Commissioner—Mining recorder—Powers and authority—Yukon Placer Mining Act, R.S.C. 1906, c. 64, s. 3. 4, 5 and 6, as amended by 7 and 8 Edw. VII., c. 77, s. 25.

Under the Yukon Placer Mining Act, R.S.C. 1906, c. 64, ss. 3, 4, 5 and 6, as amended by 7 & 8 Edw. VII., c. 77, s. 25, the Gold Commissioner had all the powers and authority of a mining recorder throughout the whole Territory, without any direction to that effect by the Commissioner of the Yukon Territory (ss. 3 and 5) since the Governor-in-Council had appointed only one Gold Commissioner for the Territory at the date of the grant; or such direction, if necessary, should be presumed to have been given.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C.R. 81), was allowed.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that a water grant was issued in error and improvidently and should be declared null and void.

The questions in issue on the present appeal are fully stated in the above head-note and in the judgments now reported.

F. T. Congdon K.C. for the appellants.

W. D. Hogg K.C. for the respondent.

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

(1) 16 Ex. C.R. 81.

THE CHIEF JUSTICE.—The claim of the Crown in this suit is to set aside a water grant in the Yukon Territory made to the appellant on the 8th Oct. 1909.

The Yukon Placer Mining Act, R.S.C. 1906, c. 64, as amended by 7 & 8 Edw. VII., c. 77, provides:—

Sec. 3.—The Governor in Council may appoint gold commissioners and acting and assistant gold commissioners for the purpose of carrying out the provisions of this Act; but mining recorders and mining inspectors and deputies thereto shall be appointed by the commissioner subject to the approval of the Governor in Council.

Sec. 4.—The Commissioner may, by proclamation published in the Yukon Official Gazette, divide the territories into districts to be known as mining districts, and may, as occasion requires, change the boundaries of such districts.

Sec. 5.—The Gold Commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

Sec. 6.—A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector.

Sections 54 to 58 provide for the adjudication on any application for a water grant by a mining recorder who is then empowered to make the grant.

It is admitted that all necessary proceedings were regularly taken under the Act except that the adjudication on the application was held before the Gold Commissioner and it is claimed that this was contrary to the statute inasmuch as he had not been directed by

1917

MURPHY v. THE KING

The Chief Justice.

the Commissioner to act as a mining recorder for the district.

The Act does not provide for any such direction. Sec. 5 provides that the Gold Commissioner shall have jurisdiction within such districts as the Commissioner directs

> and within such districts shall possess also all the powers and authority of a mining recorder.

There was, I think, no necessity for any direction at all because at the date of the grant only one Gold Commissioner had been appointed by the Governor in Council. The statute contemplates the appointment of more than one gold commissioner as appears from other than the sections above quoted, for instance section 79 which provides that affidavits

> may be made before any Gold Commissioner anywhere within the Territory.

When there are several gold commissioners appointed, the Commissioner is to direct in which districts each shall have jurisdiction and of course it was never intended that there should be a gold commissioner for each district as there is a mining recorder. In the districts directed by the Commissioner each gold commissioner exercises jurisdiction and by sec. 5 has within those districts the powers of a mining recorder. Where there is only one gold commissioner appointed there can be no division of jurisdiction and the only possible direction of the Commissioner would be that he should have jurisdiction in all the districts; if this were necessary it would amount to saying that the gold commissioner appointed by the Governor in Council could have no jurisdiction without being further appointed by the Commissioner. The Judge of the Exchequer Court

does indeed attempt a distinction between certain duties of the Gold Commissioner under the statute and those of a mining recorder. He says:—"An analysis of the statute shews that the Gold Commissioner had certain duties to perform as Gold Commissioner but was not clothed with the powers of a mining recorder until appointed by the Commissioner." Passing by the fact that the statute says nothing about any appointment of the Gold Commissioner by the Commissioner such an interpretation of section 5 must apply to all the duties of the Gold Commissioner who would have no jurisdiction either as to the special duties imposed on him by the Act or as to the powers of a mining recorder.

The learned judge says in his reasons for judgment: "Turning to the statutes, for convenience I have been furnished with a copy of the "Yukon Placer Mining Act" as consolidated with the amending Acts." In case he has not referred to the statutes themselves it may not be amiss to point out that under the original statute the Governor-General in Council appointed all the officials, mining recorders as well as gold commissioners. It was only by the amending Act, 7 & 8 Edw. VII., c. 77, that the change was introduced "but mining recorders and mining inspectors and deputies thereto shall be appointed by the Commissioner." This, the only power of appointment given to the Commissioner, may have given rise to the error as to appointment of gold commissioners by the Commissioner; it does not touch them at all.

I think the Act is perfectly clear though it would have been better if in sec. 5, in place of the words "The Gold Commissioner," the words "The Gold Commissioners" or "A Gold Commissioner" had been used.

1917
MURPHY
v.
THE KING
The Chief Justice.

The Act, however, repeatedly refers to *the* Gold Commissioner and if one may make a surmise this is to be accounted for by the fact that there was, and for years previous to the passing of the Act had been, only one official known as the Gold Commissioner in the Yukon Territory.

The objection to the grant entirely fails and the appeal should be allowed with costs.

DAVIES J.—I concur with the reasons of my brother Anglin for allowing the appeal.

IDINGTON J.—I think this appeal should be allowed and the Information be dismissed with costs here and below.

DUFF J.—The controversy on this appeal relates to the construction of certain provisions of the Yukon Act, R.S.C. 1906, ch. 64 which are as follows:—

"3.—The Governor in Council may appoint gold commissioners and acting and assistant gold commissioners for the purpose of carrying out the provisions of this Act; but mining recorders and mining inspectors and deputies thereto shall be appointed by the commissioner subject to the approval of the Governor in Council.

"4.—The Commissioner may, by proclamation published in the Yukon Official Gazette, divide the territory into districts to be known as mining districts, and may, as occasion requires, change the boundaries of such districts.

"5.—The Gold Commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

"6.—A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector."

The question can be dealt with without any further reference to the particular facts of the case in which it arises and it is this. Is an express direction by the commissioner a condition which must be complied with before a Gold Commissioner appointed by the Governor in Council under the authority of section 3 is invested with jurisdiction as gold commissioner or as mining recorder to perform the duties and to exercise the powers committed to a gold commissioner or a mining recorder under the statutes relating to the Yukon and to mining therein?

It is contended on behalf of the Attorney-General that this question must be answered in the affirmative even where only a single gold commissioner for the whole territory has been appointed under section 3; and it was quite candidly admitted by Mr. Hogg that the practical effect of accepting this interpretation of section 5 must be that from some date in 1906 down to some date in 1912, a period of six years, no officer was invested with the powers of a gold commissioner in the Yukon although a gold commissioner had been appointed by the Governor in Council and was all that time acting as if he possessed authority and in the full belief of everybody that his acts were lawful and valid. The section is no doubt a crabbed one, but I think when the law in existence at the time the statute was passed by virtue of the orders in council then in effect touching the powers and authority of the Gold Commissioner is considered, a way is opened out of the difficulty though it is impossible to say the difficulty wholly disappears. Under that law a gold commissioner was *ex officio* mining recorder. That provision of the law is not

1917
MURPHY
v.
THE KING.
Duff J.

explicitly repealed by the Act of 1906 and I think section 5 manifests an intention to recognize the gold commissioner's *ex officio* capacity as mining recorder.

I agree with Mr. Congdon's contention that the application of section 5 must be restricted to those cases in which more than one gold commissioner is appointed. Further than that I express no opinion upon the true construction of section 5; it may be hoped that before any further question can arise with regard to that Parliament will by a declaratory Act make the meaning of it clear.

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

ANGLIN J.—The Crown in this proceeding seeks a declaration that a grant of the right to use and divert water issued to the defendants on the 8th Oct., 1909, is null and void and an order for its cancellation. This relief is asked on the grounds that "the grant was made and issued through improvidence, inadvertence and error" and without any adjudication on the application therefor by the Mining Recorder who signed it. Secs. 54-57 of the Yukon Placer Mining Act (R.S.C., 1906, c. 64), as amended by 7 & 8 Edw. VII., c. 77, s. 25, provide for adjudication by a Mining Recorder upon any application for a grant of the right to use or divert water and for the issue of such grants with the approval of the Commissioner of the Yukon Territory.

In the case at bar the adjudication upon the defendants' application was made by the Gold Commissioner, Mr. F. X. Gosselin, and by his direction Mr. G. P. Mackenzie, a mining recorder, signed the grant to them and it issued with the approval of the Commissioner of the Yukon Territory, who appears to have had full knowledge of the facts.

The substantial question presented is whether the Gold Commissioner had the powers and authority of a mining recorder requisite to enable him validly to adjudicate upon the defendants' application under s. 57 of the statute. If he had I attach no importance to the fact that the grant was signed not by the Gold Commissioner himself, as it might have been, but by another mining recorder acting by his direction. No improvidence, inadvertence or error in the making of the grant other than an alleged absence of jurisdiction as mining recorder in the Gold Commissioner has been suggested.

Prior to 1906 the Gold Commissioner for the Yukon Territory was appointed under the provisions of an order in council of the 7th July, 1898. By this order in council the Gold Commissioner was constituted *ex officio* Mining Recorder at the headquarters of the Government of the Territory, *i.e.*, at Dawson City, and he was empowered to appoint such additional Mining Recorders as might be necessary and to divide the Territory into such mining divisions as he deemed advisable. Under this order in council the Gold Commissioner acted as a Mining Recorder for the Dawson district and adjudicated upon all conflicting or contested applications for grants of water privileges. That this was the practice which obtained is fully established by the evidence.

In 1906 the "Yukon Placer Mining Act" was passed and it appears in the R.S.C., 1906, which came into force on the 31st of Jan., 1907, as c. 64. Secs. 3, 4, 5 and 6 of that Act are as follows:—

3. The Governor in Council may appoint gold commissioners, mining recorders and mining inspectors, and deputies thereto, for carrying out the provisions of this Act.

4. The Commissioner in Council may, by proclamation published in the Yukon Official Gazette, divide the territory into districts to be

1917

MURPHY v. THE KING.

Anglin J.

known as mining districts, and may, as occasion requires, change the boundaries of such districts.

5. The gold commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

6. A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector.

On the 28th May, 1907, Mr. F. X. Gosselin, theretofore Assistant Gold Commissioner at Dawson, was appointed by the Governor in Council "Gold Commissioner for the Yukon Territory" and he held that office for about five years. During that time there was no other Gold Commissioner nor any Assistant Gold Commissioner appointed. The Yukon Territory had been divided into mining districts by the Commissioner of the Yukon Territory prior to 1906. No re-division or alteration of existing divisions appears to have been made under s. 4 of the Yukon Placer Mining Act.

Mr. Gosselin states that prior to the 1st April, 1912, he never had

any specific appointment or directions from the Commissioner of the Yukon Territory as to what districts within the Yukon Territory he should exercise his jurisdiction over as Gold Commissioner and the Mining Recorder,

that he acted as mining recorder because of his

construction of the "Yukon Placer Mining Act" * * * and the construction of the order in council of the 7th July, 1898, defining the powers of the Gold Commissioner * * * (and) according to the practice of the office from the earliest times.

I am quite satisfied that under s. 5 of the Yukon Placer Mining Act the authority and powers of the Gold Commissioner as Mining Recorder were territorially co-extensive with his jurisdiction as Gold Commissioner.

Having regard to the circumstances and to the pro-

visions of ss. 3 and 4, I should, if necessary, require to consider very carefully whether, although it speaks of "*the* Gold Commissioner," the provision of s. 5 prescribing a direction by the Commissioner of the Yukon Territory was meant to apply unless the Governor in Council, under the power conferred by s. 3, should appoint more than one Gold Commissioner, as it was probably expected that he would when the statute was enacted. Until that had been done there could be no purpose in having the Commissioner of the Yukon Territory direct within what mining districts the sole Gold Commissioner should act. It was certainly not intended by Parliament that any part of the Yukon Territory should not be subject to the jurisdiction of a Gold Commissioner, nor can I think that it was intended that while the Governor in Council had appointed only one Gold Commissioner for the Territory the Commissioner of the Yukon Territory should have the power to restrict his jurisdiction to particular mining districts. If the construction of s. 5 for which counsel representing the Attorney-General contends should prevail and no direction under that section was given by the Commissioner of the Yukon Territory to Mr. Gosselin, from the date of his appointment in May, 1907, until the 12th of April, 1912, though appointed sole Gold Commissioner for the Yukon Territory as a whole, he had no jurisdiction therein and all his acts not only as Mining Recorder but as Gold Commissioner were invalid. Before accepting a construction of s. 5 which would entail consequences so disastrous, I would have to be convinced that it is not open to any other.

But this case may be disposed of without determining that the provisions for designation by the Commissioner of particular districts as those within

1917

MURPHY v. THE KING.

Anglin J.

which a Gold Commissioner shall exercise his office was inapplicable. Since it was clearly intended that every mining district in the Yukon Territory should be subject to the jurisdiction of a Gold Commissioner, the Commissioner of the Yukon Territory had no discretion under s. 5, if applicable, but was obliged to direct that the sole Gold Commissioner appointed should exercise jurisdiction throughout the whole Territory. Such a direction would be the veriest formality. No form of direction having been prescribed, it should be inferred from the facts that Mr. Gosselin acted as Gold Commissioner for five years under the direct supervision of the Commissioner of the Territory and that his acts as Gold Commissioner and Mining Recorder were continually under the consideration of the Commissioner, who expressly approved in writing of grants made upon some 64 applications for water privileges, of which this was one, adjudicated upon during that period by him; that he had been however informally it matters not, directed by the Commissioner of the Yukon Territory to act as Gold Commissioner throughout the Territory, as his predecessors in office had done. It is true that Mr. Gosselin himself appears to have thought that no direction from the Commissioner of the Territory was necessary—that under the statute and the order in council of 1898 his commission from the Governor in Council made his official status complete. The Commissioner of the Territory, however, was not examined as a witness and we do not know that he entertained the same view, and in the absence of evidence to that effect it should not be assumed that he did. On the contrary, we should rather presume that if his duty required that he should give a direction under s. 5—as it clearly would if that section were applicable—that that duty was discharged, though it

may have been in some manner so informal that it escaped Mr. Gosselin's notice, as it well may have since no change was made in the practice which had theretofore prevailed. It is consistent with Mr. Gosselin's evidence that something may have transpired which would satisfy sec. 5 as a general direction, but which he would not regard as a

specific appointment or direction from the Commissioner.

If the Crown desired to exclude the inference of performance of his duty by the Commissioner of the Yukon Territory I think the burden was upon it to adduce that officer's evidence to negative it. The case is one to which the maxim *omnia praesumuntur rite esse acta* applies with peculiar force. Either because the direction prescribed by sec. 5 of the Yukon Placer Mining Act was not necessary under the circumstances, or because, if it was requisite, there is a cogent presumption that it was given, which has not been rebutted, I would uphold the grant made to the defendants.

I would, therefore, with respect, allow this appeal with costs and dismiss the information also with costs.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Fred T. Congdon.*
Solicitors for the respondent: *Hogg & Hogg.*

1916
*Oct. 26, 27.
1917
*June 22.

HIS MAJESTY THE KING (PLAINTIFF) ..... APPELLANT;

AND

JOHN G. HEARN AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Market value—Prospective value—Evidence—Appeal by the Crown—"Expropriation Act," R.S.C. 1906, c. 143.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C.R. 146) was allowed, Fitzpatrick C.J. dissenting.

Held, Where compensation awarded is so clearly and grossly excessive that it is manifest that the correct principles of valuation, though stated in the abstract have not been applied, interference on appeal is not merely warranted, but *ex debito justitiae.*

Per Idington J.—The cardinal rule to be observed in expropriation proceedings is to allow the market value only, except in cases where the taking has incidentally damaged the owner's business or other material interests; and the advantages to be derived from the construction of the works for the promotion of which expropriation is made must be excluded in determining such market value.

Per Brodeur J.—The indemnity to be paid is the value to the owner of the property expropriated and such value is determined by the advantages, present and future, of the property; but the actual value only of these advantages, at the time of the expropriation, must be taken into consideration.

Per Fitzpatrick C.J. (dissenting).—In an appeal to the Supreme Court from the award of an arbitrator, when the question of value has been fully discussed before him and no mistake of law or fact is alleged, the mere suggestion that the amount of compensation is excessive or inadequate ought rarely to be considered a sufficient ground of objection to the award; and this principle must be applied with even more force in the case of an appeal by the Crown, the Exchequer Court being its own tribunal.

APPEAL from the judgment of the Exchequer Court of Canada (1), awarding, in expropriation

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

(1) 16 Ex. C.R. 146.

proceedings taken by appellant, for the value of land taken and damages to parts of land adjoining, the sum of $133,976.03. The Supreme Court of Canada, allowing the present appeal, reduced the amount to $81,767.60.

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

Gibsone K.C. and *Dobell* for the appellant.

Stuart K.C. and *St. Laurent K.C.* for the respondents.

THE CHIEF JUSTICE (dissenting)—By the "Expropriation Act" (R.S.C. (1906) ch. 143), Parliament has authorized the Attorney-General, in any case in which land is acquired, for any public work, to exhibit in the Exchequer Court an information which shall be deemed the institution of a suit, and in and by which the compensation to be paid shall be ascertained and all claims, other than such as may be allowed, shall be barred. But though Parliament has set up this special machinery for reference of claims to compensation to the court which it has erected for the adjudication of claims against the Crown in right of the Dominion, yet the proceedings, though judicial in form, are in reality no different from the settlement of such cases by arbitration, the usual procedure in cases between private corporations or individuals.

In appeals to this court from the award of an arbitrator and recently in the appeal from the Exchequer Court of the *Capital Brewing Company* and *The King*, I have expressed the view that where the question of value has been fully discussed and no mistake of law or fact is alleged, the mere suggestion that the amount of compensation is excessive or

1917

THE KING v. HEARN.

The Chief Justice.

inadequate ought rarely to be considered a sufficient ground of objection to the award.

The case I have just mentioned was an appeal by the owner of the land taken, and I think the remarks which I then made apply with even more force in the case of an appeal by the Crown, the Exchequer Court being its own tribunal, the decision of which other parties may not always be so content to accept as they would that of arbitrators of their own choice or at all events independent of the parties and matters in dispute.

In the appeal, this year, by special leave, to the Privy Council, of *Ruddy* v. *Toronto Eastern Ry. Co.* (1), in which an award of arbitration under the "Railway Act" was called in question, their Lordships, after stating that in their opinion such an award was in a position similar to that of the judgment of a trial judge, continue:

> From such a judgment an appeal is always open both upon fact and law. But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed, fresh in his mind, to decide between their contending evidence—unless there is some good and special reason to throw doubt upon the soundness of his conclusions. * * * In the present case, as far as the question of fact is concerned, their Lordships see no reason whatever to justify interference with the award. The arbitrators appear to have scrutinized and examined the evidence on both sides with great care, and, in addition, they paid at least two visits to the property and made a careful inspection for themselves. It would be in a high degree unreasonable to interfere with such a finding of fact, based on such materials.

The principle so laid down, with which I am in entire accord, seems to have its application very fully in the present case. We cannot overlook the fact that the assistant judge of the Exchequer Court has a vast experience of this class of cases with which indeed

(1) 38 Ont. L.R. 556.

a great part of his time is constantly occupied. An immense volume of evidence was taken, and no doubt carefully weighed by the learned judge who delivered an elaborate judgment. With all the advantage of a view of the premises, he has fixed on each lot separately the amount of compensation which he concludes is fair and reasonable. No doubt the amount is large, but I am unable to find any sufficient reason for disturbing an award so arrived at. That the value of property in the City of Quebec has risen enormously in recent years, there can be no doubt, and excluding the increase in the value of the respondents' property attributable to the particular public work for which the lands are expropriated, their property must have shared in the general increase. This must necessarily have been the case, if we consider how strictly limited is any space available for harbour accommodation within the port of Quebec.

I am myself intimately acquainted with the property expropriated and indeed with the whole locality, and to this extent, at any rate, I have the same advantage as the assistant judge derived from his view of the premises.

Whilst, as I have said, the amount awarded is large and perhaps more than I should have felt justified in giving, had I been in the place of the learned judge, I am still unable to concur in the judgment of the majority of the court.

IDINGTON J.—The Exchequer Court has awarded, in expropriation proceedings taken by appellant, for the parts of ten parcels of land so taken and damage to the remainder, the sum of $133,796.03, of which $133,196.03 is directed to be paid the Hearn estate, represented by three of the respondents.

1917

THE KING v. HEARN.

Idington J.

From this judgment appeal is taken herein, and the contention of appellant is that the learned trial judge had not adhered to the cardinal rule to be observed in such cases, of only allowing the market value, unless in such cases (of which this is not one), as where the taking has incidentally, in doing so, damaged the owner's business or other material interests.

The case is a remarkable one and by no means easy of solution. The difficulties are created chiefly by the obvious failure of the witnesses for the respondents, representing the Hearn estate, including one of themselves, giving valuations that were not based on a strict adherence to the rule to which I have referred. Indeed I doubt if any one of these witnesses correctly apprehended what he was called upon to testify as to.

In perusing their evidence, I do not find a single one of them pledging his oath to his belief that a sale could have been made, wholly uninfluenced by the advantages to be derived from the construction of the works in question and before the expropriation, of any of these properties, for the prices at which each of the respective witnesses says he values it or them.

The learned trial judge has referred to them in comprehensive terms as follows:—

> The Crown has expropriated from these properties the right of way for the National Transcontinental Railway, coming into the city on the water front as far as the old Champlain market, and took all the land, belonging to the defendants, on the river side from the north line of the right of way, thus leaving the defendants with a certain piece of land on the northern side of the right of way to Champlain street. The part or piece of land so left to the defendants is, with the exception which will be hereafter mentioned, covered with dwelling houses with a small yard at the back. These buildings are being used for residential purposes and are subdivided into small lodgings to the one house and are occupied by tenants of the labouring class, yielding very small net revenues. The back part of their property, that is the part on the water front, is in some cases partly covered by old wharves running out at various distances. These wharves were built many years ago for a trade which no longer exists and for a number of years

back have practically remained unused and indeed shew the result of wear and tear occasioned by time and age.

While indeed, these properties at some time back, when the timber business and shipbuilding were at their best in Quebec and when large rafts of timber towed down the river St. Lawrence to Quebec and placed in the several coves adjoining the city, and while the water fronts of some of these properties were then used for retaining the logs and timber by booms stretched in front of them, these properties then commanded quite a value; on the other hand, this trade has now almost completely vanished and dissappeared from Quebec since a number of years, with the result that his water front property has gone down to a very little value on the market at the present time and at the date of the expropriation. In fact, it is a question as to whether there would now be a market for such property at Quebec, but for the public works now going on.

In connection with what I have just now said relative to market value, I would call particular attention to the last sentence of that just quoted. That and the rest of the quotation expresses with fairness the impressions I have received from an examination of the case and due consideration of the arguments advanced, as well as those derived from a perusal of the evidence of those witnesses I have referred to.

I agree with the observations of Rowlatt J. quoted by the learned trial judge herein, from his judgment in the case of *Sidney* v. *North Eastern Railway Co.* (1), at page 637, and other authorities he cites, bearing upon the exclusion from consideration of the market value, the advantages to be derived from the construction of the work in question for the promotion of which expropriation is made. Yet I cannot help thinking that the respondent, Hearn, and his witnesses failed to observe any such distinction in giving their evidence. Hearn himself says in speaking of two of these parcels, as follows:—

Q.—In connection with the land lots Nos. 2402 and 2410, are there any special circumstances which make them more valuable in

(1) (1914) 3 K.B. 629.

1917

THE KING v. HEARN.

Idington J.

your opinion? A.—Well, I would think the very fact of their being very close to this railway terminal, that has been decided upon, should give them value.

Q.—Could you give us an idea of what you mean by saying it was worth more 5% or 10%? A.—Probably more. I am dealing entirely with my own property. I know just what I would have accepted for it in 1900 and what I would want for it in 1913, had it been let to me as it was.

Q.—That is the basis of your valuation? A.—Yes.

Q.—May I say it was made in the same way as you said your estimate of No. 2376 was made, viz., the price you would have been willing to take in 1913? A.—Exactly.

Q.—I think I asked you this question before. In the different estimates in which you have put the prices of these different lots, I think you said that the figures you had placed were the figures at which you were willing to sell; that is the basis on which you arrived at these figures? A.—Yes, the prices I felt they were worth. I was not prepared to accept less than what I thought the properties were worth.

Then one of the witnesses, Nesbitt, says:—

Q.—How did you arrive at the valuation of the lots? A.—From my general experience of values round the city, within the city and outskirts.

Q.—In the city and outskirts generally? A.—Yes, generally.

Q.—Any special reference to Champlain street? A.—No, I can't say any special reference to that part particularly.

And Conway says:—

Q.—In view of the rentals and other revenues of these different properties and the amount of business that has been carried on upon the different properties for the past twenty or forty years, do you still consider those prices reasonable? A.—I do not consider the rentals on the revenue at all.

Q.—What do you consider the proper revenue of, say, the wharves on 2376? A.—I don't know, I did not consider that.

Q.—I want to know what the revenue would be. I want to know where the value lies. How could you make money out of it? A.—I would consider it a good property to hold and sell to men who would come there for shipping purposes and build a wharf and including that part in it.

Q.—The prospective value of the property is what gives it the value that you name. Is that right? A.—That is right.

Mr. Taschereau's views were also evidently unduly impressed with the possibility of future development in the city.

Whether for the reasons I suggest or other good

reasons, the valuations of these witnesses has not been accepted by the learned trial judge in arriving at his award.

There was evidence adduced on behalf of the appellant which was ostensibly based on transactions relative to similar properties next or near to those here in question.

The learned trial judge has not accepted that either, but seems, though he does not say so, to have reached his conclusions by a compromise between these two sets of evidence.

It is to be observed that the respondent's witnesses, referred to, also relied upon some transactions relative to properties of which the nearest was half a mile distant from the properties in question, except where Mr. Taschereau refers to those of one Evoy and another Picard deal, to be referred to presently.

The latter, as explained in appellant's factum, is hardly worth mentioning. The other is claimed to have been no real transaction, but the evidence on which that contention is set up is not cited, and if it exists, has escaped me.

The respondents make no argument based or bearing upon them.

On the other hand, there are a number of transactions relied upon by appellant relative to properties in the immediate neighbourhood of those in question based upon prices, which if to be accepted as evidence of market value of property, seem strongly to maintain the contention of the appellant.

Some of these are the result of decisions of the Exchequer Court relative to expropriations for the same purpose as now in question.

These should have considerable weight in the

1917

THE KING v. HEARN.

Idington J.

same court. Obviously, however, the parties concerned as owners may not have taken the same care in presenting their case as the present respondents or they may have given a grudging assent through failing to appeal.

For these and the like reasons they cannot carry the same weight as bargains made between parties relative to properties next to or in the immediate neighbourhood of those in question.

For that reason I look on the latter as a safer guide. And, as I have said in other cases heretofore, such bargains should, when there is no reason shewn to impeach their value as such, be taken as a safe guide touching the question of market value. There are at least three instances herein presented by the appellant of such bargains bearing upon the issue presented.

I refer to that called "The Molson Macpherson sale," that known as "The Allen sale," and that belonging to the Belanger estate.

The first and lastly named seem directly in point though some objections are taken as to the Allen sale, which renders it of less value, yet of very great value, if correctly understood. A number of other properties referred to are not quite as clearly in point and would require an inspection and study of their relative situation to render sales thereof as valuable in evidence as those I specially refer to.

Indeed two of the experts produced to testify for the appellant tell that it was their duty, according to instructions, to try and reach a proper estimate and to be liberal in doing so, as it always is the interest of the Crown not to deal harshly nor to antagonize, needlessly, proprietors who may not desire to sell, and may be likely to resent injustice or even the appearance thereof, and force undesirable litigation.

They tell that they used the many instances they give, as well as results of other inquiries, as the basis of their investigation.

Men so instructed and so acting frequently give evidence of greater value than experts retained, as it were, to promote the views of him retaining them, when often they may be unconsciously influenced by the interested suggestions of him whose cause they represent.

For these several reasons I think their estimates are more reliable than those presented by respondents' witnesses.

Again I observe that the latter seem herein prone to cite sales of property a long way from the property in question.

No doubt such illustrations as shew a rapid rise in properties elsewhere in same city are of value for that purpose, but not beyond the surmise that in time all may be more or less appreciated thereby. Any one of experience knows that properties may only be a very short distance from some others in the same city, yet by reason of many circumstances, sometimes puzzling to understand, be much inferior in value and much less responsive to any general rise in values in the city.

Hence the nearer any property sold is to that expropriated renders a sale of same of greater value than any sales beyond the district where the expropriated land is situated.

For these various reasons I attach great importance to the sales, already referred to, in the district in question, few though they be, and am inclined favourably towards the evidence of those Crown experts who approached the valuation in question herein from that point of view I have referred to.

1917

THE KING v. HEARN.

Idington J.

Again the prospective rise in value is of no weight unless the market value of that possibility is directly borne in mind and testified to.

There are a number of other considerations I am about to present which tell very strongly against the respondent's claims as being of a most exaggerated character. I observe how far they exceed any estimate made by their witnesses.

These properties had been acquired by the late Mr. Hearn who died in 1894, and had then, I think, become worth a great deal less than when first acquired, or at all events less productive of revenue.

The respondent, Hearn, who seems to have had them in charge, gives an account of the revenue for five years preceding the year 1913, which shews a total of less than a thousand dollars per annum, after deducting taxes and insurance. He does not seem to have kept any accurate account of repairs which no doubt would still further reduce the net revenue given.

He intimates the results would be pretty much the same for the time back to his father's death.

Is there any conceivable reason why properties worth what he says, or any of his witnesses says, should be held for such a long period of time producing no more than he testifies to?

I have not heard of any prohibition against their being sold. The only reason that has occurred to me is that they were quite unsaleable at any such price as these gentlemen estimate them to be worth, or anything more than the Crown's witnesses have estimated them at.

Is it conceivable that any business man who could undoubtedly reap 6% per annum on a capital investment of say fifty or sixty thousand dollars, would hang on for twenty years to a property he could sell

for that and reap such an income, yet would not sell it, if he could, even if in that time, it increased in value 25%? In other words, why did he, with such gloomy prospects as that decayed part of Quebec presented, accept less than a thousand dollars a year, with all the worries of weary waiting for something to turn up, face his steadily losing say two thousand dollars a year? At the best, admitting a rise of 25% in nearly twenty years, he would be winning in that time twelve to fifteen thousand dollars, and losing the compound interest on the surplus from a new investment.

I can find no answer except that it was quite impossible to realize even fifty thousand dollars on these properties.

And when we come to contemplate a possible one hundred and twenty to one hundred and thirty thousand dollars the proposition to hang on seems still more absurd, unless on the hypothesis that, as they could not be sold at all, the owners might amuse themselves by imagining such values.

I do not suggest that a non-productive property is valueless. All that I submit is there must exist some reasonable probability of its use to give it a value.

Then let us turn to the assessed values. We find them running from $14,250 in 1903, on a rental basis, to $38,700 in 1913, when a new basis of actual values seems to have been adopted for assessment purposes. The latter system admittedly increased the assessment values, as it generally does.

The assessment, I admit, varies so much as not to be a very reliable guide to exact actual values, but what a difference between $38,700 and $133,169! Can it be possible that the assessment was so far below what it ought to have been?

1917

THE KING v. HEARN.

Idington J.

But when we come to contemplate the sworn return of values for purposes of succession tax duties we find these properties, in 1894, valued at $7,250 and that accepted by the provincial authorities on the spot as right, or near enough to make it not worth contesting.

Assuming they were undervalued, how came it that the provincial authorities, sitting in Quebec, did not find anything worth quarrelling about? A slight difference of say even double or treble, might not matter for all the province could reap. But is it at all conceivable that any one then imagined they were, then, in 1894, worth forty thousand dollars or thereabouts? It would require that to bring them, allowing for rise since in value, up to what the agents of appellant placed them at in 1913.

And when we come to think of $133,169 it seems something unthinkable.

True such estimates do not bind those entitled to claim the true value for another purpose, but they do bind the conscience of the respondent Hearn and lead us to weigh his evidence accordingly.

I cannot, in view of all these considerations, see how we should allow more than the estimate made by the appellant's witnesses, save to add thereto the usual 10% for expropriation.

But then there are the questions of title which may make some slight variation in the result.

It will depend on the opinion of the other members of this court, as to valuations, whether it is necessary or worth my while entering upon that phase of the matter.

If their estimate exceeds mine to any very substantial extent that may cover the utmost possible margin of difference arising from the view to be taken

1917

THE KING v. HEARN.

Idington J.

by appellant's witnesses of the titles and consequent area to be considered. But I, by no means, admit that extra area, liable to be covered by water, equal to that not so when we find no present use for watered lots.

The appeal should, in any event, be allowed with costs.

DUFF J.—The award should be reduced to $81,767.50.

ANGLIN J.—I agree with the learned assistant judge of the Exchequer Court that, having regard to the statutory right of the Hearn Estate to maintain and use the wharves owned by it, it was unnecessary to determine the question of title raised as to the lands below low water mark on which portions of those wharves are erected. The estate had practically all the benefit and advantage of full proprietorship and was entitled to compensation on that basis. I therefore accept the areas adopted by the learned judge as the proper basis on which to compute compensation.

The general views expressed by the learned judge as to the principle on which compensation should be awarded and the elements that should enter into the computation are not open to criticism. But, making due allowance for the advantage which he had in viewing the property, I am, nevertheless, with great respect, of the opinion that the amounts allowed for compensation are so clearly and so grossly excessive that it is apparent that he failed to make a correct application of the principles which he had correctly stated in the abstract.

Without laying too much stress on this feature of the case it is, to say the least, astounding—

1917

THE KING v. HEARN.

Anglin J.

and something which certainly called for a better explanation than was given of it—that, although, according to the testimony of John G. Hearn, the increase in value in the interval had probably not exceeded 25%, the executors of the Hearn Estate for purposes of succession duties in 1894 valued on oath at $7,250 the entire property for the taking of a portion of which the estate in this proceeding has demanded as compensation $281,181.18 and has been actually awarded, as of the 8th November 1913, $133,796.03. The municipal valuation for assessment purposes of the whole property, of which part was taken, was in 1903, $4,250, in 1908, $21,500 and in 1913, $38,700.

After giving to the whole evidence the best consideration of which I am capable, the valuations of the Crown witnesses on the basis of area on which they were made commend themselves to my judgment as sound and reasonable, erring, if at all, in favour of the respondents. I see nothing to be gained by discussing the evidence in detail or setting out the analysis of it on which this conclusion is based. Applying the figures of the Crown witnesses to the greater areas for which I think compensation should be made, I would modify the judgment in appeal by reducing the sum of $133,796.03, the amount awarded in the Exchequer Court, to $81,767.50, including 10% for compulsory taking.

It seems to me to be unnecessary, as the learned trial judge has found, to determine in this proceeding any rights *inter se* of the Crown and the Quebec Harbour Commissioners in regard to beach and deep water lots.

The appellant is entitled to the costs of the appeal to this court.

1917

THE KING v. HEARN.

Brodeur J

BRODEUR J.—Il s'agit d'un appel de la Cour d'Echiquier concernant l'expropriation de terrains pour le Transcontinental National dans le hâvre de Québec. La Cour a accordé aux intimés une somme de $133,196.03.

Les trois points qui se présentent dans la cause ont trait

1o. au droit de propriété des intimés.

2o. à l'étendue des terrains qui leur appartiennent.

3o. à leur valeur.

Droit de propriété.

Le nombre de lots expropriés est de dix; mais il n'y a divergence d'opinion quant au droit de propriété que pour trois, savoir les lots 2376, 2404 et 2410.

Tous ces lots sont situés sur le côté sud de la rue Champlain et se prolongent dans le fleuve St. Laurent. Des quais y ont été construits depuis un temps immémorial, probablement dans la première partie du siècle dernier. La Couronne était alors propriétaire de ces lots de grève et ces quais ont dû être faits avec son autorisation, sinon formelle, dumoins tacite. Aussi quand la Commission du Hâvre de Québec a été créée en 1859 (22 V. ch. 32), il a été décrété que la Commission devenait propriétaire en fidéicommis du lit de la rivière à partir des hautes eaux et qu'elle devenait la créancière des rentes constituées qui avaient été stipulées lors de l'octroi des lots de grève. Mais la loi ajoutait que les personnes qui avaient construit des quais ou d'autres travaux dans les limites du hâvre continueraient à en être les propriétaires.

En 1871, le cadastre d'enrégistrement a été fait sous l'autorité du Code Civil et l'un des terrains dont les intimés sont maintenant en possession a été désigné par le lot No. 2376. Le plan décrit ce lot comme comprenant non seulement la terre ferme, mais aussi

1917

THE KING v. HEARN.

Brodeur J.

une partie du hâvre couverte par les eaux à haute et basse marées. Le livre de renvoi lui donne une superficie de 34,440 pieds. mesure anglaise.

Plus tard, en 1882, ce No. 2376 a été vendu par le shérif et acheté par l'Honorable John Hearn, dont les intimés sont les exécuteurs testamentaires. La description du lot dans l'acte de vente du shérif est comme suit:

> Bounded on the N.W. by Champlain street and by No. 2377; to the S.E. by low watermark of the river St. Lawrence by No. 2377a, to the S.W. by No. 2380 and to the N.E. by No. 2371, containing 34,440 in superficies together with the buildings, wharf, etc., circumstances and dependencies.

Cette description est évidemment erronée. Ce lot ne peut pas avoir 34,440 pieds, s'il ne comprend que le terrain couvert par les hautes eaux; et d'ailleurs une partie du quai qui en dépendait se trouvait à eau profonde. La description n'était pas conforme d'ailleurs à celle du livre de renvoi.

En vertu de l'article 2168 du Code Civil, il est statué que le numéro donné à un lot sur le plan et le livre de renvoi est la vraie description de ce lot et suffit dans tout document quelconque et notamment dans la vente faite par le shérif. Il n'est pas nécessaire d'indiquer ses tenants et aboutissants, excepté dans le cas où il s'agit d'une portion d'un immeuble. Dans le cas actuel, le shérif, en indiquant que ce lot était borné par les limites de la basse marée, a donné un aboutissant qui n'était pas exact et cela n'a aucun effet légal; *Caron* v. *Houle* (1); car le plan couvrait incontestablement un morceau de terrain au delà des eaux basses.

Le lot cadastré a été évidemment fait pour couvrir tout le quai, non-seulement la partie à découvert dans les eaux basses, mais aussi celle qui s'étendait au delà.

(1) Q.R. 2 S.C. 186.

L'appelant allègue que le droit de propriété des intimés est borné par la ligne des eaux basses; et, en outre du contrat du shérif, il invoque un acte fait par la Commission du Hâvre aux auteurs de l'Honorable Mr. Hearn en 1861 par lequel la Commission du Hâvre a vendu une partie de ce terrain.

Il est loin d'être certain que cet acte de vente fut nécessaire; car il est évident, par le récit des faits qu'il contient, que ce terrain était occupé par les acheteurs ou leurs auteurs en 1859, lors de la création de la Commission du Hâvre, et par le statut, comme nous l'avons vu, il était décrété que les possesseurs continueraient à jouir et à se servir de leurs quais comme par le passé. Ces possesseurs cependant voulaient je suppose s'assurer à tout jamais de la validité de leur titre et c'est, ce qui les a incités à se faire donner un nouveau titre par la Commission du Hâvre.

Je suis d'opinion, avec le cour Inférieure, que la succession Hearn est propriétaire du lot No. 2376 jusqu'à l'extrême limite du quai qui y est construit et ce, en vertu du statut créant la Commission du Hâvre. Elle a eu d'ailleurs possession paisible et indiscutable de cette partie du lot 2376, tant par elle que par ses auteurs, depuis plus de trente ans (art 2242 C.C.).

La cour Inférieure a fait mesurer la partie ainsi occupée par les intimés et a trouvé une superficie de 25,280 pieds.

J'en suis venu à la même conclusion que la Cour inférieure pour les autres lots au sujet desquels le droit de propriété est contesté.

Etendue du terrain.

La cour inférieure a accordé aux intimés une indemnité pour cette partie appelée *Gore*. Cela représente une superficie de 888 pieds. C'est une

1917

THE KING v. HEARN.

Brodeur J.

toute petite lisière de terrain dont il a été question dans certains actes. Il me paraît cependant que le mesurage des lots tel que fait sous l'autorité du cadastre et par l'arpenteur Tremblay ne saurait justifier les intimés de réclamer une indemnité pour ces 888 pieds.

Valeur.

Les propriétés expropriées, comme je l'ai déjà dit, sont situées en front sur la rue Champlain, à Québec, et s'étendent vers et dans le fleuve St. Laurent, dans le hâvre de Québec.

Des maisons sont construites à la rue Champlain et sur l'arrière des lots, on a érigé des quais dont on se servait autrefois pour le commerce si considérable de bois qui se faisait dans le cours du siècle dernier.

La construction du chemin de fer le Transcontinental ne touchait pas aux maisons bâties sur la rue Champlain, mais elle prenait une partie de ces quais; et afin d'éviter des réclamations en dommages assez difficiles à déterminer, la Couronne a jugé à propos d'exproprier tout le terrain couvert par les quais et même jusqu'à la ligne frontière de la Commission.

Le traffic pour lequel ces quais avait été originairement construits n'existe plus ou n'est fait que sur une bien petite échelle; et, en réalité, comme dit l'honorable juge de la cour inférieure:—

> These wharves * * * for a number of years back have practically remained unused and indeed shew the result of wear and tear occasioned by time and age * * * with the result that this water-front property has gone down to a very little value on the market at the present time and at the date of the expropriation. *In fact it is a question as to whether there would now be a market for such* property at Quebec, but for the public works now going on.

On voit d'ailleurs que la plupart de ces propriétés ont été vendues par le shérif et achetées à des prix extrêmement bas.

Il est possible que ces lots pourraient avoir plus tard une très grande valeur si le gouvernement ou les autorités du port y faisaient des travaux tellement considérables qu'un particulier ne saurait et ne pourrait pas entreprendre. Ces possibilités peuvent être prises en considération quand on déterminera la valeur actuelle. C'est ce que le juge de la cour inférieure a fait.

L'indemnité qui doit être payée est la valeur que le terrain exproprié avait pour le propriétaire; et cette valeur consiste dans tous les avantages actuels et futurs que le terrain possédait; mais on ne doit considérer que la valeur actuelle de ces avantages. *Cedar Rapids* case (1).

Il y a une grande divergence d'opinion entre les témoins des propriétaires et ceux de la Couronne quant à la valeur des terrains: les premiers disent $281,181.18 et les seconds donnent une valeur de $38,700.

Les témoins du propriétaire procèdent suivant différents principes. M. Hearn, l'intimé, lui-même nous dit qu'il peut fixer un prix et y tenir, sans prendre en considération la valeur marchande du terrain dans les environs. Un autre témoin nous déclare que son évaluation est basée sur le mouvement de la propriété dans la ville de Québec et de ses environs, mais qu'il n'a pas pris en considération les conditions actuelles des terrains expropriés et de leur participation dans ce mouvement général. Un dernier témoin base son évaluation sur le prix qu'une compagnie de bateaux pourrait plus tard offrir, quand le commerce se développera et pourra utiliser ces quais.

Les témoins de la Couronne étaient des experts employés dans le but de faire l'évaluation de toutes

(1) (1914) A.C. 569 p. 576.

1917

THE KING
v.
HEARN.

Brodeur J.

les propriétés à être expropriées pour le Transcontinental dans cette localité, depuis le Pointe de Sillery â aller jusqu'au marché Champlain. Les propriétés en question dans cette cause étaient parmi celles-là. Ils se sont mis au courant des ventes de terrain qui avaient été faites dans ces derniers temps et ont pris en considération toutes les autres circonstances de nature à influer sur cette valeur. Ils ont également considéré les revenus que donnaient ces propriétés et leur évaluation municipale.

La preuve nous démontre que les revenus bruts étaient annuellement d'environ $1,500 et que les revenus nets étaient de $500 de moins, soit $1,000 environ.

Alors les évaluateurs de la Couronne, en accordant $38,700 d'indemnité, donnaient au propriétaire un capital qui produirait le double de ce qu'il retirait de ses propriétés.

Il est à remarquer également qu'en 1894, au décès de l'Honorable M. Hearn, l'auteur des propriétaires actuels, les propriétés ont été évaluées par l'intimé M. J. G. Hearn lui-même, l'un des héritiers et des exécuteurs, et il a alors payé des droits sur une valeur qu'il a fixée à $7,250.00.

C'était bien loin de la somme de $280,000 qu'il réclame aujourd'hui.

Il est intéressant de lire la partie du témoignage de M. Hearn qui nous parle de la valeur proportionnelle des terrains en 1890 et en 1913. Il en est arrivé à la conclusion que les terrains pendant cette période ont peut-être augmenté d'une valeur de 10%. Alors comment peut-il expliquer qu'en 1890, il jurait dans sa déclaration au Trésorier Provincial que ces terrains valaient $7,250 et qu'aujourd'hui ils valent $280,000?

Comment concilier ses déclarations? Voici d'ailleurs son témoignage sur ce point:—

Q.—You spoke to us about the value of this property, I suppose the values you were talking about were the values in 1913? A.—About that, yes.

Q.—How would those valuations compare with say five years before? Was there any increase or decrease at all? I am not speaking about small differences. A.—The value might have increased a little, that is five years ago or thereabout.

Q.—Five years before 1913. Are you talking about? A.—Five years before 1913, I might possibly have sold the property for less than I would since 1913 in certain conditions.

Q.—Are the circumstances such, since 1913 and the time you now give evidence, as to make it proper or incumbent on you to ask a higher price to-day than you would have asked in 1913? A.—No.

Q.—Would you say there is any great difference in the value of property between the year 1913 and the year 1900? A.—I think in 1913, this property we are speaking of would be of more value than in 1900 had the railway not come in and destroyed it, had the railway remained at Cape Diamond.

Q.—Leaving aside for the moment any effect the railway might have had would the property have been worth approximately the same in 1900 as it would in 1913? A.—Eliminating any influence the railway might have had?

Q.—Yes. A.—I think it would be worth more in 1913 because of the general improvement of property in Quebec.

Q.—Could you give us an idea of what you mean by saying it was worth more? 5% or 10%? A.—Probably more. I am dealing entirely with my own property. I know just what I would have accepted in 1900 and what I would want for it in 1913, had it been left to me as it was.

Q.—May I say, it was made in the same way as you said your estimate of No. 2376 was made, viz., the price that you would have been willing to take in 1913? A.—Exactly.

Q.—Would you compare the price in a general way, that you would have been willing to take in 1913 with the price you would have taken in 1900? A.—I would want more than I would want in 1900.

Q.—Approximately what proportion or percentage? A.—Probably 25% or something of that kind.

Q.—Could you go as far back, from recollection, and compare in a general way, the value of the property in 1913 with the value in 1890? A.—No.

Q.—Can you say in a general way, whether the value of this property increased between 1890 and 1900? A.—I think it would increase.

Q.—To any considerable extent? A.—Yes, I would think the property in Quebec during the last ten years increased generally.

1917

THE KING v. HEARN.

Brodeur J.

Q.—I am not talking of the last ten years. I am taking from 1890 to 1900. A.—I cannot tell you that.

Q.—Can you say, in a general way, whether those properties increased or not from 1890 to 1900? A.—Perhaps not.

Quant aux ventes de terrain dans les environs, il est en preuve que le lot No. 2411, qui est voisin de l'un des lots expropriés, a été vendu en 1901, avec les quais qui y avaient été construits, à raison de 16 cents du pied carré, et un autre terrain, aussi contigu, portant le No. 2415, a été vendu aussi en 1901 pour 22½ cents. Cette différence dans le prix entre ces deux ventes était probablement due au fait que les quais étaient plus spacieux dans le premier que dans le dernier cas.

Mais vers le même temps où l'expropriation a eu lieu, des terrains semblables ont été vendus à la Couronne pour la construction du chemin de fer par les héritiers Molson, par Madame Bélanger et par la Compagnie Allan. Les héritiers Molson ont vendu 65 cents du pied, Madame Bélanger 85 cents et la Compagnie Allan 94 cents.

Ces terrains étaient voisins des terrains de la succession Hearn et le prix qui a été payé peut nous donner une idée assez exacte de la valeur marchande des propriétés expropriées. Je vois que les terrains ainsi vendus à la Couronne ont été vendus à des prix différents, selon qu'ils étaient plus ou moins rapprochés du centre de la ville. Ainsi la propriété Allan, qui est la plus près, a été vendue à 94 cents, la voisine vers l'ouest, celle de Madame Bélanger, à 85 cents, et enfin celle de la succession Molson, qui est la plus éloignée à 65 cents. Or, cette dernière est justement voisine de la propriété de la succession Hearn, la plus proche de la ville. Elle porte les numéros du cadastre 2370 & 2371 et la propriété voisine à l'ouest, qui appartient à la succession Hearn, porte le numéro

2376. La propriété Molson, qui, comme la propriété Hearn, est un lot de grève, est donc mieux située que cette dernière. Elle a été vendue cependant au prix de 65 cents le pied, tandis que la cour inférieure a accordé à la succession Hearn une indemnité sur le pied de $1.88 le pied. Il n'y a rien dans la cause qui puisse justifier une si grande différence.

Les autres propriétés de la succession Hearn sont toutes situées plus à l'ouest, c'est-à-dire de plus en plus éloignées du centre de la ville.

La cour inférieure a accordé pour le No. 2381 une indemnité équivalente à $1.35 du pied,
pour le No. 2385..... 1.57 du pied,
pour les Nos. 2393, 2394..... 1.17 du pied,
et pour les Nos. 2402, 2403, 2404, 2409 & 2410, $1.64 du pied.

Ce dernier lot (No. 2410) est voisin d'une propriété semblable qui a été expropriée et pour laquelle il a été accordé 52 cents du pied.

Je crois que, dans les circonstances, une indemnité raisonnable, même libérale, serait accordée à la succession Hearn, si je fixais un prix uniforme pour tous ces lots et si j'adoptais pour cette fin la valeur payée à la succession Molson, soit 65 cents du pied. D'après les calculs que j'ai faits, la superficie du terrain exproprié se chiffrerait comme suit:—

Lot No. 2376.....	25,280
Lot No. 2381.....	5,880
Lot No. 2385.....	2,529
Lots Nos. 2393 & 2394.....	8,552
Lots Nos. 2402, 2403, 2404, 2409 and 2410.....	31,633
formant un total de.....	73,874

à 65 cents du pied, cela donnerait $48,018.10.

1917

THE KING v. HEARN.

Brodeur J.

Il faudrait ajouter à cela la valeur des quais. Il est en preuve qu'il y a 15,833 verges cubes de quaiage et que, pour l'une des propriétés voisines, il a été considéré qu'une somme de $1.50 la verge était raisonnable. La Couronne, dans son factum, reconnait que la somme de $1.35 la verge serait une valeur raisonnable. Je suis prêt à accorder la somme de $1.50. Alors cela ferait une somme additionnelle de $23,749.50. Il conviendrait d'ajouter à cela la dépréciation que la partie des lots restant à l'exproprié va subir à cause de l'expropriation. Cette dépréciation parait avoir été évaluée par la cour inférieure à la somme de $10,000.00. En ajoutant ces trois sommes de $48,018.10, de $23,749.50, et de $10,000.00 nous arrivons à un total de $81,767.60, qui serait certainement une indemnité juste et raisonnable.

L'appel devrait être maintenu avec dépens de cette cour et l'indemnité devrait être réduite à $81,767.60.

Les frais de la cour inférieure seront à la charge de la Couronne.

Appeal allowed with costs.

Solicitors for the appellant: *Gibson & Dobell.*

Solicitors for the respondents: *Pentland, Stuart, Gravel & Thompson.*

GRACE S. GEALL AND GEORGE W. ADAMS (PLAINTIFFS)..... } APPELLANTS;

AND

THE DOMINION CREOSOTING COMPANY, LIMITED (DEFENDANT)..... } RESPONDENT.

1916
*Oct. 20.
1917
*Oct. 15.

JOSEPH A. SALTER (PLAINTIFF)..... APPELLANT;

AND

THE DOMINION CREOSOTING COMPANY, LIMITED (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRTISH COLUMBIA.

Negligence—Findings of jury—Railway company—Cars left on tracks—Extraneous interference—Anticipation.

The respondent was engaged in delivering creosoted paving blocks brought in freight cars over the British Columbia Electric Railway's tracks. The employees of the railway company, after having placed the cars so loaded at points indicated by the servants of the respondent, had taken care to set the air brakes and to have blocks placed and "pinched" in front of the wheels. Later on the respondent's men, for their convenience, moved the cars further down the grade, put back the blocks without "pinching" them and applied the brakes by hand. Then some school boys unloosened the brakes on the car furthest uphill which, being propelled by its own gravity against the lower ones, moved all the cars so that a collision took place at the foot of the hill between them and a passenger coach of the Electric Railway.

Held, Davies and Duff JJ. dissenting, that, upon the evidence, the employees of the respondent should have anticipated that the school boys might release the cars and that the respondent was liable for having taken no steps to guard against such interference.

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

1917

GEALL
v.
DOMINION CREOSOTING CO.

SALTER
v.
DOMINION CREOSOTING CO.

Per Idington J.—The question as to whether or not this interference was such an occurrence as ought to have been foreseen and provided against, is not a question of law, but a question of fact within the province of the jury.

Per Davies and Duff JJ. dissenting.—The proximate and effective cause of the accident was the interference of the school boys, which the respondent had no reason to anticipate.

APPEAL from the judgments of the Court of Appeal for British Columbia (1), reversing in each case the judgment of the trial court and dismissing the actions against the respondent.

The material facts of the present case and the questions of law are fully stated in the above headnote and in the judgments now reported.

J. W. de B. Farris for the appellants.
Tilley K.C. for the respondent.

The reasons for judgment of the trial judge in *Green* v. *British Columbia Electric Railway Company* (2), are applicable to the present cases, as the grounds of action are the same in the three cases.

THE CHIEF JUSTICE.—The facts of the cases from the judgments in which these appeals are brought are fully set out in the notes of my brothers Idington and Anglin. The cars which caused the accident were left by the servants of the respondent (The Dominion Creosoting Company) in a dangerous position, insecurely fastened and without any protection. There can, I think, be no doubt on the evidence that they were actually set in motion on the down grade by mischievous school boys interfering with the insecure fastenings.

The employees of the company had reason to foresee the probability of such interference and they

(1) 10 W.W.R. 620; 10 W.W.R. 617. (2) 25 D.L.R. 543; 9 W.W.R. 75.

took no steps to guard against it. Had the case come before me, sitting as a trial judge without a jury, I should, on these facts, have had no difficulty in finding for the plaintiffs.

The jury, however, simply found that the negligence of the defendant was the proximate cause of the accident and I entertain considerable doubt whether the omission of all reference to the action of the boys did not render it impossible to support this finding. I have come to the conclusion, however, that the negligence of the respondents' servants as involving the natural consequences that flow from it may be said to have been the proximate cause of the accident in the same way as it would have been if the cars had started moving through the mere force of gravity. It is of course obvious that the accident could not have happened at all but for the respondents' negligence.

It would certainly have been more satisfactory if the jury's attention had been pointedly directed to the exact facts and they had been invited to give a verdict accordingly. The alternative of allowing the appeal, however, is to send the case back for retrial, a most unsatisfactory proceeding in the case of a practically foregone conclusion. Since therefore I am satisfied that the appellants have a good claim on the merits and the majority of the court is prepared to find for the appellants, I am glad to be able to conclude that such finding can be reconciled with strict legal principles.

The editor of the Law Quarterly, commenting on the case of *Crane* v. *South Suburban Gas Company* (1), says:—

> People who create a dangerous nuisance on the verge of a highway, come under the good and fairly old authority of *Barnes* v. *Ward* (2),

(1) [1916] 1 K.B. 33.

(2) 9 C.B. 392.

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Davies J.

and will not save themselves by trying to divert the argument into refined distinctions about negligence and intervening acts of third persons.

I would allow with costs.

DAVIES J. (dissenting).—I think the judgment of the Court of Appeal for British Columbia with respect to the defendant, the Dominion Creosoting Company, was right and that these appeals should be dismissed.

The negligence of which they were found guilty by the jury and the only negligence found against them was

in moving the cars without the B.C. Electric Company's shunter and crew in attendance with proper facilities.

I am unable to see in what respect this negligence could be said to be a proximate or effective cause of the accident. I agree with the Court of Appeal that this moving of the cars in the way they did move them "did not effect the situation at all."

The proximate and effective cause of the accident was the interference of a number of mischievous young boys about eleven years of age, two of whom worked together to unloose the brakes of the car and let them loose upon the track on which they stood.

Two of the boys worked together, one prying up the dog of the brake with a piece of iron and the other twisting on the wheel.

They succeeded after a good deal of ingenuity and labour in loosening the brakes of the upper cars which ran down the inclined grade of the rails they were on by force of gravity and collided with the two cars lower down the grade.

Two of these cars, the upper ones, were stopped by one of two men left with the cars by the defendant company but the lower cars, which had been hit by the upper ones, ran down the grade and collided below

the switch through the knife switch with a passenger car going north, in which collision the plaintiffs were injured.

There are two or three important and controlling facts which must be kept in mind in determining the liability of the Creosoting Company.

One is that when and after moving the cars on the day of the accident, in order to get from them the paving blocks necessary to enable the company to go on with the work they had contracted to do, the cars were braked and blocked in the same way in which they had been braked and blocked by the Railway Company on the day previously, and the other is that but for the mischievous intermeddling and loosening of the brakes of the two upper cars by the boys, the accident would not and could not have happened.

There was no finding of the jury that the paving company (defendant) had any reason to fear or anticipate this mischievous action of the boys, nor was there any evidence to justify any such finding had it been made. The only negligence found was that I have previously stated

in moving the cars without shunter and crew of the Railway Company in attendance.

There was no negligence found by the jury that the cars had not been left on the tracks well and sufficiently braked and secured by the Creosoting Company.

The mischievous interference and action of the boys in unloosening the brakes of the two upper cars which the evidence shews were effectively and securely fastened was the proximate and effective cause of the accident and without which it neither would nor could have happened.

It is not the province of this court to make findings of other negligence on the defendant's part than that

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Davies J.

found by the jury. The explicit and definite negligence found excludes from our consideration any other suggested negligence not found by the jury.

If the jury had found that the company had reasonable grounds to anticipate any such mischievous interference of the boys as was proved and had neglected to take reasonable care to guard against it, or if they had found that the company defendant had not properly braked and secured the cars on the inclined grade, a totally different case would have been presented for our consideration.

On the findings of fact, however, of the negligence of the company, I am quite unable to hold them liable.

I think the principles laid down by the Court of Appeal in the case of *McDowall* v. *Great Western Rly. Co.* (1), must govern our judgment here. These principles stand unquestioned to this day. One of them, as stated by Vaughan-Williams L.J. at p. 337 I take to be this that

> in those cases in which part of the cause of the accident was the interference of a stranger or third person the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident,

and

> that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury.

Having regard to the facts proved and the findings of the jury, I cannot reach a conclusion that the defendants are liable in this action.

I have carefully considered the cases of *Cooke* v. *Midland Great Western Railway*, decided by the House

(1) [1903] 2 K.B. 331.

of Lords (1), and of *Crane* v. *South Suburban Gas Co.* (2), neither of which, it appears to me, question or qualify the principles upon which *McDowall* v. *Great Western Railway Co.* (3) above cited was decided. On the contrary, Lord Macnaghten, in the former case, with whose opinion Lord Loreburn concurred, approved expressly of the opinions expressed by Romer & Sterling L.JJ. in *McDowall* v. *Great Western Rly. Co.*, (3) which, as I read them, are in full accord with those of Vaughan-Williams from which I have quoted.

SALTER v. THE DOMINION CREOSOTING COMPANY.

IDINGTON J.—This action was brought against the British Columbia Electric Railway Co. and the respondent, the Dominion Creosoting Co. The jury found a verdict against both. The learned trial judge thereupon entered judgment against both. Upon appeal to the Court of Appeal for British Columbia, that court maintained the judgment against the British Columbia Electric Railway Company but allowed the appeal as against the respondent.

The British Columbia Electric Company appealed to the Judicial Committee of the Privy Council and that appeal is still pending there.

The appellant brings the appeal here against the judgment of the Court of Appeal exonerating the respondent.

The question of the liability of the respondent does not necessarily turn upon the facts implicating, or alleged to implicate, the British Columbia Electric Company.

Both companies may be liable, but the facts are such that the liability of either cannot in itself necessarily in law imply the liability of the other. They

(1) [1909] App. Cas. 229. (2) [1916] 1 K.B. 33.
(3) [1903] 2 K.B. 331.

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

were independent actors and whether jointly liable or not need not concern us herein. I desire under such circumstances as I have set forth to refrain from passing any opinion upon the liability of the company which is not before us. Yet it is necessary to state a good many facts which may bear upon the question of that company's liability in order to understand the claim made against the respondent.

The respondent was engaged in delivering creosoted blocks, for paving streets in Vancouver, brought in railway freight cars, loaded therewith, over the British Columbia Electric Railway Company's railway tracks. The latter company operated a street railway in said city and the appellant whilst a passenger in one of its passenger cars, used in such service, received serious injuries caused by a collision of one of the said freight cars with the said passenger car under circumstances I am about to relate.

The British Columbia Electric Railway Company had placed at different times on its track freight cars carrying said blocks for the respondent till there were in all four such cars at one time placed at short distances apart to be unloaded by the respondent at points where its servants had directed them to be placed for that purpose. The British Columbia Electric Company had taken care, when so placing each of said cars, to have the brakes applied by the air compressor available in the operation and took care in connection with that operation to have blocks put in front of the wheels and so pinched thereby as to render it difficult, if not impossible, to move any of them by such means as were resorted to by the mischievous boys who later interfered.

The respondent's men later on, for their convenience, having desired the cars to be moved further down the grade, opened the brakes and removed these blocks and

then moved the cars further down than they had originally been placed. They then again put some blocks in front only of the car furthest down the grade, and applied the brakes by such simple contrivances as they found available in the absence of a shunter. It seems clear that this second attempt to fix the cars and prevent their moving was far from being as efficient as the first operations performed by the British Columbia Electric Company's men.

It is said that the car, or perhaps two cars, last placed by the British Columbia Electric Company were left by it on a level part of the track, but all were, as finally placed by respondent, on a down grade of from two to two and a half per cent.

It was attempted to be proved that this second operation was done by the authority of the British Columbia Electric Company. That attempt at proof failed to convince the jury, who answered a question submitted on the point, by saying that it was doubtful if any authority had been given.

It seems clear from all this that whatever responsibility existed for securing the cars from being moved by any extraneous cause was thus made to rest upon the respondent. Not only did it assume the responsibility for its men attempting to fix the cars, where they placed them, by the less efficient means they had adopted than the British Columbia Electric Company had applied; but also the entire responsibility for whatever might arise, which either company was bound to have anticipated and against which it should have protected any one liable to suffer from the consequences of want of due care.

It may well be that the means adopted by the British Columbia Electric Company were less efficient than the surrounding circumstances demanded; and

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

that seems to be the basis of the finding against the company.

From the moment the respondent took upon itself to meddle with the cars it assumed, in such a case, the entire responsibility, whatever it was, for seeing that neither life, nor person, nor property, was jeopardized by having the cars on such an incline, movable, or in danger of being set rolling down the incline.

The cars were started rolling down that incline by some mischievous boys, from a nearby school, at noon hour, unloosening the brakes on the car furthest uphill.

According to the story of Law, an eleven year old actor in that enterprise, there were no blocks removed from the front of the car wheels.

Of course the momentum of the loaded car furthest from the point of collision (which was the one the boys meddled with) would account for much and that be aided by those started thereby lower down.

It is not necessary here to enter upon the story in all its details. Suffice it to say that the car furthest up the incline having been released was propelled by its own gravity against the lower one and all so moved on, that a collision took place between those freight cars and the passenger coach of the British Columbia Electric Company in which the appellant was, and he thereby sustained serious injuries.

It is hardly arguable and indeed was not much pressed in argument that, if the respondent can on any ground be held liable for the result of those boys' actions there was no evidence to submit to a jury.

I am unable to accept the view presented by the Chief Justice of the Court of Appeal, and acted upon by that court, in exonerating respondent from any liability.

The attempt to handle these cars without the necessary appliances to control their possible movements was rather a hazardous proceeding in itself.

Suppose the cars or any of them had got beyond the control of those so handling them and then accidentally collided with a passenger car, surely the respondent would have been held liable for the damages suffered thereby. It would have furnished no excuse for respondent to have said that it or its servant had not any knowledge of railway business or of the precautions needed to be taken.

In assuming as the court below does that the moving of the cars

> without the British Columbia Electric Company's shunter and crew in attendance with proper facilities,

did not affect the situation at all, I respectfully submit there is error. Indeed it seems to me there is a grave misapprehension of the facts, for the cars were not braked and blocked in the same manner, and by the same efficient means, as I understand the evidence, they had been when placed by the British Columbia Electric Company.

The jury heard the men who performed the operation and looking at the evidence may not have accepted literally all they said as true. And even if there was a perfunctory doing of that so as to lend a similarity of appearance to the results, it is not self evident that they were identical in efficiency.

To my mind there is ample evidence to warrant the jury in making the broad distinction they do.

The place where these cars were placed was on the public highway. One had been placed there on a Monday and later removed. Two of those in question were placed on Tuesday morning and two more on Tuesday evening and all left braked and blocked by the British Columbia Electric Company. On Wednesday at noon, the time of the accident, they stood, as imperfectly braked by respondent, and without any blocking in

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

front of any but the one furthest down the hill. This position of the cars and these conditions as to blocking is that outlined by the respondent's foreman. I fail to find them wear much resemblance to that which is stated to have been the condition in which they were left by the railway company.

The difficulty in the case is caused by the interference of the boys, and the question of law thus started is as to whether or not that was such an occurrence as ought to have been foreseen and provided against. Its determination depends on the facts which I think were clearly questions for the jury.

The cars were clearly liable to all sorts of interference by boys or grown-up idlers, or by movements of other cars or by storms of wind, and their situation liable in such case to produce the disastrous result in question herein.

The question in the analogous case of *Cooke* v. *Midland Great Western Railway Company* (1), for the consideration of the jury is put thus at page 234 by Lord Macnaghten:—

> Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?

Lord Macnaghten proceeds to say:—

> This, I think, was substantially the question which the Lord Chief Justice presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin*(2), and the opinion expressed by Romer and Sterling L.JJ. in *McDowall* v. *Great Western Rly. Co.*(3).

The *McDowall Case* (3) is that upon which the respondent most strongly relies.

(1) [1909] App. Cas. 229. (2) 1 Q.B. 29.
(3) [1903] 2 K.B. 331.

The respective facts in each case, as to the care taken to provide against the contingency of interference by boys, makes a marked distinction between that case and this in hand.

There reliance was also placed upon the fact that boys had trespassed for years upon the company s premises in question but had never ventured to move a car. In this case, so far from having such assurance to rely upon, these very boys had just got done, on the day in question, amusing themselves in going a step beyond the ordinary form of boyish trespass by running a hand-car of the railway company without interference by any one. Having tried that experiment unchecked, they grew bolder and tried to follow the bad example of what they or others had done a few weeks before with another car. What is the law applicable thereto?

I have considered the *McDowall Case* (1) and all the other cases counsel have referred us to, and others, including the recent case of *Ruoff* v. *Long & Co.* (2), not cited. I doubt if it is possible by any ingenuity to reconcile all that has been said in these numerous cases and give even an appearance of consistency to the decisions, or find in some of them an observance of the principles of law which have many times been set forth, relative to the duty of anticipation to be observed in such like cases, and the province of a jury as absolute judges of the fact.

The law so set forth is simple and in the last analysis nothing but enlightened common sense. It would be futile to demonstrate, even if one could, by an analysis of the cases and what is implied therein, how and why such clear law has become so much mystified, merely by an appearance of learning, through the use of words and possibly more words; for the law has not been

(1) [1903] 2 K.B. 331.

(2) [1916] 1 K.B. 148.

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

changed thereby. It may have been thus rendered confusing to those who feel they have to resort to decided cases and the numerous dicta to be found therein, rather than rely upon the long established principles of law by which the case to be decided should be governed, either as regards the liability in question or the mode of its determination, by which in our system of jurisprudence the trial of fact rests solely with the jury, and only the law with the judiciary.

The result of the test suggested by Lord Macnaghten and accepted, at least in words, by those he refers to, when it comes to be applied by a jury, and their verdict has been approved by an able judge, as happened in the *McDowall Case* (1) may be set aside by three or more other men, who may be possessed of greater learning relative to law in general, but perhaps, for aught one knows, of less actual experience than either jury or judge, of the world of affairs relative to possibilities or probabilities of what was likely to have happened, for example, to a brake van and cars left in a particular situation, unless due care has been taken to avert the consequences of such possible or probable acts as produced the injury complained of in such case.

Why should this be so? The jury may not have been properly instructed in regard to the law and exactly what they have in such a case to consider and determine; or they may not have had the evidence to warrant such finding as would answer the test suggested; or from some cause or other in the way of sympathy or prejudice, failed to act within their limits of law and evidence and thus reached a conclusion that twelve reasonable men could not properly have come to. In any such case an appellate court may interfere.

There is such an infinite variety of possible situa-

(1) [1903] 2 K.B. 331.

tions and possible surrounding circumstances out of which may arise the question of likelihood of some injury happening through the acts of others relative to the car left on a railway track that each case must be determined by the facts presented therein.

There should not in reason, I imagine, be demanded the same care to protect, against such contingencies, a car or cars left upon a siding far from the haunts of men or children, as on a public highway in a town or city. But that there is need for such care in such latter situation surely no one of sense can now deny. Why did the British Columbia Electric Company's men who left the cars there take such steps as they did by braking, tightly as power could, each car? Why put blocks in front of the fore wheels of each car if nobody is likely to interfere? Why do we hear of the use of toggles in such a connection? And apart from these means and need for their use being present to the minds of railway men in Vancouver as shewn by evidence and signifying, if common sense be applied, why the need of these things was felt, we have also another means suggested by the witnesses herein as not uncommon, when cars have to be kept in an exposed situation. Surely all these things imply much knowledge of needs begotten of sad experience. Are we to be assumed to be so astute as to find another meaning therein, or so stupid as not to be able to read or interpret what the man in the street can?

Any single appliance of either sort would quite suffice to keep the car from moving of its own weight or by reason of wind even on a slight down-grade.

It is the possibility of improper interference that evidently suggested a combination of all these means being used. To say that no one could be called upon to

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

anticipate the pranks of children is not to my mind self evident. And indeed the possibility of that being a cause of cars moving when left unsecured, must depend upon the quality of the children in each country and the vigilance of the police coupled with the kind of education and bringing up the children get.

The conditions must vary in different places. I am not diposed to criticize a jury's view of what evidence may be needed in their own neighbourhood in regard to the probability of such things being done by school children as proven herein. I am not prepared to say that the jurymen who had to consider the probability of such injury happening in the way it did and the need of its being provided against, were without evidence entitling them to find that the respondent was negligent in that regard and its negligence a proximate cause of the injury complained of.

I quite agree with the learned Chief Justice of British Columbia in appeal, when he remarked that the practice of submitting a separate question relative to the necessity of anticipating the result complained of is to be preferred because it keeps before the minds of the jurors what they might otherwise overlook.

In saying so, I by no means desire to encourage the submission of a multiplicity of questions which often tend to confuse the minds of jurors. That aspect of this particular class of cases does not often occur in accident cases where negligence is charged.

The cause and consequences are usually self evident. In this class of cases they are not always of necessity so. Want of direction by the learned trial judge in that behalf was not complained of at the trial or indeed pressed in argument.

I see, however, no reason to suppose that the jury did not fully appreciate the point and understand what

was involved in the question submitted. After all, it comes back to the question of the respondent attempting that which ought never to have done by its men.

It seems quite clear that the placing of these cars was a matter which had been so safeguarded by the railway company as to require a special leave to its employees to permit cars to be placed for any consignee receiving freight.

I think respondent must abide by the consequences of its meddling with them.

It is, I respectfully submit, rather an absurd excuse that is urged on its behalf that its servants had not the necessary experience. So much the more reason why they should have asked the railway company to lend its aid with the light of that experience, instead of attempting something they possibly knew nothing about. As a matter of fact some of them seem to have had some railway experience but not enough of the sense of responsibility they ought to have had.

Can any one doubt that the mischievous boys, if of an age to appreciate what they were about, would be liable for all the damages they caused? How much better is respondent's position than theirs?

Of course if it had succeeded in establishing that what was done by it was with the leave and as directed by the railway company, this excuse would be intelligible. But failing that, I can find no excuse for it, even in relation to the question, so much debated, of the likelihood of the boys or others intervening and their acts being provided against.

I conclude for all these several reasons that the appeal should be allowed and the judgment as against the respondent be restored with costs of this appeal and so much of the costs of the appeal in the court below as properly attributable to its share in that

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

appeal beyond what was necessarily additional to said appeal by reason of the railway company being a party thereto.

GEALL v. THE DOMINION CREOSOTING COMPANY.

IDINGTON J.:—This appeal was argued along with the case of Salter v. same parties.

The railway company having been held liable by the Court of Appeal and the respondent exonerated by that court this appeal is taken as against the latter part of said judgment. The main facts bearing upon the liability of the respondent are the same as in the Salter Case. I have reached the same conclusion in this as in that case and for the reasons I assign therein save as hereinafter expressed.

I observe that the verdict of the jury is not in the same language as that adopted in the Salter Case but is more general and comprehensive. It seems to me that the finding must be read in light of the proceedings and charge of the learned trial judge and that when regard is had to these things there is not much difficulty in understanding what the meaning of the jury's finding is.

There was no objection taken to the learned trial judge's charge in relation to anything in question herein or any request by counsel to submit any more specific question bearing upon the question of the likelihood of the cars being interfered with by boys or other idlers.

That aspect of the case was no doubt well treated by counsel in addressing the jury. I do not think, in absence of any objection to the learned trial judge's charge relevant to that, we should presume that there was any oversight in the learned judge's charge in failing to do more than he did. I may repeat, however,

that we should prefer specific attention in this class of cases being drawn to the question of the likelihood of boys or others improperly meddling with the cars as a matter to be foreseen and guarded against.

The case of *Jamieson* v. *Harris* (1), is cited by respondent's counsel. Is it unfair to assume that the decision in that case should have been present to the minds of counsel at the trial? If not, then was the time to have pointed out the need of a specific question and answer.

That was a case where the unfortunate plaintiff suffered from the multiplicity of the questions submitted. Indeed, there were no less than twenty-five questions submitted there and, as the majority of this court held, the real point at issue had not been effectively hit by any of them.

I did not think then that the jury should have been held to have misunderstood what they were trying. Nor do I find here that they failed to comprehend what they were about.

I must, however, frankly say that the answer returned in this case does not as clearly lend itself to the meaning I have attached to that in the Salter Case and hence the stress I have laid in the latter part of my opinion in that case does not seem to have as much force when applied to this verdict as to that in the Salter Case.

The other reasons I have there assigned, however, seem to me sufficient to entitle me to reach the result I do herein upon the assumption that the case at the trial was fought out on all that was involved in the question of due care to be taken by the respondent.

If I had reached any other conclusion it would not be that of the court below dismissing the action as

(1) 35 Can. S.C.R. 625.

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Idington J.

against respondent but of a new trial for which nobody seems anxious herein.

The appeal should be allowed and the trial judgment restored with costs of this appeal and in the court below, save such extra costs (if any) as entailed by the British Columbia Electric Company being a party thereto.

DUFF J. (dissenting).—The judgment of Mr. Justice Lush in *Ruoff* v. *Long & Co.* (1), contains at page 157 of the report an exposition of the principles and considerations which were held to govern the decision of the case in which he was giving judgment and which, I think, are precisely applicable for the decision of the dominating question raised by this appeal. That question is whether the acts of the respondent's servants could properly be held by a jury to be the proximate cause of the most unfortunate accident which led to the proceedings in these actions. I quote from Mr. Justice Lush verbatim in these words:—

> But in the present case there is no ground for saying that the defendants placed a dangerous thing or an obstruction upon the highway, or in any sense used the highway unlawfully. They left a motor lorry in the street for a few minutes. It could not start of itself. In leaving it standing in the street for that short time they did nothing unlawful. Then what is the duty of a person situated as the defendants were? He must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. As a matter of fact the County Court Judge did not find that this accident was likely to arise from the defendants' user. If he had so found I agree that there was no sufficient evidence to support the finding. There would have been no danger if these two persons had not by their irresponsible acts converted into a source of danger a thing which in itself was perfectly safe and could do no harm to anybody. We need not go so far as to hold that a person lawfully leaving a vehicle standing unattended in a highway can in no circumstances be held responsible for damage through the intervening act of a third party. The circumstances might be such that he ought to recognize that he was offering a temptation or invitation to another to set the

(1) [1916] 1 K.B. 148.

vehicle in motion and that danger might result to third persons. The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he would properly anticipate. In *Latham* v. *Johnson*(1), Hamilton L.J. states a rule which he says is as old as *Scott* v. *Shepherd* (2), namely, that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person that injury would not have occurred. The Lord Justice proceeds: "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a cause *sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief." That indicates that a person who so leaves his property will not be responsible if the mischief is created by a fresh, independent cause, and that a fresh, independent cause may be one which in the circumstances he is under no obligation to contemplate.

The question, which must be answered in the affirmative then if the appellants are to succeed, is this: Could the jury properly find that the respondents' servants ought reasonably to have anticipated the acts of the boys who loosened the brake on the first car and to have foreseen that such intervention would lead to mischief? As to the second branch of the question, I should have no trouble with that if an affirmative answer to the first branch could be justified on the evidence, but to that branch of the question I think there is no evidence to justify such an answer. There was something, it is true, to shew that apprehensions of interferences by school boys were entertained by some of the servants of the railway company and it may be, I express no opinion on the point, that an inference might properly be drawn that the experience of the employees of that company had proved more instructive than the experience of others; but

(1) [1913] 1 K.B. 398, at p. 413. (2) 3 Wils. 403.

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO.

Duff J.

there is nothing in the evidence to suggest that the extent or nature of the risk proved to have been incurred by leaving these street cars unattended when the mischievous propensities of the school boys frequenting the neighbourhood are revealed by the court had been brought home by any special warning or experience to the present respondents.

ANGLIN J.—The negligence charged against the defendants, the Dominion Creosoting Company, in both these cases is that after four cars of their co-defendants, the British Columbia Electric Company, had been placed by that company in a situation of comparative safety on level ground at the top of the grade, the Creosoting Company moved them to a place of much greater danger, *i.e.*, down on to the slope or grade, failed to brake them properly, failed to block three of the cars and "to pinch" the block under the fourth, and, knowing the risk to be apprehended, left the cars in this dangerous position unguarded. The finding of the jury in the Geall Case is that the Creosoting Company neglected

> to take proper precautions when the cars were in their charge to be unloaded,

and in the Salter Case, that the Creosoting Company was negligent

> in moving the cars without the British Columbia Electric Railway Company's shunter and crew in attendance with proper facilities.

In both cases the jury also found that the Creosoting Company had failed to establish authority from the British Columbia Company to move the cars down the grade. The fact that they moved the cars from above the grade down the hillside is undisputed.

The evidence makes it reasonably clear that brakes can be more securely set by air pressure than by

hand—so much so that, whereas a boy could release brakes set by hand with comparative ease, he probably could not release brakes set by air; that it is a reasonable precaution to block as well as to brake cars on a grade; that the blocks should be "pinched" so that they cannot slip and cannot be easily dislodged; and that there is a knack in hand-braking, which is acquired by training and experience. The Creosoting Company's employees were not trained or experienced brakesmen. There is also evidence from the respondent's foreman that he knew of the proximity of the school boys and of their mischievous tendencies and had in mind the danger of their tampering with the cars and feared that "they might have got the cars going," as they had on other occasions. He was aware of the danger involved in this. Yet he left the cars in the temporarily disused highway near a school-house at the "noon hour" when he knew the boys would be out of doors and without supervision, on the grade braked only by hand by inexperienced men, and with a block under only one car, and that block not "pinched." What he anticipated might occur then happened.

Under these circumstances, notwithstanding the very meagre charge to the jury, I think we may and should read the verdict in each case as covering the negligence charged against the respondents and involving a finding that their employees either anticipated, or should have anticipated, that the school boys might release the cars. That they did in fact so anticipate was established by their foreman's undisputed testimony. Without so finding, the juries (as is pointed out by Macdonald C.J.) could not properly have found, as they did, that the respondents' negligence was the proximate cause of the collision in which the plaintiff

1917

GEALL v. DOMINION CREOSOTING CO.

SALTER v. DOMINION CREOSOTING CO

Anglin J.

Salter and the deceased Geall were injured. They were explicitly told that the plaintiffs must establish "negligence (which) was the proximate cause of the accident," consisting in a failure

> to take reasonable care under all the circumstances not to injure another * * * not to expose other people to unnecessary risk in connection with (their) operations.

These cases are distinguishable from *Rickards* v. *Lothian* (1), relied on by Mr. Tilley, because there the verdict was held not to involve a finding of failure to guard against a mischievous act that should have been anticipated, which I think may fairly be held to be implied in the findings in the case before us, as it was in *Cooke* v. *Midland Rly. Co.* (2).

Upon the findings so viewed the respondents are liable in both these actions, which seem to me to fall directly within the principle of the decision of the *Cooke Case*(2). There a turntable was left unlocked and therefore easily movable by children. It was situated close to a public road from which it was separated only by a defective fence through which children were in the habit of trespassing to the knowledge of the company's servants. Here the cars were left on the temporarily unused highway, insecurely braked and insufficiently blocked, on a dangerous grade and therefore capable of being easily moved by children, whose proximity and mischievous propensities were known to the company's foreman in charge. This is indeed an *a fortiori* case because the injury here was sustained not by the mischievous meddlesome trespassers themselves, as it was in the *Cooke Case* (2) but by innocent third persons. The language of Denman C.J. in the case of *Lynch* v. *Nurdin* (3), is in point:—

(1) [1913] A. C. 263. (2) [1909] A. C. 229.
(3) 1 Q.B. 29 at p. 35.

If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

Lord Atkinson in his speech in the *Cooke Case* (1), at p. 237, if I may be permitted to say so with respect, admirably expresses the ground of liability in a case such as this.

The latest case illustrating liability for leaving unguarded near a highway a dangerous thing which it should have been anticipated might be so interfered with as to cause injury, though not directly in point, is *Crain* v. *South Suburban Gas Co.* (2).

The *McDowall Case* (3), relied on by the respondents, is, I think, distinguishable from that at bar in several respects. In that case the cars were left on a private right-of-way safely braked. Upon the evidence the Court of Appeal concluded that there was nothing to warrant a finding that the railway company ought reasonably to have anticipated that the boys would do or might do, what they in fact did, or that the risk of their doing such acts was known to the company. The evidence of the company's foreman in the present case is not merely that the risk was known, but that he feared that the very thing that occurred might happen.

I would, therefore, allow these appeals with costs in this court and in the Court of Appeal and would restore the judgments of the trial courts.

Appeal allowed with costs.

Solicitors for the appellants Geall and Adams: *McLellan, Savage & White.*

Solicitors for the appellant Salter: *Farris & Emerson.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*

(1) [1909] A. C. 229. (2) [1916] 1 K.B. 33.
(3) [1903] 2 K.B. 331.

1917

May 18.
June 22.

CHALMERS v. MACHRAY.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Sale—Commission—Partial payment of price—Receipt by agent—Parties.

APPEAL from a decision of the Court of Appeal for Manitoba (1), reversing the judgment at the trial in favour of the plaintiff Chalmers.

One Campbell employed the plaintiff to sell his hotel for $50,000 retaining for himself any excess over that amount. He sold for $52,500 and $22,000 was paid to defendants, solicitors for Campbell, who used it to pay rent due and incumbrances on the property. Plaintiff obtained judgment against Campbell for the $2,500 due him under the agreement but not being able to collect it he brought action against the defendants alleging that they had notice of his claim before paying out the money. The Court of Appeal held that plaintiff could not maintain this action.

After hearing counsel for both parties the Supreme Court reserved judgment and on a later day dismissed the appeal with costs.

Appeal dismissed with costs.

G. A. Elliott K.C. for the appellant.
Tilley K.C. and *E. K. Williams* for the respondents.

(1) 26 Man. R. 105

FRANKLIN v. REARDON.

1917
*Oct. 22.
*Oct. 26.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Company—Transfer of shares.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial by which the action was dismissed.

By agreement between the parties, stock of a theatre company was to be transferred to the plaintiff Reardon and his nominee, who brought action to enforce it claiming a mandatory order for the transfer and for election of plaintiff and his nominee as directors, and judgment as prayed was given in his favour.

After hearing counsel the Supreme Court of Canada, with consent of both parties, varied the judgments below by striking out the order restraining defendant from excluding plaintiff and his nominee from being directors and from selling stock to any others.

Appeal dismissed without costs.

F. H. Bell K.C. for the appellants.
Mellish K.C. for the respondent.

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

(1) 51 N.S. Rep. 161.

1917
*May9.
*Oct. 9.

CLARK v. HEPWORTH.

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

Principal and agent—Sale—Common agency—Concealment.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1) reversing the judgment of Ives J. at the trial (2), and dismissing the appellant's (plaintiff's) action with costs.

The plaintiff seeks rescission of a contract for the purchase of a farm in the Province of Alberta and claims damages because of alleged misrepresentations by the vendor's agents as to its value and relative situation and because, while professing to act in a confidential relation to the plaintiff, they either actively misrepresented, or at least wilfully and with fraudulent intent concealed their relations with the vendor.

The trial judge found in the plaintiff's favour on the ground of concealment of the agency, granted rescission of the sale and ordered repayment, by the vendor and the firm of real estate agents, of the moneys paid on account of the purchase price. This judgment was reversed by the Appellate Division of the Supreme Court of Alberta and an appeal to the Supreme Court of Canada by the plaintiff was dismissed, Idington J. dissenting.

Appeal dismissed with costs.

Ford K.C. for the appellant.
Hogg K.C. and *Ewing* for the respondent Mitchener.
Lafleur K.C. and *Payne* for the respondent Hepworth.

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

(1) 34 D.L.R. 177. (2) 9 W.W.R. 802; 33 W.L.R. 175.

FAFARD v. LA CITÉ DE QUÉBEC.

1917
*June 6.
*Oct. 9.

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

Municipal corporation—Maintenance of highways — Protection wall on dangerous hill—Automobile traffic—Liability for damages — Negligence.

APPEAL from the judgment of the Court of King's Bench, Appeal Side (1), affirming the judgment of the Superior Court, District of Quebec (2), and dismissing the plaintiff's action with costs.

The appellant was being driven down a very steep hill in the City of Quebec, in a hired automobile. As it was raining, the pavement was slippery. The hill has always been considered as a very dangerous one: half way down there is a stiff turn to the right and the highway is along the edge of a precipice of over twenty feet high. The respondent had erected a prop wall up to the road surface and had put on that wall a wooden fence. The chauffeur, noticing that the wheels of his car were slipping, put on the brakes, but with no result, the automobile ascended the curb stone and the sidewalk, broke through the fence and fell down the incline. The appellant, seriously wounded, claimed from the respondent damages to the amount of $2,500 on the grounds that the accident had been caused by the bad condition of the hill and the want of proper protection for the public.

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

(1) Q.R. 26 K.B. 139. (2) Q.R. 50 S.C. 226.

1917

FAFARD v. LA CITÉ DE QUÉBEC

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs, Idington and Anglin JJ. dissenting.

Appeal dismissed with costs.

Bernier K.C. and *Dion* for the appellant.

Alex. Taschereau K.C. and *Morin* for the respondent.

RURAL MUNICIPALITY OF SHERWOOD v. WILSON.

1917

*May 16.
*June 22.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Assessment and taxation—Power to revise—Statutes, Sask., 1914, c. 9, s. 1.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of Elwood J. at the trial in favour of the respondents (defendants).

On the 27th December, 1915, the Local Government Board of the Province of Saskatchewan made an order reducing the assessment of some lots belonging to respondents. The appellant contends that the Board had no power to make this order so as to affect the assessment for the year 1915.

The trial judge held that the Local Government Board had power, under section 1 of chapter 9 of the Statutes of Saskatchewan, 1914, at any time during the year, to reverse and adjust assessments made in that year. This judgment was affirmed by the Court of Appeal.

The plaintiff appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Tilley K.C. for the appellant.
Sampson K.C. for the respondents.

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

(1) 30 D.L.R. 539; 34 W.L.R. 1187.

1917

*Feb. 27, 28.
*Oct. 9.

MIGNAULT v. DESJARDINS.

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

Principal and agent—Real estate agent—Option—Fraud.

APPEAL from a decision of the Court of Review at Montreal (1), affirming the judgment of the trial court and maintaining the plaintiff's action with costs.

On September 11th, 1912, the appellants wrote one Rollit a letter in which they agreed to buy the property situate in Montreal and known as the Molson property, at the price of $425,000.00, payable $75,000.00 at the passing of the deed, $50,000.00 in one year, and the balance in five years. Thereupon, Rollit secured a sub-option on that property from the Colonial Real Estate Company, which had an option to purchase from the owners, the Grey Nuns, the price to be paid being $395,000.00. Rollit took such option "on behalf of his client," but it has been found by both courts below, as a fact, that in doing so, he was not acting as the agent of the appellants. Subsequently, the appellant Morin became aware of the fact that the respondent was Rollit's undisclosed principal but said nothing at the time. The conditions of the option held by Rollit were altered, with respect to the terms of payment, to suit the appellants; and to bind the option, Rollit paid the Colonial Real Estate

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

(1) 23 R.L. N.S. 85.

Company $5,000.00, which sum he had received from the appellants. The appellants were notified in due course that Rollit and his principal were prepared to sell the property and make good the title in accordance with the terms of appellants' letter, but the appellants refused to carry out the bargain. The result was that the appellants bought the property direct from the Grey Nuns for the price at which the latter agreed to sell to Rollit; and the respondent lost the benefit of his option, *i.e.*, $29,824, for the recovery of which he took action against the appellants.

The judgment of the trial judge, Panneton J., maintaining the action of the respondent, was affirmed by the Court of Review; and, on appeal to the Supreme Court of Canada, the judgment was also affirmed by a majority of the court.

Appeal dismissed with costs.

Louis Boyer K.C. for the appellants.
Lafleur K.C. and *G. Barclay* for the respondent.

1917
*Oct. 9.
*Oct. 15.

CANADIAN COLLIERIES (DUNSMUIR) LIMITED v. DIXON.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and servant—Damages—Negligence—Jury.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), maintaining the verdict at the trial in favour of the plaintiff (respondent).

This action was brought by the plaintiff on behalf of herself and children for damages occasioned by the death of her husband through the negligence of the defendant company. The deceased was in their employ, and while on the way out of one of the tunnels of a mine belonging to the company defendant, a cave-in occurred which caught the deceased and killed him. The tunnel, at the point of the cave-in, was timbered and the plaintiff alleged a defective system of inspection.

The jury found against defendant and assessed damages to the amounts of $3,000 to the widow and $3,000 to the children.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal maintaining the verdict was affirmed.

Appeal dismissed with costs.

Wallace Nesbitt K.C. for the appellant.
Farris K.C. for the respondent.

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

(1) 24 B.C. Rep. 34.

MONTREAL TRAMWAYS COMPANY v. MULHERN.

1917
*Oct. 30.
*Nov. 13.

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

Negligence—Jury trial—Medical evidence—Causal connection between the injury and the occurrence.

APPEAL from the judgment of the Court of King's Bench, Appeal Side (1), maintaining the verdict for the plaintiff (respondent) at the trial.

The husband of the respondent, while a passenger on a street car belonging to the appellant, sustained severe bodily injuries resulting in his death, when the car became uncontrollable and crashed down the grade into another car in the rear. The deceased survived the accident some months, and the injuries did not at first appear to be serious. The appellant contended that the respondent had failed to prove that the death was attributable directly to the accident.

The case was tried before a mixed jury, and a verdict was entered for the plaintiff with damages assessed at $6,693.00, which verdict was maintained by the Court of Appeal.

The defendant appealed to the Supreme Court of Canada which, after hearing counsel on its behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

Thibaudeau Rinfret K.C. for the appellant.
Callaghan for the respondent.

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

(1) Q.R. 26 K.B. 456.

1917

*Oct. 11.
*Oct. 15.

POPE v. THE ROYAL BANK.

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

Company—Shares held in Family—Trust—Representations to bank.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Simmons J. at the trial and maintaining the respondent's (plaintiff's) action with costs.

The defendants (appellants), the father and three sons, were the shareholders of the West View Ranch Company. The plaintiff (respondent) had a judgment against one of the defendants who was the holder of only one share in the company. The action was brought to enable the plaintiff-respondent to enforce its judgment against a quarter interest in the company which, it alleges, the judgment debtor had, according to representations made by the latter and his father to the bank plaintiff, in order to obtain a loan from it.

The trial judge found in favour of the defendants; but the Supreme Court of Alberta held that the representations made to the bank could not be withdrawn to its prejudice.

On an appeal by the defendants to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Aimé Geoffrion K.C. for the appellants.

G. H. Montgomery K.C. and *H. H. Hyndman* for the respondent.

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

(1) 11 Alta. L.R. 68.

DUPLESSIS v. THE EDMONTON PORTLAND CEMENT COMPANY.

1917
*Oct. 10.
*Oct. 15.

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

Bills and notes—Notice — Dual capacity — Promissory note.—Consideration.

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

This action is on a promissory note given by the defendant (appellant) to the plaintiff (respondent). The appellant alleged misrepresentation and lack of consideration. The Supreme Court of Alberta held that the defendant had not discharged the burden upon him of proving that the plaintiff was not a holder in due course.

On the appeal to the Supreme Court of Canada, the court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

E. B. Edwards K.C. for the appellant.
O. M. Biggar K.C. for the respondent.

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

(1) 11 Alta. L.R. 58.

(2) 28 D.L.R. 748; 10 W.W.R. 514; 34 W.L.R. 250.

1917
*Oct. 26.
*Nov. 28.

ST. LAWRENCE FLOUR MILLS COMPANY v. STEWART.

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

Master and servant—Liability—Saw-guard—Contributory negligence.

APPEAL from the judgment of the Court of King's Bench, Appeal Side (1), reversing the judgment of Greenshields J. at the trial and maintaining the action of the plaintiff-respondent with costs.

The respondent, a millwright, was employed as such by the appellant in a large flour mill. While he was operating a circular saw, his left hand was suddenly turned into the teeth of the saw. The respondent took an action in damages for $10,000.00, alleging that the accident occurred because there was no guard over the saw, when the appellant should have had one installed. The appellant denied any liability for the reasons that the respondent had, for a long time before the accident, control of the saw, that he was himself aware of the necessity of a guard and that he had never complained or asked that one should be installed.

The trial court dismissed the action on the ground that the respondent was alone responsible for the accident. But this judgment was reversed by the Court of Appeal who held that the appellant was also, though in a less degree, liable and, on account of contributory negligence, assessed damages at $2,000.00.

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

(1) Q.R. 26 K.B. 476.

The defendant appealed to the Supreme Court of Canada, which, after having heard counsel on behalf of both parties, reserved judgment and subsequently dismissed the appeal, Davies J. dissenting.

Appeal dismissed with costs.

J. E. Martin K.C. and *John Hackett* for the appellant.

Vipond K.C. for the respondent.

1917
*Oct. 15.
*Nov. 28.

NELSON v. THE CANADIAN PACIFIC RAILWAY COMPANY.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Negligence—Injury—Railway yard—Switch stand—Board of Railway Commissioners.

APPEAL from the judgment of the Supreme Court of Saskatchewan *in banco* (1), reversing the judgment of Haultain C.J. at the trial and dismissing the plaintiff's (appellant's) action with costs.

This action is one brought to recover damages by the plaintiff-appellant for injuries sustained by him in consequence of his falling or being thrown from a car in the Moose Jaw yard of the defendant company, while engaged as a switchman. The defendant's negligence complained of and found by the jury was in having a switch stand "too close to the rail." The trial judge entered a verdict on the jury's findings for the damages found by them, which verdict was set aside and the plaintiff's action dismissed by the Appeal Court of Saskatchewan. That court held that there was no evidence showing that placing the switch where it was placed was contrary to any order of the Board of Railway Commissioners or was not according to good railway practice; and, moreover, that the accident was due to plaintiff's own negligence.

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

(1) 35 D.L.R. 318; 2 W.W.R. 294.

1917

NELSON v. CANADIAN PACIFIC RWAY. CO.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, maintained the appeal with costs, Sir Charles Fitzpatrick C.J. and Davies dissenting.

Appeal allowed with costs.

P. M. Anderson for the appellant.
Tilley K.C. for the respondent.

1917
*Oct. 12.
*Oct. 15.

CITY OF REGINA v. THE WESTERN TRUST COMPANY.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Municipal law—Failure of common law action—Abandoned appeal—Application for compensation—Workmen's Compensation Act Sask. Statutes, 1910-1911, c. 9.

APPEAL from the judgment of the Supreme Court of Saskatchewan *in banco* (1), affirming, the court being equally divided, the judgment of Newlands J. at the trial. (2).

The respondent company, as administrators of the estate of one Thomas Cook, brought an action at law against the defendant (appellant) to recover damages for the death of the said Cook, while in the defendant's employ. The jury brought in a verdict for the plaintiff; but the trial judge reserved his decision on a motion for judgment and subsequently dismissed the action with costs (2). The plaintiff, after serving a notice of appeal, abandoned his appeal and made an application, before the same trial judge, to have compensation assessed under the "Workmen's Compensation Act." This was granted and the plaintiff was awarded $2,000 damages.

The principal contentions of the appellant were: 1. That the respondent's right to compensation was conditioned upon the determination in the common law action that the defendant was liable under the Act. 2. That the application for assessment was not

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

(1) 30 D.L.R. 548; 34 W.L.R. 1125. (2) 32 W.L.R. 307.

made immediately after the judgment in the common law action, as required by the Act, and that, the appeal having been abandoned, the respondent lost the right to apply, which the statute gave in case of an unsuccessful appeal. 3. That the appellant's street railway was not a railway within the meaning of the Act.

On appeal to the Supreme Court of Canada, the judgment of the trial judge, as affirmed by the Supreme Court of Saskatchewan, was again affirmed.

Appeal dismissed with costs.

G. F. Blair K.C. for the appellant.

P. M. Anderson for the respondent.

1917

*June 7.
*June 22.

TOWN OF OAKVILLE v. CRANSTON.

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

Municipal corporation—Negligence—Maintenance of roads.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming, by an equal division of opinion, the judgment at the trial (2), in favour of the plaintiff.

The plaintiff while riding in a cutter through the Town of Oakville was thrown out and injured. At the place where the accident occurred there was a "pitch hole" in the snow which was the cause of it. An action for damages was tried without a jury and the trial judge held that the road was not in a proper state of repair and that the municipality was liable. His judgment was affirmed on appeal.

The Supreme Court of Canada after hearing counsel and reserving judgment dismissed the appeal, Davies J. dissenting.

Appeal dismissed with costs.

H. J. Scott K.C. and *W. A. Chisholm* for the appellant.

James Lawson for the respondent.

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

(1) 10 Ont. W.N. 315. (2) 10 Ont. W.N. 175.

TELEGRAM PRINTING CO. v. KNOTT.

1917
*May 18.
*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Libel—Trial—Misdirection—Admissibility of Evidence—Damages.

APPEAL from a decision of the Court of Appeal for Manitoba (1), affirming the judgment at the trial in favour of the plaintiff.

The plaintiff brought action against the Printing Co. claiming damages for a libellous publication charging him with an attempt to extort money for the issue of municipal licences. On the trial the jury found the publication libellous and a verdict for the plaintiff with $1,500 damages was sustained by the Court of Appeal. The defendant company appealed to the Supreme Court of Canada urging misdirection, wrongful admission of evidence and excessive damages as grounds for reversing the judgment below.

The majority of the court dismissed the appeal with costs. Davies J. held that the damages were excessive and that there should be a new assessment and Duff J. dissented on the ground that the appellants were entitled to a trial by jury and the case had never been properly tried.

Appeal dismissed with costs.

R. A. Pringle K.C. and *Manning* for the appellants.
Nesbitt K.C. for the respondent.

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

(1) 27 Man. R. 336.

1917
*May 22.
*June 22.

NICHOLS v. McNEIL.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Married woman—Separate property—Evidence.

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

The plaintiff, Nichols, received from one Mrs. Churchill a deed of a hotel property in Digby, N.S., and a bill of sale of the contents. The defendant, McNeil, obtained judgment against Mr. Churchill and seized the personal property in the hotel in execution thereof. In the plaintiff's action claiming damages for trespass by such seizure the Supreme Court of Nova Scotia held that Mrs. Churchill never had title to the personal property nor possession thereof other than her husband's possession and dismissed the action.

The Supreme Court of Canada after argument reserved judgment and on a later day dismissed the appeal with costs.

Appeal dismissed with costs.

Rogers K.C. for the appellant.
Mellish K.C. for the respondent.

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

(1) 50 N.S. Rep. 67.

BERGER v. CLAVEL.

1917

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

Will—Ambiguous clause—Interpretation—Extrinsic evidence.

APPEAL from a decision of the Court of Review at Montreal (1), affirming the judgment of Martineau J. at the trial, and maintaining the action with costs.

This was an action to define the rights of one Germain, plaintiff, under the testament of the late Charles Berger. The will was drawn in French, and the bequest in question was of an immovable property described in the following words:—

Mon immeuble portant les numeros civiques 1178 à 1186 inclusive ment de la rue St. Denis, coin Mont Royal, avec dependances.

It appears that, on that property on Mont Royal avenue, there were two stores in course of erection at the time when the will was made. The plaintiff contends that the bequest is of all the testator's property at the place mentioned, and the defendant, respondent, submitted that the portion of the property dealt with is limited to those houses which at the time the will was made bore the civic numbers therein mentioned. Both the courts below held that, in view of the doubt which exists as to what constitutes the subject matter of the legacy, extrinsic evidence was admissible to prove what the intention of the testator was, as imperfectly expressed by the notary who drew the will.

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

(1) Q.R. 51 S.C. 165, sub nom. Germain v. Clavel.

1917

BERGER v. CLAVEL.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, allowed the appeal with costs, Sir Charles Fitzpatrick C.J. and Anglin J. dissenting; Davies J., though thinking there was sufficient ambiguity in the language of the devise to admit extrinsic evidence, was of the opinion that this appeal should be allowed on the questions of fact.

Appeal allowed with costs.

Lafleur K.C. and *St. Germain K.C.* for the appellant.
Atwater K.C. and *J. A. Bernard* for the respondent.

INDEX.

COMPANY—*Appeal — Jurisdiction — Company—Revocation of letters patent—Revival of charter—R.S.M. c.* 35, *ss.* 77, 130.] At the time leave to appeal to the Supreme Court was granted, the letters patent of the company appellant had been cancelled under section 77 of the "Manitoba Companies Act;" but subsequently its charter was revived under section 130 of the same Act.—*Per* Fitzpatrick C.J. Davies, Anglin and Brodeur JJ. The revocation of the charter operated as a mere suspension of the powers and functions of the company and the order-in-council reviving the letters patent of incorporation restored the company to its legal position at the time of the revocation as to the proceedings instituted between such revocation and the re-instatement of the company for an order allowing the present appeal to the Supreme Court of Canada.—*Per* Duff J. Without deciding whether acts of the officers of the company during the interregnum are in all respects to be deemed acts of the company, it is clear that the company, by virtue of the